CASE NO. 11-2141

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LOS ALAMOS STUDY GROUP	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE STEVEN CHU, in his capacity as Secretary, Department of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, in his capacity as Administrator, National Nuclear Security Administration,	)
	)
Defendants-Appellees.	)

On Appeal from the United States District Court
For the District of New Mexico
The Honorable Judge Judith Herrera
D.C. No. 1:10-CV-760-JCH-ACT

APPELLANT'S REPLY BRIEF

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Oral Argument is requested
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

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Introduction

In the decade since Chemistry Metallurgy Research Replacement ("CMRR") project began, Defendants-Appellees the United States Department of Energy, *et al.*, ("DOE/NNSA") successfully avoided any public comparison of reasonable alternatives to this massive venture. Their response to this appeal consistently pursues this objective.

DOE/NNSA have taken a tortuous route to avoid compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"). In 2003, DOE/NNSA prepared an Environmental Impact Statement ("EIS") for the CMRR and selected one alternative considered in that EIS. However, they shortly abandoned their choice, supposedly because of new design directions and seismic hazards. Without a NEPA analysis, DOE/NNSA selected a new CMRR-NF design, the budget ballooned, and they proceeded with detailed final design, contracted with Los Alamos National Security, LLC ("LANS") for construction subcontracts, and built the $390 million CMRR Radiological Laboratory, Utility, and Office Building ("CMRR-RLUOB"), a large support facility. When Plaintiff The Los Alamos Study Group ("LASG") demanded a new EIS analyzing this new massive project, and then sued to require NEPA compliance, DOE/NNSA announced that they would put some activities on hold and prepare a supplemental EIS ("SEIS"), which turned out to be a limited study *only* of the plan that they had

already been implementing, without analyzing reasonable alternatives, *i.e.*, it offered no hope of achieving NEPA compliance. Then, flaunting their plan for a SEIS, DOE/NNSA told the court below that they had turned over a new leaf and sought dismissal of LASG's lawsuit. That court, erroneously LASG submits, dismissed this suit, supposedly to allow DOE/NNSA to satisfy NEPA. While that order was on appeal, DOE/NNSA issued their SEIS—which, to no one's surprise, ignored the fundamental NEPA requirement of analyzing alternatives to the 2010-11 iteration of the CMRR-NF, so that the NEPA analysis would actually foster the decision-making process. Now, relying on the after-the-fact—but plainly inadequate—SEIS, DOE/NNSA seek dismissal, asserting that the courts can do nothing more to bring about NEPA compliance.

In this convoluted history, DOE/NNSA have consistently maneuvered to avoid reopening their decision to build CMRR or comparing the impacts of alternatives to it. As a result, they have also failed to incorporate NEPA analyses in their decision-making. Their preparation of a SEIS constitutes an admission that DOE/NNSA are far in default of the requirements of NEPA. But the SEIS does nothing to repair the default because it does not analyze alternatives enable DOE/NNSA to choose among alternatives. It is not a decision document at all, but only a restatement of a decision made long ago—a *fait accompli*. Another court remarked concerning the similar history of another agency:

> An examination of the litigation history in this matter indicates that the Forest Service has developed a practice of making, withdrawing, and reinstating timber sales and forest policy decisions in a way that might forestall judicial review indefinitely if left unchecked. Such a result cannot be encouraged.

Sierra Club v. Robertson, 764 F.Supp. 546, 550 (W.D. Ark. 1991). In this situation, it falls to the federal courts to enforce NEPA's requirements. This Court's task is to address the errors committed by the court below, in finding mootness and a lack of ripeness based on the inadequate SEIS process.

DOE/NNSA claim that mootness arose from their *voluntary* cessation of *some* of their violative conduct—a clearly inadequate ground. Nor is this case made moot by the issuance of the final SEIS. A NEPA case is not moot where claims challenging an agency's purported NEPA compliance remain unresolved. Any other rule would allow a noncompliant agency to issue plainly inadequate NEPA documents and obtain an undeserved dismissal.

Neither is the NEPA dispute made unripe by DOE/NNSA'S SEIS maneuverings. Particularly since DOE/NNSA may again seek to block valid NEPA claims with the bogus device of a post-decisional, inadequate SEIS, the Court should render judgment reversing the decision below.

We address these issues herein. The questions before the Court are the following:

1. What is the appropriate standard of review where a Fed R. Civ. P. 12(b)(1) ("Rule 12(b)(1)") motion was presented on affidavits and documentary proof and raises jurisdictional questions that are also critical to DOE/NNSA'S liability?

2. Whether this case has become moot, based upon DOE/NNSA's issuance, during project implementation, of a plainly inadequate SEIS?

3. Whether the court below erred in finding this case prudentially moot, when DOE/NNSA promised only to produce a plainly inadequate SEIS?

4. Whether LASG seeks review of a final agency action, where DOE/NNSA have made irreversible commitments to, and have taken prejudicial action to execute, the CMRR project?

