

No. 11-2141

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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LOS ALAMOS STUDY GROUP,  
*Plaintiff-Appellant,*

v.

UNITED STATES DEPARTMENT OF ENERGY;  
STEVEN CHU, in his official capacity as Secretary, Department of Energy;  
NATIONAL NUCLEAR SECURITY ADMINISTRATION;  
THOMAS PAUL D'AGOSTINO, in his official capacity as Administrator,  
National Nuclear Security Administration,  
*Defendants-Appellees.*

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On Appeal from the U.S. District Court  
for the District of New Mexico (Judith C. Herrera, J.)

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**FEDERAL DEFENDANTS-APPELLEES' MOTION FOR  
SUMMARY DISPOSITION BECAUSE OF MOOTNESS**

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Pursuant to Fed. R. App. P. 27 and 10th Cir. Local R. 27.2(A)(1)(b), the United States Department of Energy (DOE) and the National Nuclear Security Administration (collectively NNSA) move to dismiss this appeal because it is moot. NNSA has consulted with Counsel for Plaintiff-Appellant the Los Alamos Study Group (Study Group), Thomas Hnasko, who indicated that the Study Group opposes this motion. NNSA has good cause for filing at this time because recent events definitively establishing constitutional mootness occurred on October 12, 2011, and October 21, 2011, less than two weeks before this filing. *See* 10th Cir. Local R. 27.2(A)(3)(a).

## INTRODUCTION

In the instant appeal, the Study Group alleged that NNSA must prepare a new environmental analysis for the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility (CMRR-NF) under the National Environmental Policy Act (NEPA), §§ 4321-4370f. Ex. A (Compl.). The Study Group alleged that NNSA violated NEPA by failing to adequately analyze new seismic information, proposed design changes to the CMRR-NF, and other factors. The district court correctly dismissed the case as prudentially moot because, at the time the court entered judgment, NNSA was in the process of preparing a Supplemental Environmental Impact Statement (SEIS) analyzing the potential environmental effects of the proposed CMRR-NF pursuant to NEPA. Ex. B (Op.). After the

Study Group noticed this appeal, NNSA completed its supplemental NEPA process, issued its Final SEIS, and issued an Amended Record of Decision (Amended ROD) on October 12, 2011. *See* 76 Fed. Reg. 54,768 (Sept. 2, 2011) (announcing availability of Final SEIS);<sup>1</sup> Ex. C (76 Fed. Reg. 64,344 (Oct. 18, 2011) (Amended ROD)). On October 21, 2011, the Study Group filed a new lawsuit in the District Court of New Mexico, challenging the adequacy of NNSA's NEPA process and analysis for the proposed CMRR-NF and making clear that it was also challenging the Final SEIS and Amended ROD. Ex. D (new lawsuit's complaint). That case has been docketed as No. 6:11-cv-00946.

Under this Court's binding precedent, the completion of the new NEPA process definitively establishes that the instant appeal is *constitutionally* moot because this Court cannot grant any meaningful relief on the Study Group's original Complaint seeking to compel a new NEPA analysis. *See Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1121 (10th Cir. 2009) (holding that agency's issuance of environmental analyses mooted case seeking to compel NEPA analyses); *see also, e.g., Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110-15 (10th Cir. 2010); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211-13 (10th Cir. 2005). The Study Group's new lawsuit,

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<sup>1</sup> The Final SEIS is available online at: <http://energy.gov/nepa/downloads/eis-0350-s1-final-supplemental-environmental-impact-statement>.

which challenges the Amended ROD and presents the Study Group's continued concerns with NNSA's NEPA analysis, is the only suit where a court may grant some relief.

## **FACTUAL BACKGROUND**

1. *The National Environmental Policy Act (NEPA)*: NEPA is purely a procedural statute; it mandates that agencies take a hard look at the environmental consequences of their decisions but does not require particular results. NEPA requires a federal agency to prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Agencies may prepare a supplemental EIS (SEIS) supplementing an earlier EIS at any time to further the purposes of NEPA. DOE's NEPA regulations require preparation of an SEIS (not an EIS) if there are substantial changes to the proposal or significant new information relevant to environmental concerns. 10 C.F.R. § 1021.314(b), (a); 40 C.F.R. § 1502.9(c).

2. *The Proposed CMRR-NF*: The Study Group, a group advocating for nuclear disarmament, challenges NNSA's NEPA analysis for a single proposed facility at the Los Alamos National Laboratory (LANL)—the CMRR-NF. The proposed CMRR-NF is part of an effort to replace the 60-year-old Chemistry and Metallurgy Research Building (CMR) which has unique capabilities for performing nuclear research on elements such as uranium and plutonium. Ex. E

¶¶ 5-8; Ex. F ¶¶ 3-6; Ex. G ¶ 4. CMR is central to LANL's mission and critical to national security, but it is now outmoded and sits on two small seismic faults. Ex. E ¶¶ 5-8; Ex. F ¶¶ 5, 25-27.

