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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. 1:10-CV-0760-JH-ACT

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

Defendants.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT

Thomas M. Hnasko
Hinkle, Hensley, Shanor & Martin, LLP
P.O. Box 2068
Santa Fe, NM 87504
(505) 982-4554

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road #1001A
Santa Fe, NM 87507
(505) 983-1800

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LIST OF ACRONYMS

APA	Administrative Procedures Act
CBR	Congressional Budget Request
CD	Critical Decision
CEQ	Council on Environmental Quality
CMR	Chemistry and Metallurgy Research building
CMRR	Chemistry and Metallurgy Research Replacement project
CMRR EIS	Chemistry and Metallurgy Research Replacement Environmental Impact Statement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
CR	Continuing Resolution
CTSPEIS	Complex Transformation Supplemental Programmatic Environmental Impact Statement
CWC-TRU	Consolidated Waste Capability-Transuranic Waste Facility
DBT	Design Basis Threat
DNFSB	Defense Nuclear Facilities Safety Board
DOD	Department of Defense
DOE	Department of Energy
DOJ	Department of Justice
DP	DOE Defense Programs
EIS	Environmental Impact Statement
FOIA	Freedom of Information Act
LANL	Los Alamos National Laboratory
LANS	Los Alamos National Security,LLC
LASG	Los Alamos Study Group
LASO	Los Alamos Site Office
LEP	Life Extension Program
MDA	Material Disposal Area
MPF	Modern Pit Facility
NEPA	National Environmental Protection Act
NF	Nuclear Facility
NMED	New Mexico Environment Department
NMSSUP	Nuclear Materials Safeguards and Security Upgrades Project
NNSA	National Nuclear Security Administration
NOI	Notice of Intent
PDS	Project Data Sheet
PF-4	Plutonium Facility Building 4
PSHA	Probabilistic Seismic Hazard Assessment
RFI	Request for Interest
RFP	Request for Proposals
RLUOB	Radiological Laboratory Utility Office Building
RLWTF	Radioactive Liquid Waste Treatment Facility
ROD	Record of Decision

RRW	Reliable Replacement Warhead
SA	Supplemental Analysis
SEAB	Secretary of Energy Advisory Board
SEIS	Supplemental Environmental Impact Statement
New START	Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms
SWEIS	Site-Wide Environmental Impact Statement
TA	Technical Area
TRP	TA-55 Reinvestment Project
UPF	Uranium Processing Facility

Preliminary Statement

Plaintiff The Los Alamos Study Group moves the Court for entry of a Preliminary Injunction, prohibiting defendants from expending any funds for the purposes of design or construction of the Chemistry and Metallurgy Research Replacement-Nuclear Facility ("CMRR-NF") and that portion of the Nuclear Materials Safety and Security Upgrades (NMSSUP), a security perimeter project, which is needed solely for CMRR-NF construction, until this case has been tried and judgment has been entered in this Court. Plaintiffs also request that the Court hold an evidentiary hearing on this matter and allow the introduction of the significant documentary evidence supporting this motion for a preliminary injunction.

Introduction

Defendants are currently engaged in one of the most massive and expensive violations of the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* ("NEPA"), that has ever been imposed on the American people. The violations consist of the continuing design and construction of the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF"), by far the largest of a connected group of construction projects along Pajarito Road at Los Alamos National Laboratory ("LANL"). NEPA, put simply, requires federal projects of this type, which have a significant impact on the human environment, to be *preceded* by an environmental impact statement ("EIS") that analyzes the impact of the project and its reasonable alternatives. 42 U.S.C. § 4332. Under NEPA, agency decisionmakers must take a "hard look" (*Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21 (1976)) at the analysis and select an alternative action *before* the agency makes irreversible and irretrievable commitments of resources that render their action a *fait accompli.*[1]

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[1] NEPA also requires an agency issuing an EIS to *continue* to take a "hard look" at a project and to issue new NEPA documents if existing documents are overtaken by new information or changes in the project. *Norton v. Southern*

Defendants have ignored these requirements, which are mandatory and enforceable. Defendants have committed the National Nuclear Security Administration ("NNSA") to contracts that will bind the taxpayers to pay millions for the design and construction of major components of the CMRR-NF. Further contracts are pending. No one seriously claims – not even Defendants - that there is adequate NEPA documentation for the CMRR-NF, and certainly not for the entire Pajarito Corridor project.[2]

Defendants have tried to avoid the consequences of their continuing violations by asserting that they will prepare the required documentation *next year*—while they go forward with the project, pursuing increased "emergency" appropriations and accelerating their rate of spending, as they simultaneously claim to conduct an objective NEPA analysis. Preparing the necessary environmental analyses *after* the agency has made commitments toward its completion violates the fundamental principles of NEPA. However, if Defendants proceed with the project, they will create "equities in favor of completion of a partially-completed project," *Davis v. Mineta,* 302 F.3d 1104, 1116 (10th Cir. 2002), so that they can argue that "the public interest in favor of continuing the project is much stronger," *Valley Community Preservation Commission v. Mineta,* 373 F.3d 1078, 1087 (10th Cir. 2004), making the project almost unstoppable and NEPA, therefore, illusory and unenforceable. The actual public interest, as declared in NEPA, would then be rendered irrelevant. An injunction is necessary to protect the public from the impacts of this massive and inadequately examined project.

Utah Wilderness Alliance, 542 U.S. 55, 72-73 (2004); *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371, 374, 385 (1989). The DOE regulations themselves contemplate a new EIS, with new scoping, where the project has changed dramatically, as has occurred in the present case (10 C.F.R. § 1021.314).

[2] Roger Snyder, Deputy Manager of the NNSA Los Alamos Site Office, concedes in an October 9, 2010 interview with the *New Mexican* that defendants have not complied with NEPA, charitably characterizing defendants' actions to date as only "partially covered" by the 2003 EIS.