5. Whether the court below erred in finding this NEPA case unripe?

1. The Standard of Review: DOE/NNSA'S Rule 12(b)(1) Motion Must be Reviewed as a Motion for Summary Judgment.

In weighing factual contentions, the court below was constrained by Fed. R. Civ. P. 56 ("Rule 56") to resolve disputed factual issues in favor of the LASG, as the nonmoving party. Thus, the court below was required to convert DOE/NNSA'S Rule 12(b)(1) motion to dismiss into a Rule 56 summary judgment motion, because resolution of the jurisdictional question is intertwined with the merits. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The jurisdictional questions here are ones of mootness and ripeness, issues that also go

to the merits. *Holt* seeks to prevent summary disposition, with prejudice, on grounds that the movant characterizes as "jurisdictional," based upon contested facts that would not support summary judgment. *Wheeler v. Main Hurdman*, 825 F.2d 257 (10th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987), holds that, where the questions of jurisdiction and issues on the merits are similar, Rule 56 procedures apply. *Redmon v United States*, 934 F.2d 1151 (10th Cir. 1991), states that "Rule 56 governs" where the question presented on a motion "involves both jurisdictional and merits issues." *Id*. at 1155. Under Rule 56, the court "must indulge all reasonable inferences in favor of the party opposing a motion for summary judgment." *Wheeler*, 825 F.2d at 260.

Here, DOE/NNSA's motion asserted that the case was moot and unripe—both jurisdictional questions and aspects of the substantive claim. Evidence was submitted by both sides and selectively relied upon by the court below. Appellant's Appendix ("App.") 315 n.2. Thus, the motion should be considered a Rule 56 motion, and the Court should resolve all factual disputes and inferences in favor of LASG.

DOE/NNSA argue that Rule 56 does not apply here, because their motion goes to subject matter jurisdiction, and NEPA does not provide subject matter jurisdiction. D.Br.[1] 55-56. However, in both *Wheeler* and *Redmon*, the motion

[1] Citations in the form "D.Br." refer to Defendants-Appellees' Response Brief.

involved issues going to the merits as well as jurisdiction. Mootness and ripeness concern "both a jurisdictional question and an aspect of the substantive claim." *Wheeler,* 825 F.2d at 259. Notably, in *Wheeler,* jurisdiction for an antidiscrimination case would rest upon 28 U.S.C. § 1331, as here. Thus, Rule 56 necessarily applies in all such cases.

Since Rule 56 applies, it is significant that LASG sought, and was denied, discovery. App. 278-304; 311-13. Under Rule 56, if a party opposing summary judgment needs access to evidence to oppose the motion, the court may deny or defer the motion or allow discovery. Fed. R. Civ. P. 56 (d). The court below refused discovery. DOE/NNSA assert that discovery would be improper here. D.Br. 56. However, evidence outside the administrative record is commonly admitted in NEPA litigation. *Lee v. U.S. Air Force,* 354 F.3d 1229, 1242 (10th Cir. 2004). Thus, discovery is appropriate. *Public Power Council v. Johnson,* 674 F.2d 791, 793 (9th Cir. 1982).

This Court reviews the disposition of a Rule 56 motion *de novo*. *Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1521 (10th Cir. 1992). It would be incorrect to resolve against LASG factual issues, including: (a) whether construction of CMRR-RLUOB would prejudice decision-making to construct the CMRR-NF, (b) whether DOE/NNSA undertook detailed final design of CMRR-NF, in violation of their own regulations and internal policies, (c) whether the

detailed design of CMRR-NF would prejudice decision-making involving construction of the CMRR-NF, (d) whether DOE/NNSA made contracts with independent entities, such as LANS, for construction of CMRR-NF, (e) whether DOE/NNSA voluntarily ceased some CMRR-NF design or construction and modified contracts to avoid this litigation, and (f) whether DOE/NNSA plan to initiate another supplemental EIS process, if necessary, to defeat future NEPA litigation. See A.Br. [2] 55-58.

2. Issuance of the SEIS, Which Fails to Comply with NEPA, does not Render this Case Moot.

DOE/NNSA assert that the post-appeal issuance of the final SEIS and an Amended Record Of Decision ("ROD"), wherein DOE/NNSA once again "decide" to construct the 2010-11 CMRR-NF, renders this case moot. D.Br. 22-28. A case is not moot if the court can grant effective relief. *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1255 (10th Cir. 2010); *Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1311 (10th Cir 2010); *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008); *Wyoming v U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005). The burden of proof is on the party alleging mootness. *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993); *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The burden is a heavy one. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953).

[2] Citations in the form "A.Br." refer to Plaintiff-Appellant's Opening Brief.

Whether a case is moot depends upon the nature of the claims, determined from the pleadings and briefs. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111 (10th Cir. 2010); *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008). The complaint "challenges defendants' actions in planning, approving, and implementing the construction and operation of the proposed" CMRR-NF. App. 12, ¶2. It seeks relief "requiring defendants to comply with [NEPA] by preparing an [EIS] regarding the proposed [CMRR-NF] and its many subprojects." The complaint also seeks an injunction to prohibit "all further investment in the [CMRR-NF], including all detailed design, construction, and obligation of funds, until an EIS is prepared." App. 12, ¶ 3. It states further: "Defendants have never prepared an EIS analyzing the environmental impacts of the aggrandized [CMRR-NF] now proposed *and its alternatives*. NEPA requires them to do so." App. 12, ¶4 (*emphasis added*).

