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

**LOS ALAMOS STUDY GROUP,**

**Plaintiff,**

**No. CIV-10-0760 JCH/ACT**

**v.**

**UNITED STATES DEPARTMENT OF  
ENERGY; THE HONORABLE STEPHEN  
CHU, in his official 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.**

**MAGISTRATE JUDGES'S PROPOSED FINDINGS AND  
RECOMMENDED DISPOSITION**

THIS MATTER comes before the Court on the Honorable Judith Herrera's Order of Reference filed on November 17, 2010, pursuant to the provisions of 28 U.S.C. §§ 636(b)(1)(B). [Doc. 15.] The District Court referred this matter to the undersigned Magistrate Judge to submit proposed findings of fact and recommendations for disposition of Defendants United States Department of Energy, the Honorable Stephen Chu, the National Nuclear Security Administration, and the Honorable Thomas Paul D'Agostino's Motion to Dismiss for Lack of Jurisdiction and Brief in Support filed on October 4, 2010. [Doc. 9.]

**I. Procedural Background**

1. This action arises under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(f) ("NEPA"), together with the implementing regulations for NEPA issued by the

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White House Council on Environmental Quality (the “CEQ Regulations”), 40 C.F.R. §§ 1500-08, and regulations issued by the Department of Energy (“DOE”), 10 C.F.R. § 1021. [Doc. 1 at ¶ 1.] This action also arises under the Administrative Procedure Act (“APA”), U.S.C.A. §§ 701 et seq. [*Id.*]

2. In its Complaint, Plaintiff challenges the adequacy of the Department of Energy/National Nuclear Security Administration’s (“DOE/NNSA or “NNSA”) analysis of potential environmental impacts from the construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility (“CMRR-NF”) at Los Alamos National Laboratory (“LANL”). [Doc. 1 at ¶ 2.] The National Nuclear Security Administration (“NNSA”) is responsible for the management and security of the nation’s nuclear weapons, nuclear nonproliferation, and naval reactor programs. [Doc. 9, Ex. A, and 50 U.S.C. § 2401(b).] NNSA is also responsible for the administration of LANL. [*Id.*]

3. The Complaint seeks a declaratory judgment and mandatory injunction requiring Defendants to prepare a new Environment Impact Statement (“EIS”) regarding the CMRR-NF and also seeks to prohibit all further investments in the CMRR-NF. [Doc. 1 at ¶ 3.] Specifically, in Count I, Plaintiff alleges that Defendants violated NEPA and the APA by failing to prepare an applicable EIS for the CMRR-NF. It claims that Defendants’ current proposal differs substantially from the 2003 EIS and the 2004 Record of Decision (“ROD”) and that a new EIS should be prepared. [Doc. 1 ¶¶ 52-64.] In Count II, Plaintiff alleges that Defendants have failed to develop an EIS which addresses “connected actions” to the CMRR-NF and that Defendants should prepare a new EIS which address these actions. [Doc. 1 ¶¶ 65-71.] In Count III, Plaintiff alleges that Defendants failed to provide required mitigation measures and a mitigation action plan in the 2003 EIS and the 2004 ROD and that they should prepare a new

EIS which addresses reasonable mitigation measures. [Doc. 1 ¶¶ 72-79.] In Count IV, Plaintiff alleges that the Defendants' decision making processes for the CMRR-NF exceed the scope of the 2003 EIS and the 2004 ROD and that all activities should be stopped pending the completion of a new EIS and ROD. [Doc. 1 ¶¶ 80-90.] In Count V, Plaintiff alleges that the proposed CMRR-NF involves a much greater commitment of resources and has a far greater impact than what was analyzed in the 2003 EIS and the 2004 ROD. It alleges that the DOE authorized production of a Supplement Analysis which addresses the changed project parameters and allegedly determines if a Supplemental EIS ("SEIS") or a new EIS should be prepared has not been made public or provided to the Plaintiff. [Doc. 1 ¶¶ 91-95.]

4. Defendants filed a Motion to Dismiss [Doc. 9] which argues that (1) some of Plaintiff's claims are time-barred, (2) Plaintiff's claims are not ripe for review, (3) Plaintiff's claims are moot, and alternatively (4) Plaintiff's claims should be dismissed under the doctrine of prudential mootness.

5. Having considered the pleadings, the exhibits, and the relevant law, the undersigned Magistrate Judge recommends that Plaintiff's Complaint be dismissed pursuant to the doctrine of prudential mootness.

## II. Factual Background

6. In 2002, NNSA published a Notice of Intent to prepare the CMRR-NF EIS and invited public comment on the CMRR-NF EIS proposal. [Doc. 9-1 at ¶ 9.] The Chemical and Metallurgy Research ("CMR") building which prompted Defendants to propose the CMRR-NF in 2002 was almost 60 years old and near the end of its useful life. [*Id.* at ¶ 6.] The CMR building is a facility which has "unique capabilities for performing special nuclear material

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analytical chemistry, materials characterization, and actinide<sup>1</sup> research and development.” [*Id.* at ¶ 5.] CMR supports various national security missions including nuclear nonproliferation programs; the manufacturing, development, and surveillance of pits (the fissile core of a nuclear warhead); life extension programs; dismantlement efforts; waste management; material recycle and recovery; and research. [*Id.*] NNSA’s proposal to construct the replacement facility, CMRR-NF, was to insure that NNSA could “fulfill its national security mission for the next 50 years in a safe, secure, and environmentally sound manner.” [*Id.* at ¶¶ 7 and 8.]

7. NNSA hosted two public meetings on the proposed CMRR in August of 2002 and published a Draft EIS. [*Id.* at ¶ 9.] NNSA issued a Final EIS in November 2003. [*Id.*] NNSA published its Record of Decision (“ROD”) on the 2003 EIS in the Federal Register on February 12, 2004. [*Id.* at ¶ 10; 69 Fed.Reg. 6967 (Feb.12, 2004).]

8. 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 Radiological Laboratory Utility Office Building (“RLUOB”). [Doc. 9-1 at ¶ 10.]

9. Since the 2003 EIS and the 2004 ROD were published, Defendants acknowledge that new developments have arisen which require changes to the proposed CMRR. [*Id.* at ¶ 12.] A site-wide analysis of the geophysical structures that underlay the area occupied by LANL was prepared and revealed new geologic information regarding the seismic conditions at the site. [*Id.*;

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<sup>1</sup>“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.” [Doc. 9 at footnote 1.]

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Doc. 10 at pp. 7-10.] As a result of the new geologic information, as well as more information on the various support functions, actions, and infrastructure needed for construction “changes were made to the proposed design of the CMRR-NF.” [Doc. 9-1 at ¶ 12.] In addition, other changes were made to ensure that 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.” Also, “sustainable design principles have been incorporated to minimize the environmental impacts of construction and operation of the proposed CMRR-NF.” [Id.]

10. In light of the design changes, NNSA prepared a Supplement Analysis pursuant to 10 C.F.R. § 1021.314(c)(2) to determine (1) if the 2003 EIS should be supplemented, (2) if a new EIS should be prepared, or (3) if no further NEPA document was required. [Id. at ¶ 15.]

11. On July 1, 2010, counsel for Plaintiff wrote to the DOE and the NNSA and expressed concerns about the cost and adequacy of NNSA’s NEPA analysis for the CMRR-NF. Plaintiff requested that DOE stop any and all CMRR-NF design activities, make no further contractual obligations, and seek no further funding until NNSA complete a new EIS for the CMRR-NF. [Id.]

12. On July 30, 2010, NNSA informed the Plaintiff that it was preparing a Supplement Analysis. [Id.]

13. Prior to NNSA’s completion of the Supplement Analysis of how to proceed with possible changes to the proposed design of the CMRR-NF, Plaintiff filed its Complaint on August 16, 2010. [Doc. 1.]

14. On September 21, 2010, NNSA’s Deputy Administrator for Defense Programs, Donald L. Cook, decided “for prudential reasons” that the NNSA should complete an SEIS “to

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analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF.” [Doc. 9-1 at § 16.] A Notice of Intent to prepare an SEIS appeared in the October 1, 2010 issue of the Federal Register. [Doc. 9, Ex. 2.]

15. The preparation of the SEIS includes a public scoping process which involves “two public scoping meetings to assist NNSA in identifying potential impacts, alternatives, and mitigation strategies that should be analyzed in the SIS.” [Doc. 9-1 at ¶ 17.] Other federal agencies, as well as state agencies, Native American tribes, and the general public, including Plaintiff, are on notice of the NNSA’s intention to prepare an SEIS and can participate in determining the scope of the environmental analysis. Thereafter, the NNSA will make a draft of the SEIS available to the public for a 45-day comment period and all comments will be considered in the preparation of the Final SEIS. [*Id.*]

16. 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. [Doc.9-1, Ex. 1 ¶ 20.] No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared. [*Id.* at ¶ 21.]

17. Between October 2010 and June 2011, the expected SEIS period, the overall design is expected to advance by only approximately 15 percent. [*Id.* at ¶ 25.] Construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. [Doc. 9 at p. 27; Doc. 9-1 at ¶ 21.] If, after completion of the SEIS, NNSA decides to proceed with construction of the proposed CMRR-NF, the building is not expected to be occupied and operational until 2022. [*Id.* at ¶ 23; Doc. 10 at 11.] NNSA has expended money over the course of the past six years for the design of the proposed CMRR-NF. [Doc. 9-1 at ¶ 19.]

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III. Legal Framework for Prudential Mootness.