NNSA prepared an Environmental Impact Statement (EIS) in 2003 (with ample opportunity for public comment) and issued an unchallenged ROD in 2004 authorizing the proposed CMRR-NF, along with a separate but adjacent Radiological Laboratory Utility Office Building (RLUOB).<sup>2</sup> 69 Fed. Reg. 6,967 (Feb. 12, 2004). After NNSA issued the 2004 ROD, NNSA began an iterative design process for the CMRR-NF. Ex. G ¶¶ 9-14. During that process, NNSA proposed certain changes to the design for the CMRR-NF to address new seismic information based on its site-wide analysis of the geology underlying the area, to meet updated earthquake criteria, and to meet updated nuclear safety basis requirements, at 10 C.F.R. Part 830. *See* 75 Fed. Reg. 60,745, 60,747 (Oct. 1, 2010); Ex. E ¶¶ 12-14, Ex. F ¶ 8; Ex. G ¶¶ 9-14. The design continues to develop. Ex. F ¶¶ 9, 14.

3. *The SEIS Process:* On July 1, 2010, the Study Group wrote to NNSA and requested a new EIS in light of new seismic information, other new information, and proposed design changes. Ex. E ¶ 15. Later that month, NNSA

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<sup>2</sup> The RLUOB has already been constructed, pursuant to the 2004 ROD. Occupancy is expected to begin this year, with radiological laboratory operations commencing during 2012. *See* Ex. F ¶ 3.

informed the Study Group that NNSA was deciding whether to prepare an additional NEPA analysis. Ex. E ¶ 15.

Roughly three weeks later, before NNSA had made any decision about whether to pursue an additional NEPA analysis, the Study Group filed its Complaint. Ex. A. Shortly thereafter, NNSA formally announced that it would prepare an SEIS for the CMRR-NF to analyze potential environmental impacts of the proposed facility in light of new information and proposed design changes. 75 Fed. Reg. 60,745; Ex. E ¶ 16. NNSA stated that no final design work or construction would take place on the proposed CMRR-NF until it completed the SEIS process and made a final decision in a ROD about whether to pursue the proposal and, if so, what proposed alternative to pursue. Ex. E ¶¶ 20-21, 25; Ex. F ¶¶ 14-15; Ex. G ¶ 14.

In April 2011, NNSA issued a Draft SEIS for the CMRR-NF. 76 Fed. Reg. 24,018 (April 29, 2011). The SEIS conducted an in depth analysis of the potential environmental impacts associated with three alternatives: (1) continuing to implement the earlier NNSA decisions issued in the 2004 ROD and based on the 2003 EIS relative to the CMRR-NF; (2) constructing the Modified CMRR-NF which includes various design changes that address new seismic information, enhance the infrastructure of the facility, and meet new nuclear-safety-basis requirements; or (3) continuing to use the old CMR building.

4. *District Court Proceedings and the Study Group's Appeal:* The Study Group's original Complaint alleged that NNSA violated NEPA by failing to develop a new EIS for the proposed CMRR-NF in light of proposed design changes, new information, and other factors. Ex. B at 2-4; Ex. A ¶¶ 52-95. The Complaint requested a broad injunction barring all further investment in or design of the CMRR-NF absent a new EIS. Ex. B at 2-3; Ex. A ¶ 3.

The United States moved to dismiss the case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The district court found that, under the doctrine of prudential mootness, the ongoing SEIS process mooted the Study Group's claims that NNSA needed to prepare a new NEPA analysis. Ex. B at 22. The court found that NNSA is "proceeding with an SEIS and [is] not moving forward with final design or construction pending completion of that process." Ex. B at 11. The court found "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." Ex. B at 15. The court concluded that the Study Group's "Complaint should be dismissed on the grounds of prudential mootness." Ex. B at 22.

At oral argument in the district court, the Study Group shifted its challenge to assert that the ongoing SEIS process and Draft SEIS were inadequate (though no

allegations regarding that process appear in its Complaint (Ex. A)). The district court rejected those arguments and found that “[w]hile the SEIS process is ongoing, there is no ripe ‘final agency action’ for the court to review pursuant to the Administrative Procedure Act [(APA)].” Ex. B at 16; *see also* Ex. B at 16-21. The court correctly held that any of those alleged NEPA violations should be considered “at the completion of the process, as opposed to while it is ongoing.” Ex. B at 20.

The Study Group appealed the district court’s dismissal for lack of jurisdiction on July 1, 2011.

