

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 STEVEN
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 OPPOSED MOTION TO COMPEL DEFENDANTS' COUNSEL
TO PARTICIPATE IN A CONFERENCE OF THE PARTIES
UNDER RULE 26(f)(1) AND FOR THE ISSUANCE OF
A SCHEDULING ORDER UNDER RULE 16**

Plaintiff The Los Alamos Study Group ("plaintiff") hereby moves the Court to enter an order compelling counsel for the defendants to confer as soon as practicable to formulate a discovery plan and other matters required under Fed.R.Civ.P. 26(f), and for the issuance of a scheduling order under Fed.R.Civ.P. 16(b)(1). As grounds for this motion, plaintiff states:

1. Counsel for plaintiffs has requested that counsel for defendants participate in an initial conference of the parties, pursuant to Rule 26(f)(1), to develop a discovery plan and other matters necessary for the efficient prosecution of this litigation.

2. Rule 16 requires the issuance of a scheduling order “within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.” Fed.R.Civ.P. 16(b)(1).

3. No such scheduling order has been issued, and counsel for defendants refuses to participate in a conference of the parties to develop a discovery plan and to confer on other matters required under Rule 26, despite the requirement under Rule 26(f)(1) that the parties confer “as soon as practicable.” Fed.R.Civ.P. 26(f)(1).

4. As a consequence of the absence of a scheduling order and defendants’ refusal to confer, plaintiff has been constrained to rely solely upon publicly available information to support its motion for injunctive relief under the National Environmental Policy Act. This constraint has unjustly impeded plaintiff’s efforts to present factual matters to the Court, given that there is no administrative record concerning defendants’ implementation of the current iteration of the Chemistry and Metallurgy Research Replacement (“CMRR”) project at Los Alamos National Laboratory, and particularly its Nuclear Facility component (“CMRR-NF”). Moreover, plaintiff is unable to obtain documents from defendants through traditional means of discovery, including depositions of defendants’ representatives who possess peculiar knowledge about the current design and implementation of the present iteration of the CMRR-NF.

5. Counsel for the defendants responded to plaintiff’s counsel’s request for a conference of the parties by stating that this matter is allegedly exempt from the requirements of Rule 26(f) because, in defendants’ view, it is “an administrative record review case under the APA.” However, plaintiff does not challenge the administrative record supporting the obsolete 2003 EIS and the 2004 ROD. Plaintiffs seek injunctive relief preventing defendants’ continuing

prejudicial commitment of resources to the on-going detailed design of the current CMRR-NF. There is no administrative record available that supports defendants' current actions in violation of NEPA.

6. Counsel for defendants have also stated that they will not participate in a conference of the parties because, "in any event, there is no case management order from the court." The parties, however, have an independent obligation to confer "as soon as practicable," regardless of whether any such scheduling order has been issued by the Court. Moreover, Rule 16 provides that a scheduling order must be issued within 90 days after the defendants have appeared. Fed.R.Civ.P. 16(b)(1). Defendants' counsel appeared in this case on August 27, 2010.

WHEREFORE, plaintiff respectfully requests that the Court require counsel for the defendants to participate expeditiously in an initial conference of the parties, to develop in good faith a discovery plan, and to submit a report outlining the plan pursuant to Rule 26(f)(2). Plaintiff also requests that the Court thereafter issue a scheduling order pursuant to Rule 16(b)(1), based on the parties' report, so that plaintiff may obtain information relevant to this NEPA case which is not publicly available, .

Respectfully submitted,
[*Electronically Filed*]

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Certificate of Service

I hereby certify that on this 11th day of March, 2011, I filed the foregoing PLAINTIFF'S OPPOSED MOTION TO COMPEL DEFENDANTS' COUNSEL TO PARTICIPATE IN A CONFERENCE OF THE PARTIES UNDER RULE 26(f)(1) AND FOR THE ISSUANCE OF A SCHEDULING ORDER UNDER RULE 16 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

Andrew A. Smith

/s/ Thomas M. Hnasko

Thomas M. Hnasko