The Present Situation

The defendants issued an EIS in 2003 and followed it with a Record of Decision ("ROD") in 2004. (http://nepa.energy.gov/finalEIS-0350.htm; 69 Fed. Reg.6967; Feb. 12, 2004; http://edocket.access.gpo.gov/2004/pdf/o4-3096.pdf). The EIS concerns structures to be built no deeper than 50 to 75 feet below grade. There was no discussion of deeper excavation and no reference to a layer of volcanic ash known to underlie the site that would greatly complicate plans to construct at a greater depth, or meet seismic safety criteria. The ROD stated that "[b]ased on the CMRR EIS, the environmental impacts of the preferred alternative" (built 50 feet or less deep) would be "minimal" and "small." (69 Fed. Reg. at 6969). The ROD described the impacts of the preferred alternative:

> Construction activities would result in temporary increases in air quality impacts, but resulting criteria pollutant concentrations would be below ambient air quality standards. Construction activities would not impact water, visual resources, geology and soils, or cultural and paleontological resources. Minor indirect effects on potential Mexican spotted owl habitat could result from the removal of a small amount of habitat area, increased site activities, and night-time lighting near the remaining Mexican spotted owl habitat areas. The socioeconomic impacts associated with construction would not cause any major changes to employment, housing, or public finance in the region of influence.

(*Id.*)

With this description of minimal impacts, NNSA selected its preferred alternative, the then-contemplated "above ground" CMRR-NF.

Since 2004, the project has fundamentally changed.[3] In 2002, the budget for both the administrative building and the nuclear facility was estimated at $350-500 million. (FY 2003 NNSA Congressional Budget Request ("CBR"), Project, 03-D-103). In 2003, defendants told

[3] NNSA did issue a Supplement Analysis in January 2005 to consider a change in the location of CMRR "Phase A" (*i.e.*, RLUOB) structures. (DOE/EIS-0350-SA-01) NNSA claimed that the impacts of the proposed changes were adequately bounded by the impacts analyzed in the CMRR EIS. From 2005 until 2010, however, the project underwent major changes, but no further supplemental analyses were issued.

Congress that the total cost, including administrative costs, would be $600 million. (FY 2004 NNSA CBR at 347). The EIS stated construction would be completed in 2009. (at S-28). In 2003, NNSA stated that the Nuclear Facility would have 60,000 square feet of Hazard Category 2 space within 200,000 square feet of gross area. (EIS at 2-20; FY 2004 NNSA CBR at 349).

The project at present is depicted in defendants' 2010 presentations, showing construction along the "Pajarito Corridor." The principal connected activities include the CMRR-NF, the Nuclear Materials Safeguards and Security Upgrade ("NMSSUP") Phase II, the TA-55 Revitalization Project ("TRP") Phase II and III, the Radioactive Liquid Waste Treatment Facility ("RLWTF"), the Transuranic (TRU) Waste Facility, and other projects, including the relocation of Pajarito Road itself. (McKinney presentation, June 16, 2010; Bretzke presentation, June 16, 2010). These actions encompass Technical Areas ("TAs") 46, 48, 50, 52, 55, 63, 64, and 66, plus possibly others. (Mello Aff. Ex. 4). LANL's "Timeline of Major Projects on Pajarito Corridor through 2020" shows construction of the CMRR-NF lasting through 2020. The construction period has increased from 34 months to 144 months. A two year prove-in period and a four-year transition period are then planned. The schedule implies that the existing CMR must be used until at least 2022, probably longer, raising questions as to impacts of such use and the improvements required for safety, including structural safety.

The CMRR-NF has changed from a structure to be built to a depth of 50 feet to a structure requiring an excavation to 125 feet, with the bottom 50-60 feet of the hole filled with concrete. (Cook Aff. ¶ 13)(DNFSB CMRR Facility Project Certification Review, Report, Sept. 4, 2009, at 2-4, 2-6). As a result, the total volume of excavation for the CMRR-NF increased from about 167,000 cubic yards in 2003, to 579,000 to 704,000 cubic yards in 2010, a three- to

four-fold increase in construction equipment usage, spoil haulage, and disposal needs. The volume now remaining to be excavated has increased six-fold.

Changes in the basic concept for the CMRR-NF have included the introduction of the "hotel concept" that would accommodate various unknown future uses, but requires large open floor areas and therefore requires large increases in concrete and steel. (DNFSB Staff Issue Report, April 16, 2008). The concrete now needed is 371,000 cubic yards, up from 3,194 cubic yards (SA at 7); the steel needed is 18,539 tons, up from 242 tons. (SA at 30, CMRR EIS at 2-21). The increases in materials by two orders of magnitude mean construction will require far more mining of concrete components and a massive trucking effort over many years.

In late 2009, defendants stated that the area of the CMRR-NF would be 270,000 square feet, with 38,500 square feet of Hazard Category 2 space (CMRR Project Update, March 20, 2009, Fong slide 21; Mello #1 Aff. 23). Thus, Hazard Category 2 space would decrease by 36% from the building analyzed in the 2003 EIS, and total area would increase 44%. Since then the gross area has increased to 381,130 sq. ft. (SA Table 1, at 6), roughly doubling the size analyzed in the 2003 EIS. (CMRR EIS at 2-19)

The CMRR-NF construction project now includes two concrete batch plants, a warehouse, a craft worker facility, an electrical substation, and an additional truck inspection site (McKinney presentation, Sept. 8, 2010, at 5; Bretzke presentation, June 16, 2010, at 7). The area required for the project itself, plus construction yards and office space, parking lots, concrete plants, utilities, security, spoil disposal, storm water retention, housing, and road realignment has more than quadrupled since the 2003 EIS estimated that only 22.75 acres, in addition to the 4

acres already taken for the first CMRR building, would be disturbed[4] (Bretzke presentation, June 16, 2010, at 8; CMRR Nuclear Facility Project Overview, Oct. 2010; Exh. A, Mello #2 Aff. at 12a). Presently, Pajarito Road is expected to be closed for two years, affecting traffic flow to and around Los Alamos, a requirement not mentioned in the 2003 EIS.