18. Prudential mootness is a legal doctrine closely related to Article III mootness.

However, prudential mootness arises from the doctrine of remedial discretion. *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10<sup>th</sup> Cir. 1997). Specifically, prudential mootness addresses “not the power to grant relief but the court’s discretion in the exercise of that power.” *Id.*, quoting *Chamber of Commerce v. United States Dep’t of Energy*, 627 F.2d 289, 291 (D.C.Cir.1980). Thus, even if a case is not constitutionally moot, a court may dismiss the case under the doctrine of prudential mootness if the case “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*.” (Emphasis in original.) *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10<sup>th</sup> Cir. 2010), quoting *Fletcher v. United States*, 116 F.3d 1315, 1321 (10<sup>th</sup> Cir. 1997); *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727, quoting *Chamber of Commerce v. United States Dep’t of Energy*, 627 F.2d 289, 291 (D.C.Cir.1980).

19. The Tenth Circuit has expressly recognized the doctrine of prudential mootness, and has stated that “it has particular applicability in cases . . . where the relief sought is an injunction against the government.” *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727 (citations omitted). In fact, “[a]ll the cases in which the prudential mootness concept has been applied have involved a request for prospective equitable relief by declaratory judgment or injunction.” *Building and Construction Department; AFL-CIO v. Rockwell International Corporation*, 7 F.3d 1487, 1492 (10<sup>th</sup> Cir. 1993) (citations omitted).

20. Under the prudential mootness doctrine, the central inquiry is whether “circumstances [have] changed since the beginning of litigation that forestall any occasion for

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meaningful relief.” *Fletcher v. United States*, 116 F.3d at 1321; *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727. In cases involving prudential mootness, “a court may decline to grant 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.” *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d at 1122, quoting *Building and Construction Department*, 7 F. 3d at 1492.

21. “[E]ven if some remnant of the original controversy be still alive [sic], [circumstances may exist] where the courts, as a matter of prudence and sound discretion, should stay their hand and withhold drastic injunctive relief.” *State of New Mexico v. Goldschmidt*, 629 F.2d 665, 669 (10<sup>th</sup> Cir. 1980), citing *United States v. W.T. Grant Co.*, 345 U.S. 62, 669 (1953).

22. The United States Supreme Court has stated that “sound discretion withholds the remedy where it appears that a challenged ‘continuing practice’ [of an administrative agency] is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted.” *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961), cited with approval in *Chamber of Commerce v. United States Dep’t of Energy*, 672 F.2d at 292.

23. Because the doctrine of prudential mootness is concerned with the court’s discretion to exercise its power to provide relief, the Court’s determination of prudential mootness is reviewed for an abuse of discretion. *Fletcher v. U.S.*, 116 F.3d at 1321; see also *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d at 1124; *United States v. W.T. Grant Co.*, 345 U.S. at 635-36.



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IV. Analysis

24. Plaintiff's Complaint seeks declaratory and injunctive relief with regard to the Defendants' activities in connection with the design of the CMRR-NF on the grounds that the project exceeds its scope as defined in the 2003 EIS and the 2004 ROD.

25. Defendants are currently in the process of undertaking an SEIS, which would supercede the 2003 EIS and 2004 ROD, to ascertain how best to proceed with the proposed CMRR-NF in light of newly discovered geological information as well as design modifications that came to light after the completion of the 2003 EIS and 2004 ROD. After the SEIS is completed, NNSA will decide, based on that study, how best to proceed with the proposed CMRR-NF. Thus "circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief." *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727.

26. "The purpose of an injunction is to prevent future violations." *United States v. W.T. Grant Co.*, 345 U.S. at 633. Here, there will be no future violations of the 2003 EIS and the 2004 ROD because the CMRR-NR project will be governed by the SEIS which is currently being conducted.

27. The claims in the Plaintiff's Complaint seek declaratory and injunctive relief to ensure that Defendants' design and planning of the CMRR-NR conform to Plaintiff's request for a court-ordered new EIS. However, because the Defendants are currently conducting an SEIS which has not yet been completed, it is premature for the Court to order the Defendants to prepare a new EIS. The SEIS may very well address the Plaintiff's concerns about CMRR-NF.

28. Plaintiff also requests that this court order Defendants to stop all activities in connection with the CMRR-NF pending the completion of a new EIS and ROD. [Doc. 1 ¶¶ 80-

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90.] Under the doctrine of prudential mootness, the district court has the discretion to withhold injunctive relief “even if some remnant of the original controversy be still alive.” *Goldschmidt*, 629 F.2d at 669, citing *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d at 1124, quoting *Goldschmidt*, 629 F.2d at 669. “[A] court may decline to grant 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.” *Building and Construction Department v. Rockwell International Corp.*, 7 F.3d at 492. The court has the general discretion in “formulating prospective equitable remedies, especially with regard to the government of the United States where ‘consideration of . . . comity for coordinate branches of government’ come into play.” *Id.*, quoting *Chamber of Commerce*, 627 F.2d at 291. The moving party, in this case the Plaintiff, “must satisfy the court that relief is needed.” *United States v. W.T. Grant Co.*, 345 U.S. at 633.

29. Here, the doctrine of prudential mootness counsels against a court issued injunction to halt all work. The Defendants are in the process of changing their policy in that they are conducting an SEIS which will supercede the 2003 EIS and 2004 ROD. The expected duration for the completion of the SEIS is from October 2010 to June 2011. [Doc. 9 at p. 26.] In addition, any on-going activities pending the completion and publication of the SEIS are preliminary. [Doc. 10 at p. 10.] The actual construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. [Doc. 9 at p. 27.]<sup>2</sup> Furthermore, construction will take

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<sup>2</sup> Plaintiff states that “[t]he Infrastructure Package may begin in March 2011.” (Emphasis added.) [Doc.10 at pp.10-11.] Not only is this assertion qualified (infrastructure “may” begin), it is also unsupported. Moreover, even if Defendants should acknowledge that such infrastructure work will begin in March, the work described by Plaintiffs which “may” take place is not sufficient enough to alter the undersigned Magistrate Judge’s recommendation that the doctrine of prudential mootness counsels against a court issued injunction to halt all work.

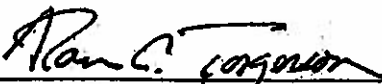
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more than a decade, and the facility is not expected to be occupied and operational until 2022. [Doc. 10 at p. 11; Doc 9 at p. 16-17.] Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins.

**RECOMMENDED DISPOSITION**

For the reasons stated above the undersigned Magistrate Judge recommends that the District Court dismiss Plaintiff's Complaint in its entirety based on the doctrine of prudential mootness.

Timely objections to the foregoing may be made pursuant to 28 U.S.C. § 636(b)(1)(c). Within fourteen days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to § 636(b)(1)(c), file written objections to such proposed findings and recommendations with the Clerk of the United State District Court, 333 Lomas N.W., Albuquerque, NM 87102. A party must file any objections within the fourteen-day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

  
ALAN C. TORGERSON  
UNITED STATES MAGISTRATE JUDGE

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

**LOS ALAMOS STUDY GROUP,**

**Plaintiff,**

**v.**

**No. 10-CV-760 JCH/ACT**

**UNITED STATES DEPARTMENT OF  
ENERGY; THE HONORABLE STEPHEN  
CHU, in his capacity as SECRETARY,  
DEPARTMENT OF ENERGY;  
NATIONAL NUCLEAR SECURITY  
ADMINISTRATION; THE HONORABLE  
THOMAS PAUL D'AGOSTINO, in his  
capacity as ADMINISTRATOR,  
NATIONAL NUCLEAR SECURITY ADMINISTRATION,**

**Defendants.**

**MEMORANDUM OPINION AND ORDER**

THIS MATTER comes before the Court on Plaintiff Los Alamos Study Group's *Objections to Magistrate Judge's Proposed Findings and Recommended Disposition*, filed January 20, 2011 [Doc. 33]. On November 17, 2010, the Court referred Defendants' *Motion to Dismiss for Lack of Jurisdiction* [Doc. 9] to the Magistrate Judge for proposed findings of fact and a recommended disposition pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B). See Doc. 15. On January 6, 2011, the Magistrate Judge filed his Proposed Findings and Recommended Disposition (hereinafter referred to as "F&R"), recommending that Plaintiff's Complaint be dismissed in its entirety based on the doctrine of prudential mootness. See Doc. 25. Plaintiff timely filed its objections.<sup>1</sup>

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<sup>1</sup> Defendants also timely filed *Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition* [Doc. 32]. These Objections focus only on two minor

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Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed *de novo* the findings and recommendations to which Plaintiff objects. In addition to exhaustively reviewing the briefs and voluminous exhibits submitted by the parties, the Court held hearings on April 27, 2011 and May 2, 2011, at which both sides were heard and during which the parties submitted additional material.<sup>2</sup> Having carefully considered the Objections, briefs, relevant law, arguments of the parties at the hearings, and the submitted exhibits, and being otherwise fully informed, the Court finds that Plaintiff's Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition are not well taken and will be DENIED. Because this denial results in Plaintiff's Complaint being dismissed in its entirety, the Court does not reach Plaintiff's *Motion for Preliminary Injunction* [Doc. 13].

#### **BACKGROUND**<sup>3</sup>

This action arises under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(f) ("NEPA"), together with the implementing regulations for NEPA issued by the White House Council on Environmental Quality, 40 C.F.R. §§ 1500-08, and regulations issued by the Department of Energy ("DOE"), 10 C.F.R. § 1021. This action also arises under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*

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inaccuracies in the factual section of the F&R, but do not object to the recommended disposition. The two minor inaccuracies are corrected in this Court's statement of facts.