The SEIS in no way rectifies these NEPA deficiencies, and leaves much room for meaningful relief. The SEIS does not change DOE/NNSA's decision to build CMRR-NF or their continuing actions implementing that decision, it analyzes no reasonable alternatives, it fails to enable a choice among alternatives, and it purports only to update an EIS that long ago lapsed into irrelevancy and cannot be "supplemented." DOE/NNSA claim to have made an informed "amended"

decision to proceed with the 2010-11 CMRR-NF project that they chose internally in the late 2000s and have never compared to any actual alternatives. They claim that their actions have "healed any injuries set forth in the Complaint" D.Br. 29, that it is "impossible . . . to grant any meaningful relief" and this case is over. D.Br. 23.

If DOE/NNSA's position is accepted, NEPA compliance will no longer precede agency decisions and foster a better decision-making process through the analysis of alternatives. 40 C.F.R. § 1500.1 (b),(c). NEPA would become a document-producing mechanism only. DOE/NNSA could then continue to design, build, and contract for their chosen alternative, in open violation of NEPA, and produce NEPA paperwork after-the fact. Clearly, the Complaint seeks relief beyond an inadequate SEIS and the recital of the party-line commitment to build the 2010-11 CMRR-NF, and it is not true that the new SEIS "moots those claims" D.Br. 23-24 or "healed any injuries." *Id.* at 29.

Examining the "concrete and particularized factual context" D.Br. 23, there has been no analysis of alternatives—the "heart" of an EIS. 40 C.F.R. § 1502.14. DOE/NNSA have not conducted any full NEPA process as prayed for in the Complaint, but only a patently inadequate "supplement" to an obsolete eight-year-old EIS, without any alternatives. This is not NEPA compliance.

A NEPA lawsuit does not become moot because a defendant contends that it has done all the law demands. In *Sw.Williamson Cnty. Cmty. Ass'n, Inc. v. Slater*, 243 F.3d 270 (6th Cir. 2001), the Secretary of Transportation asserted that he had completed NEPA compliance and that the case was moot. The Sixth Circuit rejected the argument:

> This case is not rendered moot merely because the federal defendants assert that, under their own interpretation of the statute, they are not required to act.

Id. at 277. Here, DOE/NNSA assert that the Court cannot grant any meaningful relief. D.Br. 23. But the Court can reverse the erroneous dismissal, which misconceives prudential mootness and ripeness and relies on DOE/NNSA's contested factual assertions, so that the court below can examine DOE/NNSA's supposed NEPA compliance and undertake remedies.

DOE/NNSA argue that the Court should ignore the fact that they have constructed and are now equipping the CMRR-RLUOB D.Br. 25-26, which DOE/NNSA analyzed in the 2003 EIS and selected for construction alongside the CMRR-NF as the unitary CMRR project. App. 1548, 1551. The purpose of the CMRR-RLUOB is to serve the CMRR-NF, and DOE/NNSA have consistently described it as Phase A or the First Replacement Component of the CMRR project. App. 936, 1571. It contains numerous facilities that serve the proposed CMRR-NF, including:

1. a radiological laboratory;

2. a central utility building of 20,998 Sq. ft., serving both CMRR buildings;

3. offices accommodating 350 people in both CMRR buildings;

4. a personnel entrance control facility for both CMRR buildings;

5. a training center with laboratories for both CMRR buildings;

6. a parking lot serving both CMRR buildings;

7. fuel oil storage and backup electrical generation for both CMRR buildings;

8. a facility incident command center for CMRR-NF and other nearby plutonium facilities; and

9. an operations center.

App. 929-37; 1673-78. Thus, the contention that the CMRR-RLUOB has "independent utility" D.Br. 10, 26 n. 4 is unfounded. To accept such an assertion would violate Rule 56 by resolving these disputed factual issues against the non-moving party.

The CMRR-RLUOB has cost the taxpayers $359 million to date App. 939-40 and will cost an additional $108 million to equip. *Id.* DOE/NNSA tell the Court to ignore it, because LASG did not seek to enjoin its construction, which was largely completed when suit was brought. D.Br. 25. This would be error. Enjoined or not, this CMRR subproject is a "connected action" under 40 C.F.R. §

1508.25 and a major investment in completion of CMRR-NF, and, as such, a violation of 40 C.F.R. § 1506.1(a). Likewise, the Nuclear Materials Safeguards and Security Upgrades Project ("NMSSUP") is in part another investment in CMRR-NF completion. App.1681-83.