NNSA now plans for 1000 construction workers to be involved in the CMRR-NF project (SA at 25), an increase from 300 estimated in the 2003 EIS (at 2-21). Such an increase will may require temporary worker housing and affect infrastructure usage and economic activities.

Cost estimates for the CMRR-NF illustrate the scope of the dramatic changes. In February 2010, defendants estimated the cost at $3.4 billion (FY 2011 CBR, 227), about ten times the original estimate. Press accounts now say that the cost may exceed $5 billion. (*Nuclear Weapons and Materials Monitor* ("NWMM"), Oct. 25, 2010, at 2) Thus, today's CMRR-NF project bears little resemblance to the preferred alternative of the 2003 EIS and 2004 ROD. There has been no environmental analysis of the CMRR-NF that defendants are now building. There is no indication that, after the minor Supplement Analysis of early 2005, defendants gave any consideration to further NEPA analysis, as the project assumed its present greatly-expanded form.[5]

Defendants' Current Plans

The Obama Administration is publicly committed to construction of the CMRR-NF. Vice President Biden sent a letter to the Chairman and Ranking Member of the Senate Foreign Relations Committee, declaring the Administration's "unequivocal" support for the CMRR-NF

[4] The SA states that the laydown area in TA-63/46 will occupy an estimated 40 acres, and the laydown area in TA-48/55 will occupy an estimated 15 acres. Further, the cement plant in TA-63 will occupy about 15 acres, and the cement plant in TA-48/55 will occupy about five acres. (Pages 12, 13).

[5] When litigation impended, defendants apparently became motivated to draft a Supplement Analysis (SA), which they produced to plaintiff's counsel. The draft unctuously asserts that all of the impacts of the new greatly expanded project are "bounded" by the impacts disclosed in the 2003 EIS. This draft SA has never been signed. Defendants do not rely upon it.

project, shortly before a Foreign Relations Committee vote on ratification of the "New START" arms treaty (Vice President's Letter, Sept. 15, 2010). The Vice President promised that the Administration would seek additional funding to cover increased costs in future years. He stated that the President is committed to the "immediate start" of nuclear weapons modernization actions, including construction of the CMRR-NF. (*Id.*) DOE "weapons activities" are specifically included in the Continuing Resolution, which finances government operations at previous year levels, but appropriates an increase for weapons activities and the CMRR-NF. (HR. 3081, Sept. 29, 2010). The rate of spending, if continued through FY 2011, would increase the annual spending on nuclear weapons at LANL by $338 million. Despite the CMRR-NF's massive cost increases, the Administration persists in its unwavering support.

NNSA Headquarters has issued its program directive: "Plan for CMRR-NF completion by 2020 with operations in 2022." (Holmes presentation, June 10, 2010, at 4) NNSA has telescoped planning processes to accelerate construction of the CMRR-NF. Thus, it has combined two project management stages under DOE Order 413.3A of "approve performance baseline" and "approve start of construction" so that construction may proceed as soon as the baseline is established. In addition, NNSA has divided the CMRR-NF project into five separate "packages" so that construction on some parts may go forward, even if the baseline has not been established for other parts. (Bretzke presentation, June 16, 2010, at 7). As a result, it has been decided that the footprint of the CMRR-NF shall be 342 feet by 304 feet (Cook Aff. ¶ 13) and that all future design and construction must necessarily conform, without NEPA analyses. Contracts for interior fixtures have been let. (Snodgrass interview cited in Exh. A, Mello Aff. #2, Exh. 3).

A NNSA Performance Evaluation Plan ("PEP") governs the compensation of the LANL Management and Operating contractor, Los Alamos National Security, LLC ("LANS"). The FY 2010 PEP calls upon LANS to develop integrated planning to support Pajarito Corridor construction. (PEP at 121). LANS is to:

> Institute [] a process to manage the institutional interfaces and resolve issues for TA-50-55 related projects (CMRR, TA-55 Reinvestment, RLWTF, New TRU, and NMSSUP2) that enhance overall site project performance and minimize operational impacts for the next decade.

LANS is being rewarded for producing planning tools for these construction elements:

1. laydown, staging and warehousing;
2. concrete batch plant strategy;
3. parking and workforce transportation;
4. security strategy;
5. scope or schedule conflicts;
6. master integrated schedule;
7. multi-year staffing plan; and
8. FY 2011 and FY 2012 budgets.

If LANS meets each measure, it will receive an additional $300,000. That is, LANS will be compensated for enabling construction of the CMRR-NF and other Pajarito Corridor projects to proceed unchanged. NNSA and LANS have, in substance, unlawfully predetermined the impacts of the CMRR-NF project and agreed to disregard any future EIS or supplemental EIS (SEIS). *Davis v. Mineta,* 302 F.3d 1104, 1112-13 (10th Cir. 2002).

Defendants state that the CMRR-NF design is approaching "50 percent" completion. The cost to date has been $210 million; funds appropriated and obligated are more than that. A staff of 283 is working now. If they continue to work until June 2011, the design will be advanced by

about another 15 percent. (Cook Aff. ¶¶ 19, 20, 25) Further, 125 craft workers are scheduled to work on the CMRR-NF site in FY 2011, and 308 at all Pajarito Corridor projects. (Bretzke presentation, June 16, 2010, at 4).

NNSA has already excavated 90,000 cubic yards of earth and rock at the CMRR-NF site. (H.R. Report No. 110-185, June 11, 2007, at 105). Thirty-five separate construction contract packages are planned for award. (McKinney presentation, June 16, 2010, at 8). Approval of the first baseline and the beginning of construction of the Infrastructure Package is scheduled for March 2011. This package includes one concrete batch plant, temporary utilities, site preparation laydown, site utility relocation, site excavation, soil stabilization, warehouse design/build, and substation design/build. (Bretzke presentation, June 16, 2010, at 7).