<sup>2</sup> At the April 27, 2011 hearing, Plaintiff presented the Court with three binders of materials: (1) Plaintiff's Opening Statement Exhibits; (2) Gregory Mello Testimony Exhibits; and (3) Frank Von Hippel Testimony Exhibits. In addition, the Court received a copy of Defendants' Draft Supplemental Environmental Impact Statement. While these materials were not formally moved into evidence, both counsel referred to the exhibits, as did the witnesses, and the Court considered them in making its ruling. Thus, they will be considered part of the record.

<sup>3</sup> This background section is taken largely from the Magistrate Judge's thorough but concise summation of the facts as laid out in Doc. 25 at 1-6.

In its Complaint [Doc. 1], Plaintiff challenges the adequacy of the Department of Energy/National Nuclear Security Administration's ("DOE/NNSA" or "NNSA") analysis of potential environmental impacts from the construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL"). Complaint at ¶ 2. The NNSA is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. See Declaration of Donald L. Cook, attached as Ex. 1 to Deft. Mot. to Dismiss [Doc. 9] (hereinafter "Cook Decl.") at ¶ 3; 50 U.S.C. § 2401(b). NNSA is also responsible for the administration of LANL. *Id* at ¶ 4.

Plaintiff's Complaint seeks a declaratory judgment and mandatory injunction requiring Defendants to prepare a new Environment Impact Statement ("EIS") regarding the CMRR-NF and also seeks to prohibit all further investments in the CMRR-NF project, including any funds for detailed design or construction, until a new EIS is completed. Complaint at ¶ 3. Specifically, in Count I, Plaintiff alleges that Defendants violated NEPA and the APA by failing to prepare an applicable EIS for the CMRR-NF. It claims that Defendants' current proposal differs substantially from that considered in the project's 2003 EIS and the accompanying Record of Decision ("ROD") that was released in 2004, so that a new EIS must be prepared. Complaint at ¶¶ 52-64. In Count II, Plaintiff alleges that Defendants have failed to develop an EIS which addresses "connected actions" to the CMRR-NF and that Defendants must prepare a new EIS to address them. Complaint at ¶¶ 65-71. In Count III, Plaintiff alleges that Defendants failed to provide required mitigation measures and a mitigation action plan in the 2003 EIS and the 2004 ROD and that they must prepare a new EIS which addresses reasonable mitigation measures. Complaint at ¶¶ 72-79. Count IV alleges that the Defendants' decision-making

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processes for the CMRR-NF exceed the scope of the 2003 EIS and the 2004 ROD and that all activities should be stopped pending the completion of a new EIS and ROD. Complaint at ¶¶ 80-90. In Count V, Plaintiff alleges that the proposed CMRR-NF involves a much greater commitment of resources and has a far greater impact than what was analyzed in the 2003 EIS and the 2004 ROD. It alleges that the DOE authorized production of a Supplement Analysis which addresses the changed project parameters and allegedly determines if a Supplemental EIS (“SEIS”) or a new EIS should be prepared has not been made public or provided to Plaintiff. Complaint at ¶¶ 91-95.

Defendants filed a Motion to Dismiss [Doc. 9] which argues that (1) some of Plaintiff’s claims are time-barred; (2) Plaintiff’s claims are not ripe for review; (3) Plaintiff’s claims are moot; and, alternatively, (4) Plaintiff’s claims should be dismissed under the doctrine of prudential mootness.

In 2002, NNSA published a Notice of Intent to prepare the CMRR-NF EIS and invited public comment on the CMRR-NF EIS proposal. Cook Decl. at ¶ 9. At the time NNSA published the Notice of Intent, the Chemical and Metallurgy Research (“CMR”) building that Defendants sought to replace was over 50 years old and allegedly nearing the end of its useful life. *Id.* at ¶ 6. The CMR building is a facility which has “unique capabilities for performing special nuclear material analytical chemistry, materials characterization, and actinide<sup>4</sup> research and development.” *Id.* at ¶ 5. The CMR building supports various national security missions including nuclear nonproliferation programs; the manufacturing, development, and surveillance of pits (the fissile core of a nuclear warhead); life extension programs; dismantlement efforts;

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<sup>4</sup> “Actinide” refers to the 14 elements with atomic numbers from 90 to 103. Uranium and Plutonium are actinides. *See* Doc. 9 at 3 n.1.]

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waste management; material recycle and recovery; and research. *Id.* NNSA's proposal to construct the replacement facility, CMRR-NF, was to insure that NNSA could "fulfill its national security mission for the next 50 years in a safe, secure, and environmentally sound manner." *Id.* at ¶¶ 7 and 8.

NNSA hosted two public meetings on the proposed CMRR project in August of 2002 and published a Draft EIS. *Id.* at ¶ 9. NNSA issued a Final EIS in November 2003. *Id.* NNSA published its Record of Decision ("ROD") on the 2003 EIS in the Federal Register on February 12, 2004. *Id.* at ¶ 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 Radiological Laboratory Utility Office Building ("RLUOB"). Cook Decl. at ¶ 10.

Defendants contend that, since the 2003 EIS and the 2004 ROD were published, new developments have arisen that require changes to the proposed CMRR-NF structure. *Id.* at ¶ 12. Specifically, a site-wide analysis of the geophysical structures that underlie the area occupied by LANL revealed new geologic information regarding the seismic conditions at the site. *Id.*; Pl. Resp. to Deft. Mot. to Dismiss [Doc. 10] at 7-10. As a result of the new geologic information, as well as more information on the various support functions, actions, and infrastructure needed for construction, "changes were made to the proposed design of the CMRR-NF." Cook Decl. at ¶ 12. In addition to addressing the seismic issues, other changes were made to "implement[] DOE's nuclear safety management design requirements for increased facility engineering controls to ensure protection of the public, workers, and the environment." *Id.* Also,



“sustainable design principles have been incorporated to minimize the environmental impacts of construction and operation of the proposed CMRR-NF.” *Id.*

In light of the design changes, NNSA prepared a Supplement Analysis pursuant to 10 C.F.R. § 1021.314(c)(2) to determine (1) if the 2003 EIS should be supplemented, (2) if a new EIS should be prepared, or (3) if no additional NEPA document was required. *Id.* at ¶ 15. On July 1, 2010, counsel for Plaintiff wrote to the DOE and the NNSA and expressed concerns about the adequacy of NNSA’s NEPA analysis and the increased cost and scope of the CMRR-NF project. Plaintiff requested that DOE stop any and all CMRR-NF design activities, make no further contractual obligations, and seek no further funding until NNSA complete a new EIS for the CMRR-NF. *Id.* On July 30, 2010, NNSA informed the Plaintiff that it was preparing a Supplement Analysis. *Id.* Prior to NNSA’s completion of the Supplement Analysis of how to proceed with possible changes to the proposed design of the CMRR-NF, Plaintiff filed its Complaint on August 16, 2010. *See* Doc. 1.

On September 21, 2010, NNSA’s Deputy Administrator for Defense Programs, Donald L. Cook, decided “for prudential reasons” that the NNSA should complete an SEIS “to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF.” Cook Decl. at ¶ 16. A Notice of Intent to prepare an SEIS appeared in the October 1, 2010 issue of the Federal Register. *See* Ex. 2 attached to Doc. 9.

The preparation of the SEIS includes a public scoping process which involves “two public scoping meetings to assist NNSA in identifying potential impacts, alternatives, and mitigation strategies that should be analyzed in the SEIS.” Cook Decl. at ¶ 17. Other federal agencies, as well as state agencies, Native American tribes, and the general public, including Plaintiff, are on notice of the NNSA’s intention to prepare an SEIS and are able to participate in

determining the scope of the environmental analysis. On April 22, 2011, the NNSA released a draft of the SEIS to the public. *See* National Nuclear Security Administration, *Draft Supplemental Environmental Impact Statement for the Nuclear Facility Portion of the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico (CMRR-NF SEIS) (DOE/EIS-0350-S1) (2011)* (hereinafter "Draft SEIS"), available at <http://www.nnsa.energy.gov/nepa/cmrrseis>. Release of this draft began a comment period scheduled to last at least 45 days. All public comments must be considered in the preparation of the Final SEIS. Cook Decl. at ¶ 17.

Significantly, 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. *Id.* at ¶ 20. In fact, the Draft SEIS contains a new proposed design option for the CMRR-NF that requires significantly less excavation than the option that had been considered prior to the commencement of the SEIS process. *See* Draft SEIS at 2-14 to 2-19. Unquestionably, 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, prior to discovery of the seismic issues. However, no CMRR-NF construction is underway, and none will occur until after the SEIS is finalized. Cook Decl. at ¶ 21. If, after completion of the SEIS, NNSA decides to proceed with construction of the proposed CMRR-NF, the building is not expected to be occupied and operational until 2022. *Id.* at ¶ 23; Pl. Resp. to Deft. Mot. to Dismiss [Doc. 10] at 11. Thus, no construction or other irrevocable actions appear to be ongoing while Defendants are engaging in the SEIS process.