Further, where the process is defective because of predetermination, issuance of NEPA documents does not render the case moot. DOE/NNSA are formally committed to the CMRR-NF, regardless of ultimate NEPA analyses. In *Metcalf v. Daley*, 214 F.3d 1135, 1145-46 (9th Cir. 2000), the agency argued that since it had prepared NEPA documents, the court could grant no further relief and the case was moot. The court rejected the assertion:

> [A]ppellants do not concede that the EA that ultimately was prepared is adequate. To the contrary, appellants contend that the EA is demonstrably suspect because the process under which the EA was prepared was fatally defective—*i.e.*, the Federal Defendants were predisposed to finding that the Makah whaling proposal would not significantly affect the environment. We agree. Moreover, appellants vigorously maintain that the EA is deficient with respect to its content and conclusions.

Id. at 1146. Similarly, this case is not moot.

Moreover, the case is also not moot because the court below has jurisdiction to administer NEPA remedies. In *Nat'l Res. Def. Council v. U.S. Army Corps of Eng'rs*, 399 F.Supp.2d 386 (S.D.N.Y. 2005), the court determined that the agency failed to take a "hard look" at the impacts of its project. Later, the court outlined remedies and a timetable. 457 F.Supp.2d 198 (S.D.N.Y. 2006). It noted that an

agency may be directed "to prepare new NEPA-compliant documentation 'under circumstances that ensure an objective evaluation' free of the pressures that are present when an agency has already undertaken to conduct a project." *Id*. at 225. It stated that the agency "will have to demonstrate that it has acted objectively and in good faith." *Id.* at 237. It emphasized the need for scrutiny of "agency explanations that come after a decision to proceed has been made because of the risk of 'post-hoc rationalization.'" *Id*. at 222. Such relief remains to be carried out here.

The question of relief is important. NEPA is meant to *change* how agencies review projects. Environmental information is to be available "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); s*ee also* 40 C.F.R. §§ 1500.2(c), 1501.1(a). Again: "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values." 40 C.F.R. § 1501.2. Further:

> An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.1; *see also* 40 C.F.R. § 1505.1(d). The most critical part of the EIS is the analysis of alternatives:

> This section is the heart of the environmental impact statement. . . . [I]t should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for a choice among options by the decisionmaker and the public. In this section agencies shall:

> (a) Rigorously explore and objectively evaluate all reasonable alternatives . . . .

40 C.F.R. § 1502.14.

DOE/NNSA have violated all of these regulations. No analysis of alternatives to the 2010-11 CMRR-NF in accordance with 40 C.F.R. § 1502.14 has ever been undertaken, and the SEIS insists that no such analysis will be undertaken. SEIS[3] at S-8 through S-10. DOE/NNSA state that the sequence of their performance of NEPA requirements has no significance. D.Br. 30. NEPA regulations say the opposite, requiring analysis of a proposal and its alternatives *before* it becomes official policy and becomes a bandwagon no official can resist.

Further, "an agency's NEPA analysis 'must be taken objectively and in good faith . . . and not as a subterfuge designed to rationalize a decision already made.'" *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). This Court has emphasized the need to oversee objective reconsideration, even after new NEPA analyses have been prepared—which has not yet occurred here. *Upper Pecos Ass'n v. Stans*, 500 F.2d 17 (10th Cir. 1974), sustains dismissal of a NEPA suit after a new EIS was issued, but only upon determination that NEPA compliance would not be a "hollow gesture:"

[3] The SEIS is available at http://energy.gov/nepa/downloads/eis-0350-sl-final-supplemental-impact-statement.

> The question therefore confronting us is whether the Elk Mountain Road project is presently in such a stage of flexibility that consideration of environmental factors will be merely a hollow gesture. We do not think so. To date EDA has disbursed no funds on the grant, nor does it intend to disburse any funds until such time as the grant is reconsidered at every level of EDA in light of the final environmental impact statement. Although unquestionably appellees should have drafted their environmental impact statement prior to making the grant offer, we do not believe the Elk Mountain Project is so far along that appellees are precluded from objectively reconsidering the project.

Id. at 19. Here, the opposite is true. Far from showing "flexibility" about construction of CMRR-NF, DOE/NNSA have made massive commitments to it; consideration of environmental factors—should they ever be analyzed in an EIS—standing alone, would be a "hollow gesture." Thus, additional relief is required, and the case is not moot.

3. This Case was not Made Moot by DOE/NNSA's Announcement of Plans to issue an Inadequate and Unlawful SEIS.

DOE/NNSA assert that the decision below should be sustained based upon prudential mootness. D.Br. 28-38. LASG has shown that, contrary to the assumption of the court below (App. 325, 327), DOE/NNSA committed several NEPA violations in pursuing the CMRR-NF A.Br. 28-38 and that DOE/NNSA's plan for a SEIS, without consideration of alternatives, and without suspending all activities to build the 2010-11 CMRR-NF, constitutes only a "voluntary cessation" of *some* NEPA violations, insufficient to create mootness, and far from the change of position that would support prudential mootness. A.Br. 38-46. Moreover, the

promise of a SEIS is clearly less relief than NEPA requires: a fresh EIS which analyzes reasonable alternatives and consequences and drives the decision-making process. D.Br. 29-30.