Argument

Plaintiff has met the following standards for the issuance of a preliminary injunction in this NEPA case: (1) a substantial likelihood of success on the merits; (2) likelihood of irreparable harm to the movant if the injunction is denied; (3) threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) an injunction will not adversely affect the public interest. *Winter v. Natural Resources Defense Council,* 129 S.Ct. 365, 374, 375 (2008); *Wilderness Workshop v. BLM,* 531 F.3d 1220, 1224 (10th Cir. 2008); *Greater Yellowstone Coalition v. Flowers,* 321 F.3d 1250, 1255 (10th Cir. 2003); *Davis v. Mineta,* 302 F.3d 1104, 1111 (10th Cir. 2002). Moreover, if the last three factors "tip strongly" in a plaintiff's favor, it may establish likelihood of success "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone,* 321 F.3d at

1256, *quoted in Valley Community Preservation Commission v. Mineta,* 373 F.3d 1078, 1083-84 (10th Cir. 2004). Plaintiff here meets all of these requirements.

I. Plaintiff is Likely to Prevail on the Merits.

The complaint states the following five claims: (a) failure to prepare an applicable EIS and to implement the alternative chosen in the ROD; (b) failure to prepare an EIS addressing connected actions and cumulative environmental impacts; (c) failure to provide required mitigation measures and mitigation action plan; (d) failure to integrate NEPA analyses with decision-making processes for the CMRR-NF; and (e) failure to provide opportunities for public, tribal, and other government review and comment on the new CMRR-NF. The uncontradicted facts support all of plaintiff's claims.

A. Claim 1: Defendants Have No Applicable EIS Nor Are Defendants Following Any ROD.

The law is unambiguous that defendants are prohibited from continuing to commit resources and implement a major federal action without first preparing an EIS analyzing available alternatives and issuing a ROD that selects the preferred alternative. "The environmental impact statement often has been compared to the financial disclosure statement required by federal statute for corporate securities." Mandelker, D.R., NEPA Law and Litigation at 2-14 (West 2010). Before allowing a federal action to proceed, the court must "ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard." *Silva v. Lynn,* 482 F.2d 1282 (1st Cir. 1973). An injunction is appropriate where NEPA disclosure has not been made and the equitable requirements, including irreparable injury and inadequacy of damages, are met. *Monsanto Co. v. Geertson Seed Farms,* 130 S.Ct. 2743, 2756 (2010); see cases collected at Mandelker, at 4-224 through 4-229.

Defendants steadfastly ignore NEPA's mandate to analyze available alternatives and instead are proceeding unabated with the CMRR-NF, while promising to create more paperwork, after-the-fact, by conducting a SEIS to rubber-stamp retroactively the very project they are implementing today. Defendants' actions are plainly far out of compliance with NEPA. The 2003 EIS addressed a project that is far smaller, far less expensive, consumes far less materials, and causes far fewer and smaller impacts for a far shorter time than the 2010 CMRR-NF and connected actions in the Pajarito Corridor. None of the alternatives analyzed then is reasonable or even feasible. Defendants have rejected all of them. The 2003 EIS is now irrelevant. Defendants' current project is much changed since 2003, driven by new needs and priorities, and simply is not discussed in the 2003-04 documents, nor are any alternatives of similar scope. "The entire efficacy of the EIS process is called into question when changes are made to a project after the publication of a final impact statement." Andreen, The Pursuit of NEPA's Promise, 64 Ind. L.J. 205, 247-48 (1989), *quoted in Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371 n. 14 (1989). .

Moreover, defendants are plainly committed to the project of 2010, and they do not intend to consider any alternatives to this $5 billion-plus project, even in this era of concern over the size of the federal deficit. The Administration stands behind the immediate construction of weapons modernization facilities—specifically, the CMRR-NF. Hundreds are at work on the CMRR-NF design. Defendants are poised to let additional contracts for design and construction, unless they are enjoined. Unprecedented funding was sought and received under the Continuing Resolution. Clearly, the choice to build the CMRR-NF has been predetermined. "Predetermination" is the violation of NEPA that occurs when an agency commits to a project before NEPA analysis of alternatives is conducted. *See: Forest Guardians v. U.S. Fish &*

Wildlife Service, 611 F.3d 692, 712 (10th Cir. 2010); *Silverton Snowmobile Club v. U.S. Forest Service,* 433 F.3d 772, 780-81 (10th Cir. 2006); *Lee v. U.S. Air Force,* 354 F.3d 1229, 1240 (10th Cir. 2004); *Davis v. Mineta,* 302 F.3d 1104, 1112 (10th Cir. 2002); *See Metcalf v. Daley,* 214 F.3d 1135, 1143 (9th Cir. 2000); *International Snowmobile Manufacturers' Association v. Norton,* 340 F.Supp.2d 1249, 1260 (D. Wyo. 2004).

As set forth in plaintiff's complaint, defendants have been and are continuing to violate numerous, central aspects of NEPA and its implementing regulations:

1. Defendants must prepare an applicable, accurate EIS before decisions are made or actions taken: 40 C.F.R. § 1500.1(b); no such EIS exists;

2. NEPA analysis and decisionmaking must be integrated into the agency's early planning. 40 C.F.R. §§ 1501.1(a), 1501.2, 1502.5; defendants abandoned the project they analyzed and began a quite different one;

3. An EIS must work as an action-forcing device that is used to plan actions and make decisions (40 C.F.R. § 1502.1); decisions are proceeding independently from any EIS;

4. An EIS must be prepared in time so that it is included in any recommendation or report on a proposal. 40 C.F.R. § 1508.23. DOE shall include sufficient time for proper NEPA review. 10 C.F.R. § 1021.200. DOE shall complete NEPA review before making a decision. 10 C.F.R. § 1021.210(b), (c). None of this was or is being done;

5. The proposal that is the subject of an EIS must be properly defined. 40 C.F.R. § 1502.4(a). Here, the proposal of 2003 involved different requirements from those of the 2010 project, *e.g.,* "hotel concept"; seismic resistance; and safety class systems;

6. An EIS must include all reasonable alternatives. 40 C.F.R. § 1502.14(a). This has not been done; the vastly-increased cost of the 2010 CMRR-NF makes many alternatives, and additional means of construction, reasonable;