#### ANALYSIS

##### A. Prudential Mootness

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In his F&R, the Magistrate Judge found that Plaintiff's Complaint should be dismissed based on the doctrine of prudential mootness. Prudential mootness differs from the concept of the more common constitutional mootness. Specifically, prudential mootness addresses a court's discretion in the exercise of granting or withholding relief, rather than the power to grant relief. *See Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). Even if a case is not constitutionally moot, a court may dismiss the case under the doctrine of prudential mootness if the case "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." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010) (citations omitted) (emphasis in original). The doctrine of prudential mootness "has particular applicability in cases...where the relief sought is an injunction against the government." *Southern Utah Wilderness Alliance*, 110 F.3d at 727.

Under the prudential mootness doctrine, the central inquiry is whether "circumstances [have] changed since the beginning of litigation that forestall any occasion for meaningful relief." *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997); *Southern Utah Wilderness Alliance*, 110 F.3d at 727. In cases involving prudential mootness, "a court may decline to grant 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." *Rio Grande Silvery Minnow*, 601 F.3d at 1122, quoting *Building and Construction Department v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993). A court's "sound discretion withholds the remedy where it appears that a challenged 'continuing practice' [of an administrative agency] is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form

cannot be confidently predicted.” *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961).

The Magistrate Judge noted that Plaintiff seeks relief on the grounds that the project exceeds its scope as laid out in the 2003 EIS and 2004 ROD and that Plaintiff requests the Court to order Defendants to stop all activities in connection with the CMRR-NF pending completion of a new EIS and ROD. The F&R found that, because Defendants are currently in the process of undertaking an SEIS that would supercede the 2003 EIS and 2004 ROD by taking into account geological information and necessary design modifications that came to light after the completion of the 2003 EIS and 2004 ROD, “circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief,” and dismissal based on prudential mootness is appropriate. F&R ¶ 25 (quoting *Southern Utah Wilderness Alliance*, 110 F.3d at 727). In other words, because Plaintiff seeks injunctive relief to ensure that Defendants’ design and planning of the CMRR-NF are made pursuant to an EIS, and Defendants are now conducting an SEIS that will govern the CMRR-NF project, the F&R finds that dismissal is proper because Defendants have changed their previous actions by ordering an SEIS. *See id.* ¶ 29. The Magistrate Judge based his ruling in part on his finding that construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. *See id.* Thus, he concluded, “Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins.” *See id.* ¶ 29.

Plaintiff’s Objections assert that the F&R misapplies the doctrine of prudential mootness because Defendants are engaged in ongoing NEPA violations, so that a promise to conduct NEPA analysis in the future cannot undo Defendants’ failure to comply with NEPA prior to irretrievably committing resources to the CMRR-NF project. Plaintiff contends that, with

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respect to NEPA claims, the doctrine of prudential mootness applies only when a project is so close to completion that any meaningful relief is precluded. *See* Pl. Obj. [Doc. 33] at 4-5.

Plaintiff argues that, in this case, injunctive relief is appropriate because the project is still in its early stages and pausing the project to require Defendant to comply with its NEPA obligations would afford it meaningful relief. Plaintiff also characterizes Defendants' preparation of an SEIS as a "smokescreen" to defeat an injunction, and alleges that Defendants will continue to be in violation of NEPA as they move forward with design and construction of the CMRR-NF project so that preparation of an SEIS cannot make its Complaint moot. *Id.* at 11-13.

Plaintiff's Objections rely on two fundamental assertions that do not bear up under scrutiny: first, that NEPA requires Defendants to undertake a new EIS from scratch before moving forward with the project, and second, that Defendants are currently moving forward with final design and construction in violation of NEPA. Because neither of these is correct, the Magistrate Judge properly applied the doctrine of prudential mootness to dismiss this case.

The record before the Court demonstrates that Defendants have followed an orderly process as contemplated by NEPA with respect to the project in question. Following the completion of a comprehensive EIS in 2003, the CMRR-NF project was approved in an unchallenged 2004 ROD.<sup>5</sup> Pursuant to the 2004 ROD, NNSA partially excavated the CMRR-NF

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<sup>5</sup> Defendants correctly point out that any challenges Plaintiff makes to the sufficiency of the original EIS and ROD are time-barred. NEPA claims are subject to the APA's general six-year limitation period under 28 U.S.C. § 2401(a). *See Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1123 n.3 (10th Cir. 2009); *Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494-95 (10th Cir. 1997). Defendants published the 2004 ROD in the Federal Register on February 12, 2004, so that any challenge to the adequacy of the 2003 EIS would have had to have been made by February 12, 2010, prior to the date Plaintiff filed the instant action. That said, the Court notes that Plaintiff's contention is that the 2003 EIS and

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site in 2006 to allow for site characterization and seismic mapping. New information developed from this excavation and corresponding new building safety requirements led to significant evolving design changes for the CMRR-NF. As a result of these design changes, prior to this lawsuit, NNSA began reviewing whether it should prepare an SEIS. Although the NNSA's draft Supplement Analysis allegedly concluded that the potential environmental impacts from construction of the CMRR-NF in accordance with the evolving design changes were adequately bounded and addressed in the 2003 EIS, NNSA nonetheless committed to preparing an SEIS through a Notice of Intent published in the Federal Register.

Unquestionably, the scope of the CMRR-NF project has changed significantly since the 2003 EIS and 2004 ROD. Had Plaintiff come before the Court seeking an injunction requiring NNSA to complete an SEIS in the face of its continued refusal, the Court would be in a position of having to determine whether NEPA requires an SEIS under such changed circumstances. However, that is not the case currently before the Court. Defendants are proceeding with an SEIS, and are not moving forward with final design or construction pending completion of that process. Instead, Plaintiff contends that undertaking an SEIS does not satisfy Defendants' NEPA obligations, because the changed circumstances are such that NEPA requires Defendants to prepare a new EIS from scratch for the CMRR-NF project. However, Plaintiff has come forward with no legal support for its claim that Defendants are in violation of NEPA for not having prepared a new EIS in the face of the project's modifications.

Under 10 C.F.R. § 1021.314, which is part of the NEPA implementation procedures for DOE projects, "DOE shall prepare a supplemental EIS if there are substantial changes to the

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2004 ROD are not applicable to the CMRR-NF as currently envisioned.

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proposal or significant new circumstances or information relevant to environmental concerns,” and “DOE may supplement a draft EIS or final EIS at any time, to further the purposes of NEPA.” 10 C.F.R. §§ 1021.314(a), (b). In this case, whether doing so was voluntary or mandatory, Defendants are currently preparing a supplement to the initial EIS in response to changed circumstances, exactly as the NEPA regulations contemplate.

Plaintiff’s contention that “[i]t 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, and its reliance on *Blue Ocean Soc’y v. Watkins*, 767 F. Supp. 1518 (D. Haw. 1991) for that proposition, is misguided. First, *Blue Ocean* did not address prudential mootness, but instead was a constitutional mootness case. See 767 F. Supp. at 1522. Second, not only had the defendant in *Blue Ocean* not prepared an EIS for the project in question, it had not commenced preparation of an EIS through publication of a notice in the Federal Register at the time of the decision. See *id.* at 1523. Not surprisingly, the *Blue Ocean* court held that a mere promise to correct a NEPA violation at some point in the future was insufficient to render a case constitutionally moot. In the instant case, however, Defendants initially prepared an EIS for the project and are currently following a well-defined process of supplementing that EIS based on new information related to the initial project design. Defendants are not currently out of compliance with NEPA, nor is their commitment to supplementing the EIS merely aspirational.

Plaintiff’s contention that the doctrine of prudential mootness only applies in NEPA cases in which the project in question is substantially complete is similarly misguided. Plaintiff cites three cases from outside of the Tenth Circuit to make its argument: *Sierra Club v. U.S. Army Corps of Eng’r*, 2008 WL 2048359 (3d Cir. May 14, 2008), *Crutchfield v. U.S. Army Corps of Eng’r*, 192 F. Supp. 2d 444 (E.D. Va. 2001), and *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202



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(E.D. Cal. 1999). In *Sierra Club v. U.S. Army Corps of Engineers*, the court found the plaintiff's claims challenging a permit to fill wetlands to be prudentially moot because all but .12 of the 7.69 acres of the wetlands had been filled, preventing any opportunity for meaningful relief for the plaintiff. However, the *Sierra Club* court did not limit the doctrine of prudential mootness to the narrow circumstances of a nearly-completed project, as Plaintiff seeks to do. Instead, the court recognized that "the central question in a prudential mootness analysis is 'whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.'" 2008 WL 2048359 at \*2 (citation omitted). This is the same general analysis the Magistrate Judge applied in this case. See F&R at ¶ 20 (quoting *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997)).

Plaintiff characterizes *Crutchfield* as holding that NEPA claims "were not prudentially moot because work remained to be done on defendant's project." Pl. Obj at 4 (emphasis in original). However, it is misleading to suggest that *Crutchfield* uses project completion as the barometer for whether prudential mootness applies. The *Crutchfield* court did not find prudential mootness to be inapplicable to the dispute simply because work remained to be done on the challenged project; instead it found that the case was not prudentially moot 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 466. Secondly, at the time the request for an injunction was heard, the same court had previously held that the Corps had not conducted the requisite environmental assessments of the project and had, when "confronted with considerable pressure from the County, made permitting decisions that defied logic and law." *Id.* at 462. In contrast, in this case, NNSA has approved the CMRR-NF project in full satisfaction of NEPA,



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and construction of the project is on hold pending completion of the SEIS and issuance of a new ROD.