DOE/NNSA cite cases where a federal agency admitted NEPA liability, issued an EIS or an Environmental Assessment ("EA"), and completed the NEPA process, whereupon mootness was found. (D.Br. 31-32). None of these cases supports dismissal here. In *Greater Yellowstone Coal. v. Tidwell,* 572 F.3d 1115 (10th Cir. 2009), EAs were completed during the appeal. Notably, the petitioners *did not assert* that the EAs failed to provide the relief sought. Rather, they argued that the case was not moot under the "voluntary cessation" exception (*Id.* at 1121), but with no reason to expect the challenged conduct to recur, this Court found mootness. *Id*. In *Neighbors for Rational Dev. v. Norton*, 379 F.3d 956 (10th Cir. 2004) (D.Br. 30), an EA was completed, and the plaintiff "never argue[d] the completed environmental assessment does not adequately consider the environmental impact and alternatives to development of the property." *Id*. at 966. Clearly, that is not so here. [4]

[4] The other cases cited by DOE/NNSA are not relevant to NEPA. *Aluminum Co. v. Bonneville Power Adm.,* 56 F.3d 1075 (9th Cir. 1995), involves attempted review of a Record of Decision that had expired by its own terms; moreover, the underlying Biological Opinion had been superseded, *i.e.,* the questioned activities had ceased. *Id.* at 1078. Here, DOE/NNSA are pressing forward with the project in issue. In a later decision, *Aluminum Co. v. Bonneville Power Adm.,* 175 F.3d 1156 (9th Cir. 1999), petitioners asserted that the EIS that allegedly mooted the

It is demonstratively incorrect that "the SEIS considered the very issues that the Study Group alleged required a new NEPA analysis" D.Br. 32. The SEIS could not be used to "plan actions and make decisions" 40 C.F.R. § 1502.1, since it contains no alternatives to the 2010-11 CMRR-NF, and reconsideration was not attempted. DOE/NNSA assert that it is "impossible for NNSA to return to its allegedly illegal conduct of allegedly failing to conduct an additional

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case was, in fact, still defective. The petition was dismissed not because the case was moot but because the petitioners had not advanced this valid argument in their opening brief, as rules require. *Id*. at 1163. *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724 (10th Cir. 1997)(D.Br. 8, 11), an Endangered Species Act case, is inapposite, because there the only relief sought had been obtained, and there was no continuing injury. *Id*. at 728-29. In *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010), congressional action displaced earlier biological opinions under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*., and brought about mootness. *Id*. at 1108; Pub. L. No. 108-137, § 208 (2003); Pub. L. No. 108-447, § 205 (2004). Congress has not acted to alter Defendants' NEPA duties here. *Forest Guardians v. U.S. Forest Serv.* 329 F.3d 1089 (9th Cir. 2003), involves the Endangered Species Act, 16 U.S.C. § 1531 *et seq*., and, specifically, an attempted challenge to a biological opinion that had been expressly superseded. *Id*. at 1096. *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996), concerns a challenge to a fishery management plan which had been withdrawn; the challenge was moot. *Wyoming v. U.S. Dept. of Agric*.,414 F.3d 1207 (10th Cir. 2005), concerned a forest management regulation that had been withdrawn and replaced. *Id*. at 1211-13. *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244 (10th Cir. 2010), involves terms of a grazing permit which had been cancelled and superseded, leaving no relief for the Court to give. *Id*. at 1251, 1255. *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 (10th Cir. 2006), concerns an attack on Bureau of Land Management regulations that had expressly been withdrawn and superseded. *Id*. at 1135. The applicability of *State Farm Mutual Automobile Ins. Co. v. Narvaez*, 149 F.3d 1269 (10th Cir. 1998), is obscure, because there the trial court had never had jurisdiction, unlike this case, where jurisdiction is plain.

environmental analysis" (D.Br. 33), but that claim misses the point entirely. NEPA cannot function without an analysis of *alternatives* and environmental consequences; DOE/NNSA offer only a catalogue of the environmental consequences of the *one* pre-determined course of action. Since DOE/NNSA have never seriously analyzed *any* alternatives other than the 2010-11 CMRR-NF, there remains more than a "reasonable expectation" that the alleged wrongs involving the CMRR will be repeated, because they have never ceased. *Greater Yellowstone,* 572 F.3d at 1121. Accordingly, meaningful relief as prayed remains not only possible—it is legally required.

DOE/NNSA state that *Utah Shared Access Alliance v. Carpenter,* 463 F.3d 1125 (10th Cir. 2006), holds that the plaintiff must pursue allegations concerning the new agency action—the SEIS—in a new lawsuit. D.Br. 37. In fact, this Court ruled in *Carpenter* that issues involving previous BLM orders were moot where they were revoked, but reviewed the subsequent order and did not require a new lawsuit to do so. *Carpente*r, 463 F.3d at 1134-36.