5. *Events during the Appeal Definitively Render the Case*

*Constitutionally Moot:* On August 26, 2011, NNSA issued its Final SEIS, which takes a hard look at the potential environmental impacts of three alternatives for the CMRR-NF. *See* 76 Fed. Reg. 54,768. On October 12, 2011, NNSA issued its Amended ROD and selected the Modified CMRR-NF alternative. Ex. C (76 Fed. Reg. 64,344). Less than ten days later, the Study Group filed a new lawsuit challenging the adequacy of the supplemental NEPA analysis and the Amended ROD in the District Court of New Mexico, No. 6:11-cv-00946. Ex. D.

**ARGUMENT**

The Study Group’s Complaint alleged that NNSA had violated NEPA by failing to develop a new NEPA analysis for the proposed CMRR-NF in light of

proposed design changes, new seismic information, other new information, and other factors. Ex. B at 2-5. Under this Court’s binding precedent, NNSA’s completion of an SEIS for the proposed CMRR-NF—which addresses these very issues—moots the case presented in the Complaint and, in turn, moots the instant appeal.

Courts recognize two kinds of mootness: constitutional mootness and prudential mootness. *Rio Grande Silvery Minnow*, 601 F.3d at 1121-22 (collecting cases). “Under both Article III and prudential mootness doctrines, the central inquiry is essentially the same: have circumstances changed since the beginning of litigation that forestall any occasion for meaningful relief.” *Id.* at 1122 (quoting *S. Utah Wilderness Alliance v. Smith (SUWA)*, 110 F.3d 724, 727-28 (10th Cir. 1997)). “If an event occurs while a case is pending that heals the injury and only prospective relief has been sought, the case must be dismissed.” *SUWA*, 110 F.3d at 727. The district court correctly dismissed the Study Group’s case as prudentially moot, and the events that occurred during this appeal have definitively rendered the case constitutionally moot.

**A. The Study Group’s original Complaint alleged that NNSA violated NEPA by not preparing a new NEPA analysis for the proposed CMRR-NF.**

To determine whether the case is moot, the Court must first identify which agency actions and alleged violations were challenged in the Complaint. *See Rio*

*Grande Silvery Minnow*, 601 F.3d at 1111 (citing *Nat'l Mining Ass'n v. Dep't of Interior*, 251 F.3d 1007, 1010 (D.C. Cir. 2001)); see also *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 893 (10th Cir. 2008). The district court provided a thorough and accurate summary of the Study Group's Complaint and its allegations. Ex. B at 2-4. The Complaint presented several variations on a single major allegation—that NNSA violated NEPA by failing to prepare a new EIS for the proposed CMRR-NF. Ex A ¶¶ 52-95. The Complaint did not (and could not) make any allegations about the recent SEIS process, Draft SEIS, Final SEIS, or Amended ROD because NNSA had not announced the SEIS process at the time that the Study Group filed the Complaint. See, e.g., *Rio Grande Silvery Minnow*, 601 F.3d at 1111 (interpreting pleadings as directed at those agency actions that had been issued when the plaintiffs filed their Complaint).

**B. The SEIS and Amended ROD for the proposed CMRR-NF render the Study Group's case constitutionally moot.**

When an agency develops an additional environmental analysis of its proposed actions—as NNSA has done here—any challenges to its prior alleged lack of an analysis do not present a live controversy. *Greater Yellowstone*, 572 F.3d at 1121 (holding that agency's issuance of environmental analyses for projects mooted case seeking to compel NEPA analyses); see also *Aluminum Co. v. Bonneville Power Admin.*, 56 F.3d 1075, 1078 (9th Cir. 1995) (holding that review of earlier decision document “would be especially inappropriate” because

agency's underlying analysis has also been modified); *Forest Guardians v. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir. 2003); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996). *Cf. Rio Grande Silvery Minnow*, 601 F.3d at 1110-15 (holding that agency's issuance of a new Biological Opinion (BiOp) in 2003 mooted all claims challenging prior 2001 and 2002 BiOps); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211-13 (10th Cir. 2005) (holding that new Rule mooted NEPA challenges to prior "Roadless Rule"); *McKeen v. Forest Serv.*, 615 F.3d 1244, 1255 (10th Cir. 2010) (holding that new permit moots challenge to old permit); *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1135 (10th Cir. 2006).

In *Greater Yellowstone*, this Court dismissed plaintiffs' claims as moot when the relevant facts were essentially identical to those here. 572 F.3d at 1121. In *Greater Yellowstone*, the plaintiffs first filed a letter with the agency requesting that the agency prepare environmental analyses of certain projects under NEPA, just as the Study Group did here. *Id.* at 1119; Ex. E ¶ 15. Unsatisfied with the agency's response, the plaintiffs filed an action seeking an injunction requiring the agency to prepare environmental analyses of the projects under NEPA, just as the Study Group did here. *Id.* at 1119-20; Ex. A. During the litigation, the agency prepared and issued environmental analyses under NEPA for six of those projects, just as NNSA has now issued an SEIS and Amended ROD for the proposed CMRR-NF. *Id.* at 1121. This Court concluded that the agency's new NEPA

analyses of those six projects mooted the plaintiffs' "action alleging [that] the lack of environmental analyses for the six [projects] in question violated NEPA." *Id.* As this Court found, "there is no reasonable expectation the alleged wrongs involving the six [projects] in question will be repeated. The [agency] has issued an environmental analysis . . . . It is thus impossible for the [agency] to return to its allegedly illegal conduct of failing to conduct an environmental analysis." *Id.*