Plaintiff's reliance on *Sierra Club v. Babbitt* is similarly misplaced. *Babbitt* concerned the construction of a highway through Yosemite National Park. Despite finding that the defendants had violated NEPA by failing to prepare an EIS for the project, the court declined to enjoin work on several portions of the road or to order that an EIS be prepared. *See* 69 F. Supp. 2d at 1259-60. The court did not apply the doctrine of prudential mootness because it found that effective relief was still available to the plaintiff on one portion of the project. *See id.* at 1244. Because the court found that the defendants remained out of compliance with NEPA and with the Wild and Scenic Rivers Act, and because it found that most of the work to be performed on that portion of the project had already been abandoned so that an injunction would result in little burden on the defendants, the court found that injunctive relief on that portion of the project pending compliance was appropriate. In this case, there has been no finding of noncompliance with NEPA, and additional environmental studies are already underway.

The three cases cited by Plaintiff related to substantial completion as a requirement for prudential mootness in the NEPA context are distinguishable in another way as well. All three of the cases concerned projects that involved ongoing construction and that either were, or could have been, rapidly completed. In the instant case, not only are Defendants holding off on construction of the CMRR-NF pending completion of the SEIS and accompanying ROD, but the project is expected to take at least ten years after the start of construction to become operational. *See Cook Decl.* at ¶ 23. Thus, the danger of rendering an otherwise valid case moot through project completion is much reduced in this case compared to the cases cited by Plaintiff.

The Magistrate Judge correctly recognized that Defendants' undertaking of an SEIS

means that “circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief.” F&R ¶ 25 (quoting *Southern Utah Wilderness Alliance*, 110 F.3d at 727). The Court agrees that “sound discretion withholds the remedy where it appears that a challenged ‘continuing practice’ [of an administrative agency] is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted.” *Id.* ¶ 22 (quoting *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961)). The final form and conclusion of the SEIS cannot currently be known. Plaintiff has the ability to actively participate in the process to ensure that its perspectives are heard. Thus, the SEIS process may address many, if not all, of Plaintiff’s concerns about the environmental effects of the proposed CMRR-NF project. If, upon completion of the SEIS and issuance of the ROD, Plaintiff believes that its perspectives were not adequately considered, it will have the opportunity to file a new complaint. The Court agrees with the Magistrate Judge that it would be imprudent to halt all work, including design analysis, and to issue what would essentially be an advisory opinion while the SEIS process (which had not yet begun at the start of litigation) is ongoing.

B. Ripeness

Although the Magistrate Judge did not base his decision on Defendants’ assertion that this case is not yet ripe for adjudication, this would have been an equally valid ground for dismissal. The doctrine of ripeness is premised on justiciability and is intended “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.

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803, 807-08 (2003) (citations omitted). If a claim rests “upon contingent future events that may not occur as anticipated, or indeed may not occur at all,” it is not considered ripe. *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations omitted). In this case, the NNSA is in the process of completing an SEIS to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF project. The process is still open to public participation and it is unclear at this point what form the SEIS and associated ROD will take.

While the SEIS process is ongoing, there is no ripe “final agency action” for the Court to review pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. *See, e.g., Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1250 (10th Cir. 2001) (holding that the ripeness test includes whether there is a “final agency action” under the APA); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (“[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”); *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).

Plaintiff contends that the “final agency action” undertaken by Defendants was their implementation of the CMRR-NF project in violation of NEPA. *See* Pl. Obj. at 7. For this contention, it cites *Catron County Bd. of Comm’rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996), which it characterizes as holding that a failure to comply with NEPA could constitute a “final agency action” under 5 U.S.C. § 551(13). However, *Catron County* involved a challenge to a final agency rule (designation of critical habitat under the Endangered Species Act) that had been promulgated without undertaking an EIS. *See* 75 F.3d at 1432-33. In *Catron County*, there was no question that the agency had taken a final action (designating habitat); the only question was whether undertaking such a final agency action required it to

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comply with NEPA, and the court found that the final action did require such compliance. In this case, there has been no showing of a NEPA violation, and no final agency action. *See, e.g., N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1116-1117 (D.N.M. 2006) (“[I]f there is still a real possibility that the agency will conduct further environmental analysis, the NEPA claim is not yet ripe”), *vacated in part and reversed in part on other grounds*, 565 F.3d 683 (10th Cir. 2009); *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); *Ctr. 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”).

Plaintiff next contends that its claims are ripe because Defendants are currently engaged in making an irretrievable commitment of resources related to the CMRR-NF project. *See* Pl. Obj. at 7 (citing *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 718 (10th Cir. 2009) (“assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.”) (citations omitted)). However, Defendants have presented evidence that NNSA is still evaluating aspects of the sizing and layout of the proposed CMRR-NF project, and that the overall project design is less than 50 percent complete. *See* Cook Decl. at ¶ 20. The Draft SEIS published by NNSA indicates that two construction options, a deep excavation option and a shallow excavation option, are currently under consideration by NNSA, with the shallow option having been added since the issuance of the Notice of Intent to Prepare an SEIS in October, 2010. Further design options could emerge by the end of the SEIS process as a result of public

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participation, including participation by Plaintiff. Clearly, the CMRR-NF project is still in some state of flux. Plaintiff admits that Defendants have still not made what they call "Critical Decision 2" or "Critical Decision 3," which formally allow detailed design and construction, and that Congress has never authorized or appropriated funds for the actual construction of the proposed CMRR-NF. Complaint at ¶ 20. As the Magistrate Judge found, no CMRR-NF construction is underway, and none will occur while the SEIS process is ongoing. See F&R at ¶ 16. Although NNSA has spent approximately \$210 million over the past 6 years on the CMRR-NF project, this has been for building design and analysis. See Cook Decl. at ¶ 19. However, the expenditure of even large amounts of money on design does not indicate that NNSA has made an "irreversible and irretrievable commitment of resources," because design work is ongoing and neither a final SEIS nor a final approval for construction has been issued. In other words, the design work undertaken by Defendants over the past six years is not a "final agency action," and therefore does not present an action ripe for review. See *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007) (in order to constitute a final agency action, an action must satisfy two requirements: "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature...and the action must be one by which rights or obligations have been determined, or from which legal consequences will flow") (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

In a closely related vein, Plaintiff also argues that Defendants have violated NEPA by predetermining the result of its environmental analysis, so that the SEIS process is essentially a sham. Predetermination occurs "only when 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." *Forest*

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*Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010) (emphasis in original). In order to prove predetermination, “[a] petitioner must meet a high standard.” *Id.* Predetermination generally refers not to the agency having a preferred alternative, but rather to an agency entering into a binding agreement with an outside group committing it to a particular action prior to conducting an environmental analysis. *See id.* at 713-15 (citing *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780-81 (10th Cir. 2006); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1240 (10th Cir. 2004); *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000)). Plaintiff has come forward with no evidence of any such agreement in this case.

Plaintiff relies heavily on *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2004) for the proposition that allowing a project to go forward pending an environmental analysis creates a serious risk that the analysis of alternatives required by NEPA will be skewed toward completion of the project that is already underway. Certainly, preservation of the ability of an agency to take a hard look at genuine alternatives is essential to the NEPA process. However, *Davis* arose in a very different context than the situation the Court is confronted with in this instance. *Davis* concerned an attempt to enjoin a highway construction project. The *Davis* defendants never completed an EIS related to the project. Instead, they issued a Finding of No Significant Impact (“FONSI”) that enabled them to forego production of an EIS. *See* 302 F.3d at 1109. The *Davis* court found that the defendants had predetermined the NEPA issues because the contractor hired to conduct the environmental analysis was contractually obligated to prepare a FONSI, so that the decision to forego an EIS had already been made prior to conducting an environmental analysis and prior to receiving any public comments. *Id.* at 1112. Ultimately, the court enjoined construction while the defendants performed a proper environmental analysis. *Id.* at 1126.

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Unlike *Davis*, in which the court had to rule on the adequacy of a final agency action (the issuance of a FONSI), the Court here is asked to step in while Defendants are still in the process of completing an SEIS as contemplated by NEPA. This action would be premature. Further, the continuation of design activities as part of the SEIS process is hardly a showing of predetermination of the type at issue in *Davis*. An agency may legitimately have a preferred alternative in mind when it is conducting a NEPA analysis. See *Forest Guardians*, 611 F.3d at 712. A reviewing court must ultimately determine whether an agency truly took a hard look at alternatives as part of the decision making process, rather than merely justifying decisions it had already made. *Id.* However, this is a determination to be made at the completion of the process, as opposed to while it is ongoing. Notably, even the *Davis* court, which expressed concern about prejudicing the selection of alternatives through ongoing work, only enjoined actual construction pending completion of an environmental analysis; it did not order a halt to planning and design. See 302 F.3d at 1126. Such a halt would not be appropriate in this case either, especially in the absence of a finding of a NEPA violation. Cf. *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 202-03 (4th Cir. 2005) (rejecting as overly broad an injunction, following the finding of a NEPA violation, enjoining planning and development, in addition to construction, of a Navy aircraft landing field, pending preparation of an SEIS).

Plaintiff also relies on the unpublished case of *Los Alamos Study Group v. O'Leary*, No. 94-1306-M (D.N.M. Jan. 26, 1995), for the proposition that "under NEPA regulations, it is illegal for an agency to continue an activity while an EIS is being prepared unless such action 'will not prejudice the ultimate decision on the program.'" *O'Leary*, Slip Op. at 19 (citations omitted). *O'Leary* also arises in a different context than this case. *O'Leary* concerned a project for which the DOE never conducted an EIS. Despite failure to complete an EIS, the defendant



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had already completed one phase of the project and was in the process of constructing the two remaining phases of the project. *See id.* at 2. The court enjoined construction of the project (but not planning or design), pending completion of the required EIS. In this case, NNSA has taken no action that was not already analyzed and approved in the 2003 EIS and 2004 ROD, and no CMRR-NF construction is occurring. Thus, unlike the defendant in *O'Leary*, NNSA has followed the proper procedure of approving the project pursuant to an EIS and delaying construction while analyzing potential design changes in the SEIS.