7. The alternatives considered by the decisionmaker must be encompassed by the alternatives discussed in the relevant environmental documents. 40 C.F.R. § 1505.1(e); 10 C.F.R. § 1021.210(d). Here, the decisionmakers of 2009-10 have chosen an alternative not discussed in any EIS;

8. A ROD is required to identify all alternatives considered and state which is environmentally preferable. 40 C.F.R. § 1505.2(b). Here, the ROD of 2004 does not even address the project defendants are implementing in 2009-10;

9. Environmental consequences must be set forth. 40 C.F.R. § 1502.16. Here, the impacts of the massive construction project of 2010 have not been evaluated, and mitigation methods have not been explored;

10. No cost-benefit analysis of the 2010 CMRR project is incorporated or referred to in any EIS, as required by 40 C.F.R. § 1502.23. Any such analysis must consider all reasonable alternatives. Industry reports state that several cost-benefit analyses have been and are now being undertaken by, *e.g.,* DOE's Office of Cost Analysis, the Pentagon's Cost Analysis and Performance Evaluation group, and NNSA and DOE leadership (*NWMM*, Oct. 25, 2010, at 2);

11. The ROD must choose an alternative that is among those discussed in the EIS (40 C.F.R. § 1505.1(e)), but DOE has chosen and is pursuing an alternative that was not discussed in the EIS, nor chosen, nor even mentioned, in the ROD;

12. Defendants are prohibited, without a valid EIS, from committing resources which would prejudice selection of alternatives, or from taking actions that have an adverse

environmental impact or which would limit the available alternatives. 40 C.F.R. §§ 1502.2(f); 1506.1(a), (c). Here, defendants have spent hundreds of millions of dollars on design, have put hundreds of staff to work, have partially excavated the site, and are about to let construction contracts—without a valid EIS for this predetermined major federal action;

13. DOE "shall take no action concerning the proposal that is the subject of the EIS before issuing a ROD, except as provided at 40 C.F.R. § 1506.1." 10 C.F.R. § 1021.211. Clearly, DOE has acted outside the scope of permission under 40 C.F.R. § 1506.1, which allows only action that will not prejudice the ultimate decision on the program;

14. An EIS is used to assess impacts of proposed action alternatives, not to justify decisions already made. 40 C.F.R. §§ 1502.2(g), 1502.5. DOE, however, wishes to issue additional NEPA documents for the sole purpose of justifying its existing plans.

Based on the foregoing violations and defendants' own concession that the CMRR-NF is not authorized by any existing ROD, the conclusion is clear that defendants have violated NEPA and are continuing to violate NEPA by proceeding with the current CMRR-NF without an applicable EIS that has analyzed all available alternatives, and without a ROD authorizing the current CMRR-NF. Accordingly, plaintiff has demonstrated violation of NEPA's central requirement.

B. Claim 2: Defendants Have No EIS Addressing Cumulative Impacts.

NEPA regulations require agencies to include in an EIS "connected actions." Connected actions are those which:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). "The crux of the test is whether each of the two projects would have taken place with or without the other and thus had independent utility." *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 969 (9th Cir. 2006), *quoted in Wilderness Workshop,* 531 F.3d at 1229.

In addition to having no applicable EIS for the CMRR-NF itself, many, and probably most, of the projects encompassed by the Pajarito Corridor project are interrelated and connected so that they constitute a "single course of action" and should be evaluated in a single EIS. For example, the Nuclear Materials Safety and Security Upgrades ("NMSSUP") Phase II barrier has the sole purpose of securing PF-4 and CMRR-NF. The Radioactive Liquid Waste Treatment Plant ("RLWTF") will provide waste treatment for these nuclear facilities. The TRU Waste Facility will receive waste from these and other nuclear facilities. The TA-55 Revitalization Project ("TRP II and III") addresses the PF-4 plant, which is part of the plutonium complex, of which the CMRR-NF would be a key element. Relocation of Pajarito Road would serve the same nuclear facilities. These projects, including the CMRR-NF, are coordinated with one another in their construction and operation.

Defendants' FY 2011 Biennial Plan and Budget Assessment on the Modernization and Refurbishment of the Nuclear Security Complex, May 2010 ("1251 Report") describes the PF-4 plant, the CMR and its successor CMRR, the RLWTF, and solid radioactive waste management collectively as an "overall system" that comprises several interdependent facilities. (1251 Report

at 23-24) It describes the PF-4 plant, the CMRR-RLUOB, the CMRR-NF, the RLWTF, and the TRU Waste Facility as an interrelated system of plutonium programs: "the larger system of nuclear facilities used to assess, surveil, manufacture, and/or refurbish plutonium components used in nuclear weapons." (at 28) Clearly, major work on any one of the elements of this system is one part of a set of connected actions under NEPA; defendants are treating these actions as interrelated, and a CMRR-NF EIS must therefore encompass all of these projects. We single out in particular that portion of the NMSSUP – moving hundreds of feet of security perimeter to a temporary new location, costing many millions of dollars, which has no other purpose than facilitating CMRR-NF construction.

C. Claim 3: Defendants Have Failed to Provide Mitigation Measures as Required by NEPA.

No mitigation measures are mentioned in the 2004 ROD, because the ROD says that there is nothing to mitigate. (69 Fed. Reg. 6967, 6972 (Feb. 12, 2004)). Plans have dramatically changed since 2004, and now the project, properly analyzed, includes a massive construction effort, with two cement plants, fed by legions of heavy trucks, ranks of excavation equipment, a work force three times the original size, ancillary buildings, road relocation, and construction of the CMRR-NF, the NMSSUP, the RLWTF, the CWC-TRU, and the TRP. The project will now extend until 2020. In this situation, a duty to examine and specify mitigation measures arises. (40 C.F.R. §§ 1502.14(f), 1502.16(e)-(h)). The agency must specify in the ROD what mitigation measures it is committed to adopt. (40 C.F.R. § 1505.2(c)). *See Robertson v Methow Valley Citizens Council,* 490 U.S. 332, 350-52 (1989); *Davis,* 302 F.3d at 1125; *Holy Cross Wilderness Fund v. Madigan,* 960 F.2d 1515, 1523 (10th Cir. 1992). DOE's regulations also require a mitigation action plan. (10 C.F.R. § 1021.331). Additionally, contrary to defendants' statements, DOE regulations also contemplate a new EIS in the face of these dramatic changes,

together with the comprehensive mitigation measures that must be set forth in a new ROD. 10 C.F.R. § 1021.314(c)(2). Defendants are out of compliance with these requirements.