The "voluntary cessation" exception, which defeats claims of mootness, applies here. D.Br. 34. The violations continue—the SEIS is plainly inadequate, DOE/NNSA have never ceased their illegal conduct of omitting any analysis of alternatives, in contrast to *Yellowstone*, and the continuing misconduct is the same as what is claimed to have ceased, unlike that in *Unified School Dist. No. 259 v.*

Disability Rights Ctr. of Kan., 491 F.3d 1143, 1149-50 (10th Cir. 2007)(D.Br. 35). Temporarily suspending construction or contracting would constitute only a "voluntary cessation" that fails to cause mootness:

> A request for prospective relief can be mooted by a defendant's voluntary compliance if the defendant meets the formidable burden' of demonstrating that it is 'absolutely clear that allegedly wrongful behavior could not reasonably be expected to recur.'. . . Such a burden will typically be met only by changes that are permanent in nature and that foreclose a reasonable chance of recurrence of the challenged conduct.

Tandy v. City of Wichita, 380 F.3d 1277, 1291 (10th Cir. 2004), (*quoting Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

No such showing can be made here. Moreover, the argument that DOE/NNSA's construction and final design commitments, made before the Amended ROD, are based on "obsolete" presentations D.Br. 57, 58 and "outdated" statements that have been "superseded," "replaced," or "removed" (*Id*. at 58) simply underscores DOE/NNSA's deliberate orchestration of their commitments under litigation pressure that fails to moot this case.

Likewise, a new NEPA document of contested validity does not moot a NEPA case. *Oregon Natural Resources Council v. Grossarth,* cited for this (D.Br. 36), dismissed a case where there was no basis to expect "a recurrence of the same allegedly unlawful conduct." 979 F.2d 1377, 1379. The opposite is true here.

Contrary to DOE/NNSA's arguments D.Br. 37, a NEPA court may obtain such administrative record as is required for compliance and remedial action. *Nat'l Res. Def. Council v. U.S. Army Corps of Eng'rs*, 457 F.Supp.2d at 222-23.

Finally, DOE/NNSA argue that mootness arises from LASG's new lawsuit, challenging the SEIS and CMRR project. D.Br. 36-38. When that suit was brought, this case had been dismissed and was on appeal. To preserve its claim, LASG filed a second suit. Mootness depends upon the status of an individual controversy. *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). The new lawsuit does not render this one moot.

4. LASG has Sued to Contest Final Agency Action.

DOE/NNSA claim that LASG did not challenge "final agency action" under 5 U.S.C. § 704. An agency must prepare an EIS when "it reaches the critical stage of a decision that will result in 'irreversible and irretrievable commitments of resources' to an action that will affect the environment." *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999), *quoting from Mobil Oil Corp. v. Fed. Trade Comm'n*, 562 F.2d 170, 173 (2d Cir. 1977); *see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009). Litigation may then begin based upon "final agency action." A suit may challenge either "the absence or the adequacy of the final impact statement."

Kleppe v. Sierra Club, 427 U.S. 390, 406 n.15 (1976). Litigation need not await issuance of NEPA documents, which are entirely within the agency's control.

Final agency action may be as minor as approval of a project under its jurisdiction. *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). *Davis* was followed in *Utah v. U.S. Dep't of the Interior*, 210 F.3d 1193, 1197 (10th Cir. 2000). A violation may be challenged when the agency makes an irretrievable commitment of resources. *Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010).

Here, the CMRR-NF project by 2010 had expanded far beyond the facility approved in 2004, so much so that DOE/NNSA themselves admitted that the 2004 facility could not be built. *See* A.Br. 16-17. Even the court below acknowledged that "[u]nquestionably, the CMRR-NF as currently envisioned will require an expenditure of resources and create a potential environmental impact greater than the project as envisioned in the 2003 EIS and 2004 ROD." App. 320.

DOE/NNSA have nonetheless made irreversible commitments of resources to the new and expanded 2010-11 CMRR-NF. They completed the CMRR-RLUOB, a connected action (40 C.F.R. § 1508.25(a)(1)); construction and outfitting of the CMRR-RLUOB continue to the present day. App. 1655; 1660. NNSA contracted with LANS to issue and execute construction contracts for the CMRR-NF. App. 1669-70. Such a contract, before NEPA review is completed, is a NEPA violation.

Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002); *Metcalf v. Daley*, 214 F.3d 1135, 1142-43 (9th Cir. 2000). The court below stated that there was no "binding agreement with an outside group" (App. 332), but LASG's evidence shows such an agreement, and LANS is plainly independent from DOE/NNSA.

DOE/NNSA's contentions that NNSA did not select the Modified CMRR-NF (D.Br. 40) nor commit resources to final design or construction of CMRR-NF (D.Br. 48; *see also Id.* 56-58) before the October 12, 2011 Amended ROD, and their statement that this case involves only "an ongoing NEPA analysis prior to the taking of a final agency action where any legal consequences were contingent on the later final action" (D.Br. 47), cannot be squared with the facts in the record. When DOE/NNSA assert that NNSA made no decision before the SEIS and Amended ROD (D.Br. 42), they omit to mention that NNSA issued a ROD in 2004, based upon the 2003 EIS, and proceeded with the CMRR project on that basis for seven years. During that time NNSA abandoned the decision to build the 2004 CMRR and clearly made the decision to construct the massive 2010-11 CMRR-NF, requiring hundreds of millions of dollars in construction and equipping of the CMRR-RLUOB and the final design of the 2010-11 CMRR-NF. NNSA even contracted with LANS to make construction subcontracts—all based upon the decision to build the 2010-11 CMRR-NF. This decision constitutes final agency action and is subject to judicial review.