Because the Court does not know what form the SEIS will ultimately take, and because Plaintiff has not demonstrated the type of irreversible and irretrievable commitment to a particular plan as discussed in the case law, the Court finds that any claim of predetermination is not ripe at this point. Significantly, even if the Court could make a finding of predetermination at this point, such a finding would not automatically mean that an agency's analysis was arbitrary and capricious, it only means that a court reviewing the final agency decision "is more likely to conclude that the agency failed to take a hard look at the environmental consequences of its actions and, therefore, acted arbitrarily and capriciously." *Forest Guardians*, 611 F.3d at 713 n.17. As previously discussed, the Court is not reviewing a final agency decision. Thus, the issue of whether Defendants conducted an adequate analysis in compiling their SEIS, of which the question of predetermination is a component, is not ripe at this point.

#### CONCLUSION

In rendering its decision in this case, the Court has not considered any of the policy considerations raised in this action, such as whether the proposed new nuclear facility is necessary for national security, whether a delay in construction will be detrimental to research, or whether the existing facility can be modified sufficiently to serve LANL's needs thereby



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eliminating the need for a new facility. Such policy debates are not relevant to this litigation. Instead, the Court bases its decision solely on what NEPA requires and where this case currently is in the NEPA process.

Plaintiff's interpretation of NEPA would condemn agencies to the role of the mythical Sisyphus, forever advancing projects up a hill, only to be forced to start over from scratch when they encounter new information that results in design challenges. This is not what NEPA requires. Instead, the NEPA regulations contemplate that agencies will address significant new circumstances through the issuance of an SEIS, just as Defendants are in the process of doing in this case. Some of the concerns raised by Plaintiff may be addressed by the issuance of the SEIS and accompanying ROD; it is too early to tell while the process is ongoing. On the other hand, it may well be that at the end of the process, Plaintiff will continue to have concerns about whether Defendants sufficiently considered alternative proposals and the potential environmental impacts of their chosen design. If so, judicial review of the agency's final decision will be available at that point. The Magistrate Judge was correct in finding that Plaintiff's Complaint should be dismissed on the grounds of prudential mootness because Defendants are undertaking an SEIS. Dismissal is also appropriate because, until the completion of the SEIS process, this case is not yet ripe for review.

**IT IS THEREFORE ORDERED** that Plaintiff's *Objections to Magistrate Judge's Proposed Findings and Recommended Disposition* [Doc. 33] are overruled, and that the Magistrate Judge's Proposed Findings and Recommended Disposition [Doc. 25] is adopted. **IT IS FURTHER ORDERED** that Defendants' *Motion to Dismiss for Lack of Jurisdiction* [Doc. 9] is hereby granted.

  
UNITED STATES DISTRICT JUDGE

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

**LOS ALAMOS STUDY GROUP,**

**Plaintiff,**

**v.**

**No. 10-CV-760 JCH/ACT**

**UNITED STATES DEPARTMENT OF  
ENERGY; THE HONORABLE STEPHEN  
CHU, in his capacity as SECRETARY,  
DEPARTMENT OF ENERGY;  
NATIONAL NUCLEAR SECURITY  
ADMINISTRATION; THE HONORABLE  
THOMAS PAUL D'AGOSTINO, in his  
capacity as ADMINISTRATOR,  
NATIONAL NUCLEAR SECURITY ADMINISTRATION,**

**Defendants.**

**FINAL JUDGMENT**

Having adopted the Magistrate Judge's Proposed Findings and Recommended Disposition, and having granted Defendants' *Motion to Dismiss for Lack of Jurisdiction* [Doc. 9] by a Memorandum Opinion and Order dated May 23, 2011,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that final judgment is entered in favor of Defendants, and that Plaintiff's claim is dismissed with prejudice.

  
UNITED STATES DISTRICT JUDGE

**C**

DOE F 1325.8  
(8-89)

**United States Government**

**Department of Energy**


## **memorandum**

**DATE:** June 17, 2003  
**REPLY TO:**  
**ATTN OF:** Office of NEPA Policy and Compliance (B. Mills, 202-586-8267)  
**SUBJECT:** Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions  
**TO:** Secretarial Officers  
Heads of Field Organizations

The Department of Energy (DOE) frequently needs to decide whether an action that is within the scope of an ongoing environmental impact statement (EIS) may proceed before a record of decision (ROD) is issued. An action within the scope of an EIS that is taken before a ROD is commonly referred to as an "interim action." DOE may propose to take the action before a ROD to reduce risk or mitigate adverse impacts to human health and the environment or reduce program costs. Indeed, interim actions to respond to an immediate need are often permissible and should be pursued, as appropriate. This issue arises most frequently with respect to actions that fall within the scope of a programmatic or site-wide EIS.

In preparing the attached guidance, we consulted with the Office of General Counsel, and we considered suggestions made by NEPA Compliance Officers. We prepared this guidance to help respond to the concern that compliance with NEPA could become the reason for near-term hazards to go unmitigated, as expressed in the February 2002 Environmental Management Top-To-Bottom Review. The guidance is based on criteria established by the Council on Environmental Quality in its regulations implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508), DOE's NEPA implementing regulations (10 CFR Part 1021), which rely on those criteria, and DOE Order 451.1B, *National Environmental Policy Act Compliance Program*. Examples of the types of actions that may proceed as interim actions and a flow diagram summarizing key aspects of the guidance are provided.

If you have any questions regarding this guidance or its application to particular proposed actions, please direct them to Carol Borgstrom, Director, Office of NEPA Policy and Compliance (EH-42), at 202-586-4600.

  
Beverly A. Cook  
Assistant Secretary  
Environment, Safety and Health

Attachment  
cc: William Dennison, GC-51  
NEPA Compliance Officers

**D**

01687

Mello aff 3, par 93, ref 77

**Guidance Regarding Actions That May Proceed  
During the National Environmental Policy Act (NEPA) Process:  
Interim Actions**

The Department of Energy (DOE) frequently needs to decide whether an action that is within the scope of an ongoing environmental impact statement (EIS) may proceed before a record of decision (ROD) is issued. An action within the scope of an EIS that is taken before a ROD is commonly referred to as an "interim action." DOE may propose to take an action before a ROD to reduce risk or mitigate adverse impacts to human health and the environment or to reduce program costs. Indeed, interim actions to respond to an immediate need are often permissible and should be pursued, as appropriate. This issue arises most frequently with respect to actions that fall within the scope of a programmatic or site-wide EIS.

The following guidance is based on criteria established by the Council on Environmental Quality (CEQ) in its regulations implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508; 40 CFR 1506.1 attached as Exhibit 1), DOE's NEPA implementing regulations (10 CFR 1021.104 and 1021.211, attached as Exhibit 2, which define interim action and incorporate the CEQ criteria), and DOE Order 451.1B, *National Environmental Policy Act Compliance Program*. This guidance does not create any additional requirements beyond those in these sources.

To provide assistance in determining whether an action within the scope of an EIS may be taken before a ROD, the guidance reviews applicable requirements, gives examples of the types of actions that may proceed as interim actions, describes case studies, and outlines the steps in the EIS process for interim actions.

Requirements for project-specific and programmatic EISs are distinguished where appropriate. In brief, for a project-specific EIS, an interim action must be one that would not adversely affect the environment nor limit the choice of reasonable alternatives. For a programmatic EIS, an EIS must be prepared for a proposed interim action that has potential for significant environmental effects, and the interim action must be one that would neither affect nor be affected by the proposed program. In general, an action of relatively limited scope or scale that would have only local utility normally could be taken as an interim action before a ROD.

**CEQ Criteria for Interim Actions**

CEQ's criteria for interim actions (at 40 CFR 1506.1) are best understood in the context of the purpose of an EIS. As stated in the CEQ regulations, the primary purpose of an EIS is to serve as an action-forcing device to ensure that the policies and goals defined in NEPA are infused into an agency's

ongoing programs and actions (40 CFR 1502.1). An EIS is more than a disclosure document; it is to be used by decision makers in conjunction with other relevant information to plan actions and make decisions.

At 40 CFR 1502.2, the CEQ regulations state that:

“(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision ([Section] 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made” (emphasis added).

CEQ established separate criteria for project-specific EISs in Section 1506.1(a) and for required programmatic EISs in Section 1506.1(c), as discussed below.<sup>1</sup> Both sets of criteria address, in part, the need to avoid improper segmentation, in particular with regard to connected actions, e.g., actions that are interdependent parts of a larger action and depend on the larger action for justification (in 40 CFR 1508.25(a)).

#### **Application of CEQ Criteria to DOE Actions Covered by Project-specific EISs**

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<sup>1</sup>In addition, Section 1506.1(b) states an agency's responsibility to ensure that non-Federal applicants meet the objectives of 40 CFR 1506.1(a), and Section 1506.1(d) allows limited activities (e.g., plans, designs) specifically in support of Federal, State or local permit applications.