D. Claim 4: Defendants Have Failed to Integrate Appropriate NEPA Analyses into Their Decision-Making Process.

Under NEPA, timing is critical: "Before an agency may take 'major Federal actions significantly affecting the quality of the human environment,' an agency must prepare an environmental impact statement . . . " *Silverton Snowmobile Club v. U.S. Forest Service,* 433 F.3d 772, 780 (10th Cir. 2006). The purpose of the EIS is "(1) to inject environmental considerations into the federal agency's decision-making process and (2) to inform the public that the agency has considered environmental concerns in its decision-making process." *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service,* 75 F.3d 1429, 1434 (10th Cir. 1996). Here, the record demonstrates, to the contrary, that defendants have failed to use NEPA processes to evaluate "proposed agency actions, rather than justifying decisions already made." (40 C.F.R. § 1502.2(g)).

Federal agencies must also integrate NEPA requirements with other agency planning procedures so that the processes run concurrently. (40 C.F.R. § 1500.2). But the 2004 ROD does not reflect the defendants' decision, because defendants' decision-making process continued long after 2004, resulted in fundamental changes in the CMRR-NF project, and ultimately abandoned the 2004 ROD altogether. Plainly, defendants have not carried forward any NEPA analyses concurrently with their evolving decision-making. Defendants' actual decision is to construct a CMRR-NF that lies far beyond the range of alternatives considered in the 2003 EIS, contrary to 40 C.F.R. § 1502.2(e).

E. Claim 5: Defendants Have Failed to Provide Required Opportunities for Public, Tribal, and Governmental Notice, Review and Comment.

It is uncontradicted that, after the ROD of 2004 and the first SA of 2005 and before this litigation, defendants have given no public notice of any NEPA activities in connection with the CMRR-NF. One purpose of an EIS is to provide "full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." (40 C.F.R. § 1502.1) There are provisions for public involvement in scoping (40 C.F.R. § 1501.7), preparation of the EIS (40 C.F.R. § 1503.1), and response to comments (40 C.F.R. § 1503.4). Here, plaintiff and its members have had no involvement, through the required NEPA processes, in defendants' post-2005 decisions to enlarge the CMRR-NF, to coordinate the CMRR-NF with the connected projects in the Pajarito Corridor, and to pursue a massive construction project that will continue through 2020. Failure to follow NEPA disclosure requirements directly injures plaintiff in its core functions of research and communication.

The Tenth Circuit recognized a similar NEPA violation, where a project had been modified but no NEPA disclosure was made, in *New Mexico ex rel. Richardson v. Bureau of Land Management,* 565 F.3d 683, 707 (2009):

> If a change to an agency's planned action affects environmental concerns in a different manner than previous analyses, the change is surely "relevant" to those same concerns. 40 C.F.R. § 1502.9(c)(1)(i). We would not say that analyzing the likely impacts of building a dirt road along the edge of an ecosystem excuses an agency from analyzing the impacts of building a four-lane highway straight down the middle, simply because the type of impact—habitat disturbance—is the same under either scenario. . . . NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur. Such a state of affairs would be anathema to NEPA's "twin aims" of informed agency decisionmaking and public access to information. *See Marsh,* 490 U.S. at 371; *Balt. Gas & Elec. Co.,* 462 U.S. at 97; *Citizens Comm.,* 513 F.3d at 1177-78.

The court continued: "While we agree that BLM's communication with the public, as far as it went, furthered NEPA's goals, it was no substitute for the substantive analysis required by section 1502.9(c)(1)(i). A public comment period is beneficial only to the extent the public has meaningful information on which to comment, and the public did not have meaningful information . . . ." (*id.* 708). Likewise, NEPA does not allow defendants to hide the impacts of its massive project from the public; the public was denied meaningful information, and the violation is clear. *See also Davis,* 302 F.3d at 1115 n. 5.

II. Plaintiff Will be Irreparably Injured if an Injunction is Not Granted.

It is readily apparent that defendants' continued activity on the CMRR-NF project will further entrench defendants' commitment towards its construction. Defendants are clearly making "irreversible and irretrievable commitments of resources." 42 U.S.C. § 4332(2)(C)(v). Defendants have already completed something less than 50% of the design effort; by mid-2011 they would complete another 15%. Additional final design contracts were scheduled for award in October 2010. Further detailed design and construction contracts will be awarded. At present 283 people are working on design efforts (Cook Aff. ¶ 19), and 125 craft workers are carrying out construction. (Bretzke presentation, June 16, 2010, at 4). NNSA has already excavated 90,000 cubic yards at the CMRR-NF site and stated it will issue RFPs for another $60 million in construction activities in October and November 2010. Thirty-five separate construction contract packages are planned for award. (McKinney presentation, June 16, 2010, at 8).

Plaintiff has submitted three affidavits by individuals, identifying how each of them will suffer harm if the CMRR-NF project continues on its present path. J. Gilbert Sanchez has filed an affidavit, stating that he resides at the Pueblo of San Ildefonso and is a former Governor of the Pueblo. *See* Exh. B. He fully supports the effort to require NEPA analysis of the CMRR-NF

and connected projects on the Pajarito Corridor. He states that the project, as now envisioned, will threaten sacred spaces and sites of his Pueblo. As a nearby resident, he regularly uses roads in the area and would suffer from the construction activity with its noise, dust, fumes, traffic, nighttime lighting, and offensive spoils and debris. He specifically points out that thousands of haulage trucks will bring material on roads near his home for about a decade, huge spoil piles would accumulate, construction lights will intrude upon the nights of New Mexico, and numerous facilities will generate airborne dust for a decade. Moreover, he frequents wild areas near Pajarito Canyon to collect game, wood and plants, and the construction and operation of the CMRR will inhibit wildlife from entering such sacred areas. In addition, both normal operation and possible accidents will cause releases of radioactivity, which will reach his home, which is less than 10 miles downwind of the CMRR-NF site.