DOE/NNSA's assertion that NEPA litigation requires the plaintiff to attack a published "*agency* decision or document" (D.Br.40; *see id.* 41-43) is unfounded in law. Their repeated demands for a "document or decision" to commit resources to CMRR-NF (D.Br. 53) are belied by DOE/NNSA's commitment of hundreds of millions of dollars, surely no inadvertence. App. 939-40; 1684. If DOE/NNSA's position were accepted, NEPA review would be forever foreclosed while DOE/NNSA continued to invest resources in the project and claimed that the courts could do nothing until the paperwork was issued. The purpose of NEPA, however, is not to produce documents; it is to promote better agency decisions before a commitment to *one* alternative is made. 40 C.F.R. § 1500.1(b), (c).

DOE/NNSA have made a "final decision" (D.Br. 48) to commit resources to the 2010-11 CMRR-NF, just as much as the BLM decided to issue coal bed methane leases in *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009), or the Fish and Wildlife Service decided the scope of critical habitat in *Catron Cnty. Bd. of Comm'rs v. U.S. Fist and Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996). In no sense did DOE/NNSA "'reserve to the government the absolute right' to prevent the use of the resources in question," *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (D.Br. 49), nor did they "retain the authority to prevent all surface disturbing activities," *Wyoming Outdoor Council*, 165 F.3d at 49. And it is absurd to compare the

massive investment in CMRR-NF to pre-marking of trees in *WildWest Inst. v. Bull,* 547 F.3d 1162, 1169 (9th Cir. 2008), or to suggest that the CMRR-NF project is "committed to agency discretion by law," *Lincoln v. Vigil,* 508 U.S. 182, 191-92 (1993).

DOE/NNSA assert that the Court rejected judicial review in similar circumstances in *Utah v. Dept. of the Interior,* 210 F.3d 1193 (10th Cir. 2000) D.Br. 42-43. Actually, in *Utah,* a Nuclear Regulatory Commission license and EIS were in preparation, and the Court determined that Utah's environmental claims could be heard in that process, and so deemed unripe the plaintiff's demand to participate in a Bureau of Indian Affairs lease approval process. No irretrievable commitments of resources had been made, and thus there is no parallel to the present situation.

DOE/NNSA erroneously claim that NNSA did not predetermine the outcome of NEPA reviews. D.Br. 49. NNSA had constructed the CMRR-RLUOB, directed that final design of CMRR-NF be completed, contracted for construction subcontracts to be made—all before any NEPA review of the 2010-11 CMRR-NF. *Davis v. Mineta* and *Metcalf v. Daley,* where the agency committed to a course of action before NEPA analysis was complete, directly apply.[5]

[5] The argument that *Davis* and *Metcalf* are irrelevant because in those cases "contracts or other binding agreements with outside parties required a specific outcome to the NEPA analysis" (D.Br. 50) ignores the fact that NNSA's agreement

DOE/NNSA protest that there is no predetermination without a "binding commitment to an outside group." (D.Br. 49). But predetermination occurs:

> [W]hen an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis—which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action.

Forest Guardians, 611 F.3d at 714.

Nothing in this formulation requires a "commitment to an outside group." Clearly, DOE/NNSA have committed massive resources to the CMRR-NF in disregard of the results of a valid EIS; indeed, the SEIS says so. SEIS at S-9. Since they have done so and *also* involved LANS and other outside contractors, there is predetermination under any definition.

DOE/NNSA's repeated contention that LASG seeks to challenge the Draft SEIS, which is not final agency action, is a red herring. D.Br. 43-45. The Draft SEIS was injected into this case *by DOE/NNSA* at the hearing on April 27, 2011, as evidence of planned NEPA processes, from which they argued that the case was moot. Thus, DOE/NNSA's claim (D.Br. 44) that the only legal consequence of the Draft SEIS is to require comments is untrue: DOE/NNSA used the Draft SEIS to obtain dismissal of this litigation. LASG argued then, and since, that the Draft

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with LANS required LANS to issue and execute construction contracts—predetermining the result of NEPA analyses. App. 1669-79.

SEIS is no evidence of commitment to NEPA, mainly because it omits analysis of alternatives and was not based on reopening the decision to build CMRR-NF. LASG is not seeking judicial review of the Draft SEIS, but LASG maintains that a proposal to conduct an inadequate NEPA process is no basis for deeming a pending NEPA claim moot.

DOE/NNSA assert that their design work on the CMRR-NF cannot be deemed final agency action, because NNSA has not initiated final design. D.Br. 45-46. But evidence shows that in mid-2010 DOE/NNSA were carrying out CMRR-NF design, which efforts would continue up to the date construction began (App. 1585-96; 1665; 1684; 1699; 1732), and NNSA stated that this design work would produce "all products necessary to construct." App. 1593. The statement that "[p]rior to issuance of the Amended ROD, NNSA had not committed any resources to final design or construction of CMRR-NF" (D.Br. 48) is belied by DOE/NNSA's records.