CEQ also discusses the Section 1506.1 criteria in two items in Forty Most Asked Questions Concerning CEQ's NEPA Regulations (51 FR 15618; April 25, 1986). In item 10a, CEQ reiterates the criteria in 1506.1(a) and (c). In item 11a, CEQ provides examples of actions an agency could take under 40 CFR 1506.1(b) to ensure that the objectives and procedures of NEPA are met when an applicant proposes to take an invalid interim action within the agency's jurisdiction; the agency's actions could range from negotiation to non-approval of the permit application.

Under Section 1506.1(a), until an agency issues a ROD<sup>2</sup>, no action concerning the proposal can be taken that would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

Many types of actions could be interim actions to a project-specific EIS. In general, project managers may proceed with conceptual design (under DOE O 413.3, *Program and Project Management for the Acquisition of Capital Assets*) and feasibility studies in support of a project because these activities meet both criteria of Section 1506.1(a). Site characterization activities to support a meaningful analysis of the environmental impacts of the proposed project also generally may be undertaken. Small scale corrective actions under the Resource Conservation and Recovery Act or installing fences to enhance security represent other classes of actions that usually may proceed under the criteria of Section 1506.1(a).

Although the activities discussed in the paragraph above would take place while a more extensive action (e.g., a waste management or nuclear materials action) is being evaluated in its associated EIS, the activities normally are unlikely to involve adverse environmental impacts or limit the choice of reasonable alternatives for the final action. An action that is not within the scope of the EIS, such as ongoing site operations, would not be constrained by the criteria for an interim action and could proceed.

In the context of this guidance "adverse environmental impact" means a negative environmental impact at such a level that an element of the human environment is impaired or damaged. Judgment of whether the level of negative impact is high enough to impair or damage depends on the situation and the resource. For some resources, adverse impact is defined in the statute protecting the resource or in implementing regulations.

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<sup>2</sup>The CEQ regulations address criteria for interim actions during the preparation of an EIS only. A project or program for which an environmental assessment (EA) is prepared is normally smaller in scope than a project or program for which an EIS is prepared, and the EA process is shorter in duration than the EIS process. Thus the question of interim actions is less likely to arise during EA preparation. However, EAs, like EISs, are intended to inform decisions and therefore, normally should be completed before an action is taken. In those exceptional cases where part of a proposed action needs to proceed while the EA is being prepared, DOE managers should be mindful of the principles enunciated by the Section 1506.1(a) criteria, i.e., that the activity does not have an adverse environmental impact nor does it limit the choice of reasonable alternatives. Early and continued consideration of the Section 1506.1 criteria should lead to better project and program planning and decisions, regardless of whether an EA or an EIS is being prepared.

- For example, under the implementing regulations for the National Historic Preservation Act, “An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” [36 CFR 800.5(a)(1)]
- Under the implementing regulations for the Endangered Species Act, an adverse impact would be a “take” (of an endangered or threatened species or a species proposed for listing as endangered or threatened), which means “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” [50 CFR 10.12] With regard to critical habitat, the implementing regulations define destruction or adverse modification to mean “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” [50 CFR 402.02]

NEPA documentation is not normally needed for permissible interim actions under project-specific EISs. See Exhibit 3 for a diagram of steps in the NEPA process for interim actions for project-specific EISs. Valid interim actions associated with project-specific EISs should be minor in scope (as discussed above), not require analysis to show that the criteria are met, and be similar in nature to categorical exclusions. That a proposed interim action is similar in nature to a categorical exclusion does not in itself indicate that it is a valid interim action. As with the application of categorical exclusions or many other project or programmatic decisions, a record of interim action determination is recommended.

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. For example, detailed design for containers that could only be transported via rail may prejudice consideration of truck or barge transport as alternatives. Concern about limiting the choice of reasonable alternatives is the basis for the DOE policy, expressed in the DOE NEPA regulations at 10 CFR 1021.210(b), that NEPA review normally should be completed before deciding to start detailed design.<sup>3</sup>

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<sup>3</sup> Note, too, that DOE O 413.3 similarly provides for NEPA documentation to be completed before critical decision-2 (detailed design). Conceptual design and detailed design are defined under this DOE Order.



### **Application of CEQ Criteria to DOE Actions Covered by Programmatic EISs**

Section 1506.1(c) states "While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement<sup>4</sup>; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives."

In applying the first criterion ("independent justification"), DOE needs to determine that the proposed interim action could be undertaken irrespective of whether or how the program goes forward.

- In most cases in which DOE is obligated by law to carry out the proposed interim action (e.g., usually cases involving compliance with environmental requirements), DOE would be able to demonstrate independent justification by showing that no reasonably foreseeable decision based on the programmatic EIS would affect the proposed interim action.
- In cases that involve an existing facility that is within the scope of a programmatic EIS in preparation, DOE would need to establish, for example, that a proposed interim action involving a change in the facility (structure or operation) is needed to allow the facility to fulfill its existing mission before decisions can be made and implemented on the basis of the programmatic EIS. If so, a near-term modification would be permissible because it would be necessary for the ongoing program, regardless of how decisions based on the programmatic EIS may affect the future of the facility or the ongoing program.

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<sup>4</sup>Section 1506.1(c) speaks in terms of interim actions that require an EIS ("major Federal actions"), and thus the criteria of that section do not specifically apply to interim actions to which a categorical exclusion has been applied or for which an environmental assessment and finding of no significant impact have been issued. However, proceeding with these kinds of interim actions when they do not meet the first and third criteria of section 1506.1(c) could present a risk that DOE could be found to be impermissibly segmenting the programmatic action. Therefore, it is recommended that DOE managers consider these criteria and determine that the interim action is independently justified and will not prejudice the ultimate decision on the program before proceeding with the action.



The second criterion indicates that an EIS must be prepared for a proposed interim action that has potential for significant environmental impact.

In applying the third criterion ("non-prejudicial to programmatic decision"), DOE needs to determine whether a proposed interim action would tend to determine subsequent programmatic development or limit programmatic alternatives, as these types of actions could not be taken until a ROD were issued.

- In general, interim actions of relatively limited scope or scale that have only local utility are unlikely to prejudice programmatic development or decisions. A number of related interim actions, however, when considered collectively could unduly influence programmatic decision-making. For example, proceeding with a number of decentralized waste treatment projects could prejudice the choice of programmatic options involving centralized treatment.
- In the case of a site-wide EIS<sup>5</sup>, ongoing site operations are not considered interim actions and may continue. Ongoing site operations are considered under No Action.

See Exhibit 3 for a diagram of steps in the NEPA review process for interim actions for programmatic EISs.

#### **Case Studies of the NEPA Process for Interim Actions to Programmatic EISs**

A proposed interim action satisfies criteria (1) and (3) in Section 1506.1(c) when the action neither is affected by nor affects the program. An example of such an interim action was the proposed disposal of a limited quantity of mixed-waste from DOE and other Federal facilities at the Nevada Test Site (NTS) while mixed-waste disposal approaches were being considered system-wide in DOE's *Final Waste Management Programmatic Environmental Impact Statement for Managing Treatment, Storage, and Disposal of Radioactive and Hazardous Waste* (DOE/EIS-0200, May 1997). The interim action was proposed to provide for short-term waste disposal needs and was judged appropriate because its scope was constrained by limiting the volume of waste to be disposed of and the period over which disposal would occur. No decision based on the Waste Management Programmatic EIS was foreseen to be in conflict with the interim decision for waste disposal at NTS. Likewise, because the interim action would not require a large capital expenditure, the interim action would not limit subsequent development at NTS or alternative sites, nor would it limit the choice of programmatic alternatives considered. Criterion (2) in Section 1506.1(c) was met by a site-wide EIS for NTS (*Final Environmental Impact Statement for the Nevada Test Site and Off-Site Locations*

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<sup>5</sup> DOE considers site-wide NEPA reviews to be programmatic in nature (although site-wide EISs are not necessarily "required programmatic EISs" within the meaning of Section 1506.1(c)).

*in the State of Nevada*, DOE/EIS-0243, August 1996) that adequately analyzed past, present, and reasonably foreseeable future mixed-waste disposal activities at the site.

As another example, in April 1996, a U.S. District Court ruled that DOE could proceed with a new major nuclear defense program facility, the Dual Axis Radiographic Hydrodynamic Test facility, at the Los Alamos National Laboratory as an interim action (based on a ROD for the project-specific EIS, *Final Environmental Impact Statement (EIS), Dual Axis Radiographic Hydrodynamic Test Facility*, DOE/EIS-0228, May 1995) while two programmatic EISs were being prepared (*Final Programmatic Environmental Impact Statement for Stockpile Stewardship and Management*, DOE/EIS-0236, September 1996; *Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory*, DOE/EIS-0238, January 1999). In considering the criteria for valid interim actions, the Court found that DOE had adequately demonstrated that the new facility would be useful notwithstanding the range of alternatives considered in the two programmatic EISs.

#### **Interim Action Determination**

The preceding guidance describes the key considerations necessary to determine whether an action that is within the scope of an ongoing NEPA review may proceed as an interim action. Under DOE's NEPA Order, 451.1B, Section 5.a.(12), Secretarial Officers and Heads of Field Organizations have the responsibility to determine whether an interim action is clearly allowable under DOE's NEPA regulations and should factor these considerations into a project's planning process. When it is not clear whether an interim action can proceed, a Secretarial Officer or Head of Field Organization is to provide the Assistant Secretary for Environment, Safety and Health (EH-1) with a recommendation for a determination, and EH-1 will decide, in consultation with the manager, whether the interim action may be taken. The exception to this is that the Administrator, National Nuclear Security Administration (NNSA), makes all determinations concerning NNSA interim actions, consulting with EH-1, as appropriate (DOE O 451.1B, Sections 3 and 6).