Jody Benson, a Los Alamos school board member, makes an affidavit, pointing out impacts upon the Los Alamos community and upon herself personally from the planned construction, namely: traffic impacts, housing impacts, social impacts on local schools, impacts on local construction, loss of cycling opportunities, and the direct construction impacts of dust, noise, fumes, bright lights at night, and loss of wetlands and animal life. *See* Exh. C.

The Governor of the Pueblo of Jemez/Walatowa wrote to the defendants, pointing out their regulatory duty to present a draft EIS to affected Indian tribes, 40 C.F.R. §§ 1501.7, 1502.19, 1503.1, which was not done here—because no EIS covers the project now under way. He states his concern for water supplies for Jemez Pueblo, which originate in the Valles Caldera. He states that plutonium and uranium concentrations have been measured in the Valles Caldera at several times their regional mean concentrations, and he is concerned about the risk that

operations at the CMRR-NF will cause releases of such radionuclides. He requests that expenditures halt and a new EIS be prepared. (Exh. A, Mello #2 Aff. ¶19).

The Pajarito Group of the Sierra Club submitted comments to DOE detailing the fundamental transmutation of the CMRR-NF project and its departure from the 2003 EIS. They emphasize that DOE failed to provide notice to national organizations reasonably expected to be interested in the matter, as required by 40 C.F.R. § 1506.6. Moreover, the Pajarito Group's comments underscore the need, consistent with DOE's own regulations, to perform a new EIS to consider the "profound changes in the original project" and that DOE should alleviate the prejudice to affected parties by immediately ceasing all action that further entrenches DOE and NNSA's commitment to this project. *See* 40 C.F.R. §1506.1. (Exh. A, Mello #2 Aff., ¶ 20, Exh. 2).

As set forth in the affidavits and record evidence, the injuries here are highly foreseeable, including the effects of a massive construction project; such impacts establish irreparable harm. *Davis,* 302 F.3d at 1115. However, other effects consist of environmental risks, including the future loss of wildlife from nearby canyons or the release of radioactivity. Under NEPA, the "irreparable harm requirement is met if a plaintiff demonstrates a *significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone,* 321 F.3d at 1258.

Moreover, the Tenth Circuit has made clear that, "[i]f construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis of alternatives required by NEPA would be skewed toward completion of the entire project." *Davis v. Mineta,* 302 F.3d 1104, 1115 (10th Cir. 2002). There, the court stated that "harm to the environment may be presumed when an

agency fails to comply with the required NEPA procedure" (*id.*). The court found that plaintiffs had shown that "the environmental harm results in irreparable injury to their specific environmental interests" (*id.*), where plaintiffs' property was impacted by the project, and the court reversed and remanded for entry of a preliminary injunction. (*id.* 1126). Here, knowledgeable Los Alamos area residents and members of the plaintiff organization have made affidavits that they live or work nearby and the project will cause environmental damage that directly and personally affects them. Injunctive relief is therefore appropriate.

III. Defendants Will Not be Harmed by a Preliminary Injunction.

Based on defendants' statements to the Court that they supposedly are not "irretrievably committed" to the CMRR-NF, one would expect defendants to consent to the entry of a preliminary injunction so that they can conduct appropriate NEPA analyses and fully vet the available alternatives. We expect that defendants will refuse to do so, notwithstanding their attempt, under the threat of this litigation, to block further scrutiny by preparing a superficial SEIS to justify decisions already made. But even that hollow and insufficient gesture will cause a delay in construction of the CMRR-NF project by at least nine months, and there is no suggestion whatsoever that preparing a new EIS for this new project would delay it further. Moreover, if the current version of the CMRR-NF is the best choice – as defendants maintain - there is no plausible explanation why defendants should not immediately cease all CMRR-NF activities, consent to an injunction, and examine currently available alternatives with a fresh EIS.

Moreover, defendants have not complained of the prospect of economic loss, should the CMRR-NF project be postponed while they meet NEPA requirements. In any event, defendants have known since plaintiff cautioned them about NEPA violations in a letter dated July 1, 2010 that any contractual commitments would be made at their own risk, so that any costs thereof

would be a conscious "self-inflicted" injury, entitled to no equitable consideration. *Davis,* 302 F.3d at 1116. Indeed, defendants acknowledge the need for more NEPA analysis (D.Br. on Mot.. to Dismiss at 16, 17, Oct. 4, 2010), indicating that they are already prepared to accept some delay of the CMRR-NF project pending this Court's determination whether NEPA compliance can be achieved absent a new EIS with new scoping and consideration of currently available alternatives.

IV. The Public Interest Supports an Injunction.

It is established that "the public interest favors compliance with NEPA," *Davis,* 302 F.3d at 1116. An injunction here is consistent with the public interest and is clearly required to forestall a massive NEPA violation. *See Winter v. NRDC,* 129 S.Ct. at 377-81.

Defendants insist that construction of the CMRR-NF has not begun and will not begin until a SEIS is completed. (D.Br. on Mot. to Dismiss at 16, 17, Oct. 4, 2010; Cook Aff. ¶¶ 21, 23, 25) It is clear, however, that construction has already begun, albeit to an early and limited extent. Thus, the Court is not "confronted with equities in favor of completion of a partially-completed project." *Davis,* 302 F.3d at 1116, *quoted in Valley Community Preservation Council v. Mineta,* 373 F.3d 1078, 1087 (10th Cir. 2004).