DOE/NNSA cite cases where agencies initiated, at most, preliminary planning, did no construction, and made no contracts: *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1238 (11th Cir. 2003) (Park Service generated only "prospective governance proposals"); *Rapid Transit Advocates, Inc. v. So. Cal. Rapid Transit District*, 752 F.2d 373, 378 (9th Cir. 1985) (decision to "partially fund preliminary design and engineering work"); *Envtl. Def. Fund, Inc.*

v. Johnson, 629 F.2d 239, 241 (2d Cir. 1980) ("issuance of a report recommending a further study"). They have no application here, where DOE/NNSA had constructed the CMRR-RLUOB, had done detailed design, and had entered into a construction contract for the CMRR-NF.

Contrary to DOE/NNSA's assertions (D.Br. 45-46), a NEPA court can restrain design efforts where they will limit the agency's choice of alternatives. *Nat'l Audubon Society v. Dep't of the Navy*, 422 F.3d 174, 201 (4th Cir. 2005); 40 C.F.R. § 1506.1(a). Here, DOE regulations require completion of NEPA review *before preparation of detailed design:*

> (b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (*e.g., normally in advance of, and for use in reaching, a decision to proceed with detailed design*) . . .

10 C.F.R. § 1021.210(b) (*emphasis added*).

Thus, DOE NEPA guidance cautions against carrying out detailed design before NEPA compliance:

> Proceeding with detailed design under DOE O 413.3, Program and Project Management for the Acquisition of Capital Assets, before the NEPA review process is completed (in contrast to conceptual design noted above) is normally not appropriate because *the choice of alternatives might be limited by premature commitment of resources to the proposed project and by the resulting schedule advantage relative to reasonable alternatives*.

U.S. DOE Guidance Regarding Actions that May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions. (June 17, 2003, at 4) (App. 1691) (emphasis added).

The "question of whether particular activities will in fact '[l]imit the choice of reasonable alternatives' . . . is context-specific." *Nat'l Audubon,* 422 F.3d at 202. There are good grounds for injunctive relief, suspending detailed, final design during NEPA review, because it limits the choice of reasonable alternatives:

> If construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project. *Davis v. Mineta,* 302 F.3d 1104, 1115 n. 7 (10th Cir. 2002).

(citing Sierra Club v. Marsh, 872 F.2d at 504; *Md. Conservation Council, Inc. v. Gilchrist,* 808 F.2d 1039, 1042 (4th Cir.1986). *See generally* 40 C.F.R. § 1506.1 (prohibiting an agency from taking action concerning a proposal that would limit the choice of reasonable alternatives, until the NEPA process is complete). Thus, DOE/NNSA's actions require injunctive relief.

5. The Case Meets all Standards for Ripeness.

LASG's case meets all standards of NEPA ripeness. Since a NEPA violation involves a procedural right, a plaintiff need only show that the agency has passed the point of irreversible commitments and that the plaintiff faces an enhanced risk

of environmental harm. *Utah v. U.S. Dep't of the Interior,* 535 F.3d 1184, 1198 n. 10 (10th Cir. 2008); *Friends of Marolt Park,* 382 F.3d 1088, 1095; *Laub v. U.S. Dep't of the Interior*, 342 F.3d at 1087 (9th Cir. 2003); *Greater Yellowstone Coal. v. Flowers,* 321 F.3d at 1258; *Sierra Club v. U.S. Dep't of Energy,* 287 F.3d at 1264-65 (10th Cir. 2002); *Comm. to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448-49 (10th Cir. 1996); *Wyoming Outdoor Council,* 165 F.3d at 51. LASG need not address questions of hardship from delayed review, judicial interference with administrative processes, and the need for further factual development. D.Br. 51.

Nothing in *Utah v. U.S. Dep't of the Interior,* 535 F.3d 1184 (10th Cir. 2008) (D.Br. 51), which concerns an unripe dispute about a settlement agreement, bears upon ripeness in a NEPA case concerning failure to issue an EIS. *Marolt Park,* 382 F.3d at 1095 (D.Br. 51), supports LASG, stating 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." *See also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("[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."). Indeed, the suggestion (D.Br. 52) that LASG should have delayed suit would postpone litigation of important projects until they are long past any NEPA remedy. Accordingly, the unrealized prospect of additional

NEPA documentation – which lacks the critical analysis of alternatives – does not support postponing this dispute.

CONCLUSION

The Court should vacate the judgment below. The case should be remanded with instructions to proceed to consideration of the Motion for Preliminary Injunction.

Respectfully submitted,

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January 9, 2012

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I hereby certify that a copy of the foregoing *Appellant's Reply Brief*, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the AVG Anti-Virus Business Edition 2011, AVG Version 10.0.1392, Virus DB: August 31, 2011 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

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