**EXHIBIT 1**

**Council on Environmental Quality Regulations  
Implementing the Procedural Provisions of NEPA  
40 CFR 1506.1**

**1506.1 Limitations on actions during NEPA process.**

(a) Until an agency issues a record of decision as provided in 40 CFR 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If an agency is considering an application from a non-federal entity and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g., long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

**EXHIBIT 2**

**Department of Energy  
National Environmental Policy Act Implementing Provisions  
10 CFR 1021**

**Sec. 1021.104 Definitions.**

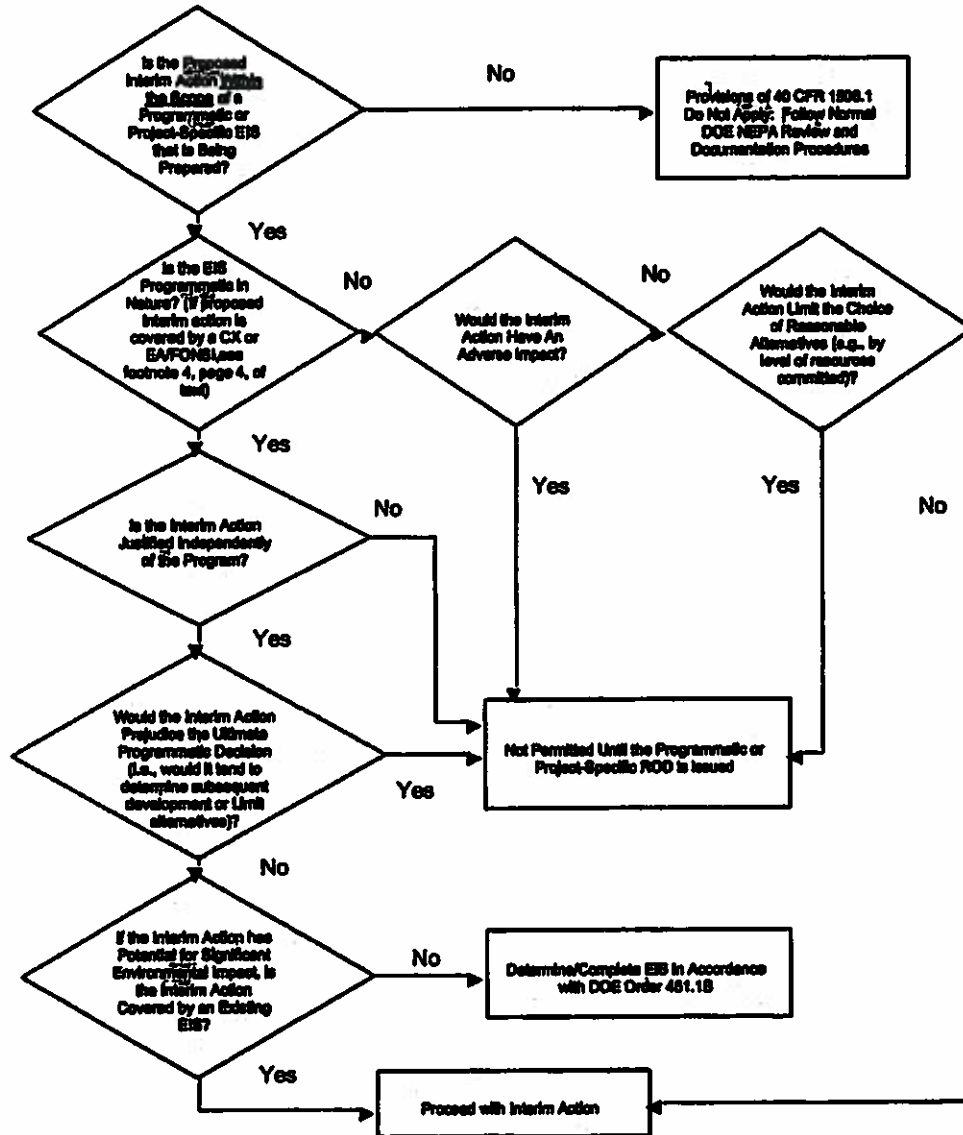
**Interim action means an action concerning a proposal that is the subject of an ongoing EIS and that DOE proposes to take before the ROD is issued, and that is permissible under 40 CFR 1506.1: Limitations on actions during the NEPA process.**

**Sec. 1021.211 Interim actions: Limitations on actions during the NEPA process.**

**While DOE is preparing an EIS that is required under Sec.1021.300(a) of this part, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1. Actions that are covered by, or are a part of, a DOE proposal for which an EIS is being prepared shall not be categorically excluded under subpart D of these regulations unless they qualify as interim actions under 40 CFR 1506.1.**

**Exhibit 3**

**Steps to Follow for Determining Whether Actions May Proceed During the NEPA Process: Interim Actions**



**C**

**Effective:|See Text Amendments|**

Code of Federal Regulations Currentness

Title 10. Energy

Chapter X. Department of Energy (General Provisions)

Part 1021. National Environmental Policy Act Implementing Procedures (Refs & Annos)

Subpart B. DOE Decisionmaking

→ § 1021.210 DOE decisionmaking.

(a) For each DOE proposal, DOE shall coordinate its NEPA review with its decisionmaking. Sections 1021.211 through 1021.214 of this part specify how DOE will coordinate its NEPA review with decision points for certain types of proposals (40 CFR 1505.1(b)).

(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), except as provided in 40 CFR 1506.1 and §§ 1021.211 and 1021.216 of this part.

(c) During the decisionmaking process for each DOE proposal, DOE shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of its consideration of the proposal (40 CFR 1505.1(d)) and shall include such documents, comments, and responses as part of the administrative record (40 CFR 1505.1(c)).

(d) If an EIS or EA is prepared for a DOE proposal, DOE shall consider the alternatives analyzed in that EIS or EA before rendering a decision on that proposal; the decision on the proposal shall be within the range of alternatives analyzed in the EA or EIS (40 CFR 1505.1(e)).

(e) When DOE uses a broad decision (such as one on a policy or program) as a basis for a subsequent narrower decision (such as one on a project or other site-specific proposal), DOE may use tiering (40 CFR

1502.20) and incorporation of material by reference (40 CFR 1502.21) in the NEPA review for the subsequent narrower proposal.

SOURCE: 57 FR 15144, April 24, 1992; 68 FR 51432, Aug. 27, 2003, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7101 et seq.; 42 U.S.C. 4321 et seq.; 50 U.S.C. 2401 et seq.

10 C. F. R. § 1021.210, 10 CFR § 1021.210

Current through August 19, 2011; 76 FR 52145.

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10 C.F.R. § 1021.211

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**C**

**Effective:[See Text Amendments]**

Code of Federal Regulations Currentness

Title 10. Energy

Chapter X. Department of Energy (General Provisions)

▣ Part 1021. National Environmental Policy Act Implementing Procedures (Refs & Annos)

▣ Subpart B. DOE Decisionmaking

→ **§ 1021.211 Interim actions: Limitations on actions during the NEPA process.**

While DOE is preparing an EIS that is required under § 1021.300(a) of this part, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1. Actions that are covered by, or are a part of, a DOE proposal for which an EIS is being prepared shall not be categorically excluded under subpart D of these regulations unless they qualify as interim actions under 40 CFR 1506.1.

SOURCE: 57 FR 15144, April 24, 1992; 68 FR 51432, Aug. 27, 2003, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7101 et seq.; 42 U.S.C. 4321 et seq.; 50 U.S.C. 2401 et seq.

10 C. F. R. § 1021.211, 10 CFR § 1021.211

Current through August 19, 2011; 76 FR 52145.

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**C**

**Effective:|See Text Amendments|**

Code of Federal Regulations Currentness

Title 40. Protection of Environment

▣ Chapter V. Council on Environmental Quality

▣ Part 1502. Environmental Impact Statement  
(Refs & Annos)

→ § 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of pro-

posed agency actions, rather than justifying decisions already made.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1502.2, 40 CFR § 1502.2

Current through August 19, 2011; 76 FR 52145.

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**G**

**C**

**Effective:[See Text Amendments]**

**Code of Federal Regulations Currentness**

**Title 40. Protection of Environment**

**Chapter V. Council on Environmental Quality**

**Part 1502. Environmental Impact Statement**  
**(Refs & Annos)**

**→ § 1502.9 Draft, final, and supplemental statements.**

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

**(c) 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.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1502.9, 40 CFR § 1502.9

Current through April 8, 2011; 76 FR 19874

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**H**

**C**

**Effective:|See Text Amendments|**

Code of Federal Regulations Currentness

Title 40. Protection of Environment

Chapter V. Council on Environmental Quality

Part 1502. Environmental Impact Statement  
(Refs & Annos)

→ § 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it 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 choice among options by the decisionmaker and the public. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1502.14, 40 CFR § 1502.14

Current through August 19, 2011; 76 FR 52145.

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**Effective:[See Text Amendments]**

Code of Federal Regulations Currentness  
Title 40. Protection of Environment  
    Chapter V. Council on Environmental Quality  
    Part 1506. Other Requirements of NEPA  
    (Refs & Annos)  
    → § 1506.1 Limitations on actions during  
    NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alterna-

tives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1506.1, 40 CFR § 1506.1

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