Neither can it be argued that the national defense requires the CMRR-NF to be constructed on defendants' schedule. In the first place, defendants maintain that they have not made up their mind whether to construct the CMRR-NF. (D.Br. on Mot. to Dismiss at 2, 13, 16, 18, 19, Oct. 4, 2010; Cook Aff. ¶¶ 18, 20, 23) Thus, they cannot assert that national security requires it to be built, or to be completed by a given date.

Moreover, the CMRR-NF has a support function, namely: analytical chemistry and materials characterization in support of operations at the Plutonium Processing Facility ("PF-

4")(1251 Report at 25-26.). The PF-4 plant carries out the manufacturing or refurbishment of plutonium components of nuclear weapons. (1251 Report at 26). NNSA's phased approach will provide continuous support to plutonium programs through 2020:

> The overall strategy associated with CMRR is to provide a pathway for continuous support to plutonium programs between now and 2020. This requires a phased approach to moving existing operations out of the CMR facility and into the CMRR facilities. Presently, we rely completely on the CMR facility for support services to plutonium programs. When the RLUOB is fully equipped and operational in 2012, it will replace a portion of the existing CMR functions, thus reducing the risk exposure in the aging CMR facility. As the CMRR-NF comes on-line the remaining functions in CMR will transition to the new building and the CMR facility will be available for decommissioning. (*id.*)

Thus, NNSA has a strategy to support PF-4, even with a delay in a replacement for the existing CMR. Increases in PF-4's capacity to produce plutonium pits will take place through the PF-4 Recapitalization, known as the TA-55 Reinvestment Project ("TRP") Phases I, II, and III:

> The existing PF-4 facility is fully capable of producing pits and will complete a War Reserve production campaign on the W88 program in 2011. However, the existing program is limited to about 10-20 pits per year. The PF-4 Recapitalization will support the process equipment and other production enhancements inside of PF-4 to achieve the [Nuclear Posture Review] requirements. The strategy for doing this is to add additional equipment to augment the existing manufacturing line inside PF-4. (*id.* 27)

Thus, the addition of equipment to PF-4, not the construction of CMRR-NF, will enable NNSA to increase pit production capability from the present level of 10-20 pits per year to 80 pits per year. "Plutonium pit work is a concern because it is today's main rate-limiting capacity. The upgrades to PF-4 will address this capability and provide the required capability-based capacity." (*id.* 6. *See also* Table D-2)

The affidavit of Bob Peurifoy, whose credentials include heading bomb design at Sandia National Laboratories ("Sandia") from 1951-91, supports this conclusion and shows that there is no current national security need for the CMRR-NF. Mr. Peurifoy was Sandia's vice president

for technical support, which included safety and reliability assessments, stockpile surveillance, effects testing at Nevada Test Site, development and remote range testing, and military liaison. He directed the Sandia weapons development program; five of the eight nuclear weapons types now in the arsenal were designed in his organization. (¶ 1). Based upon a review by DOE's JASON Committee of studies conducted by LANL and Lawrence Livermore National Laboratory, he states that most plutonium pits have a credible lifetime of at least 100 years. (¶ 4). Thus, to date no pit aging problems have been reported, all warheads and bombs have been recertified based on 14 annual assessments by the lab directors, and no Life Extension Projects for stockpile warheads have involved the pits. (¶ 6-8). He concludes that a steady-state pit production capability of 60 pits per year would satisfy all stockpile needs, and this rate can be met by the LANL PF-4 facility without the CMRR-NF. (¶ 9). According to Mr. Peurifoy, "[B]eyond question, there is no national security cost to a delay of a few years in Nuclear Facility construction." (Exh. D, ¶ 11).

V. No Bond Should be Required for an Injunction.

Plaintiff is a nonprofit organization with principal interests in the operations and impacts of LANL as a nuclear weapons laboratory. The interests in issue here are those that are protected by NEPA. In a NEPA case, a bond for a preliminary injunction is generally not required because of the important public interest being vindicated and the statutory policy in favor of private enforcement and judicial review of agency action. The Tenth Circuit has stated: "Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered." *Davis,* 302 F.3d at 1126. Other pertinent factors apply here as well; thus, "plaintiffs' strong showing on the merits and the defendants' apparent prejudgment to

proceed prematurely with the Project before the required environmental studies were considered suggest that a large bond should not be required" (*id.*). This is such a case.

Conclusion

Defendants have placed the CMRR-NF on track for design and construction to proceed in tandem, and they plan to make further commitments of money and other resources in FY 2011 to carry out their commitment to the CMRR-NF project as they now envision it. They have effectively determined the course that the project should take and, unless the Court intervenes, they have no intention of considering the environmental impacts of the CMRR-NF project, the other Pajarito Corridor projects, or any reasonable alternatives. Only if the Court directs a halt to their rush to complete the project and enforces Congress's direction to the defendants to base their decisions upon complete environmental analyses will defendants meet their legal obligations under NEPA.

If defendants proceed unhindered with their massive plans, the environmental consequences will be manifold and huge, and no consideration will be given to less damaging alternatives. Plaintiff respectfully requests that this Court hold a hearing on this matter to allow the introduction of the voluminous documents in support of this motion and thereafter enter a preliminary injunction requiring that no further expenditures be made on the CMRR-NF project and those portions of the NMSSUP project needed only for CMRR-NF construction until defendants have complied with their NEPA obligations by preparing and reviewing a complete EIS for the CMRR-NF. No bond should be required, in view of the public interests served by such relief.

Respectfully submitted,

[***Electronically Filed***]

HINKLE, HENSLEY, SHANOR & MARTIN, LLP

/s/ Thomas M. Hnasko
Thomas M. Hnasko
P.O. Box 2068
Santa Fe, NM 87504
(505) 982-4554

and

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road #1001A
Santa Fe, NM 87507
(505) 983-1800

Certificate of Service

I hereby certify that on this 12 day of November, 2010, I filed the foregoing *Plaintiff's Motion for Preliminary Injunction and Memorandum in Support* electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

John P. Tustin
john.tustin@usdoj.gov

Andrew A. Smith
andrew.smith6@usdoj.gov

/s/ Thomas M. Hnasko
Thomas M. Hnasko