Here, NNSA prepared and completed an SEIS analyzing the potential environmental effects of the proposed CMRR-NF, and the SEIS considered the very issues that the Study Group alleged required a new NEPA analysis, to wit: proposed design changes, new seismic information, and other new information. It is thus impossible for NNSA to return to its allegedly illegal conduct of failing to conduct an additional environmental analysis of the proposed CMRR-NF, failing to consider new information, or failing to consider new design proposals.

**C. The Final SEIS and Amended ROD redressed the Study Group's injuries, and the Study Group has already raised its NEPA claims in its new, recently filed lawsuit.**

NNSA's actions of preparing the SEIS and Amended ROD rendered the Study Group's Complaint moot because they redressed any alleged injuries set forth in the Complaint. *SUWA*, 110 F.3d at 727. NNSA's preparation of the SEIS provided the very relief that the Study Group originally sought. The Study Group can provide no explanation for how an injunction ordering yet *another* round of

NEPA analysis would provide it with any meaningful relief or benefit. *SUWA*, 110 F.3d at 728. “There is no point in ordering an action that has already taken place.” *Id.* at 728. *Cf. Neighbors For Rational Dev., Inc. v. Norton*, 379 F.3d 956, 965-66 (10th Cir. 2004) (dismissing NEPA claim as moot because the Court did “not think it would be wise to require the Secretary to plow the same ground twice”).<sup>3</sup>

Moreover, the Court cannot provide the Study Group with any relief “undoing” NNSA’s internal design process during the period before NNSA issued the Final SEIS and Amended ROD. *See, e.g., Aluminum Co. v. Bonneville Power Admin.*, 175 F.3d 1156, 1163 (9th Cir. 1999) (“The . . . complaints are stale because a final EIS was prepared and we can grant no relief that would ‘undo’ the operation of the [allegedly noncompliant agency action] during the period between [the action] and the final EIS.”); *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006) (“Corrective action by an agency can moot an issue. . . . Other circuits have found that subsequent agency action under NEPA moots a

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<sup>3</sup> Any relief would be particularly meaningless here because NNSA produced the SEIS “in the same manner as any other draft and final EIS” *including* the optional public scoping process. 10 C.F.R. § 1021.314(d). NNSA held a 45-day public comment period during the scoping period, and NNSA accepted and considered all comments submitted on the Draft SEIS (even those submitted after the close of the 60-day comment period for the Draft SEIS), maximizing the opportunity for public participation. *See, e.g., 75 Fed. Reg. 60,745; 75 Fed. Reg. 67,711* (Nov. 3, 2010). Thus, the Study Group cannot explain how the SEIS process provided it with less relief than an EIS process—the SEIS provided it with the same procedures and opportunity to comment that an EIS would have provided.

challenge to original compliance where there is no relief that would ‘undo’ the harm”). To the extent that the Study Group requested a broader injunction “pausing” the agency’s design process during the NEPA process, the district court correctly concluded that it lacked authority to interfere in that internal design process. Ex. B at 15-16; *see, e.g., Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544 (1978) (holding that reviewing court generally lacks authority to dictate procedures for agency to follow). And, in any event, no action by this Court could now “undo” NNSA’s internal work on design development during the NEPA process,<sup>4</sup> and the NEPA process is now complete.

To the extent that the Study Group believes that the SEIS process and Amended ROD are deficient under NEPA, the Study Group must pursue and is indeed pursuing those challenges in its new lawsuit challenging the Amended ROD. The original Complaint did not (and could not) make any allegations regarding the SEIS process, and the Study Group cannot raise new claims to confer jurisdiction on appeal when it lapsed with NNSA’s issuance of the final SEIS and Amended ROD. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Narvaez*, 149 F.3d 1269, 1272 (10th Cir. 1998); *see also Rio Grande Silvery Minnow*, 601 F.3d at 1111; *Greater Yellowstone*, 572 F.3d at 1121 (“[A]n actual controversy must be

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<sup>4</sup> NNSA did not begin final design work or construction before completing the SEIS process. *See* Ex. E. ¶¶ 20-21, 25; Ex. F. ¶¶ 14-15; Ex. G ¶ 14. Thus, it is unclear what action could be “undone.”

extant at all stages of review”). For example, the Study Group’s Appellate Brief raises numerous challenges to the *Draft* SEIS (*e.g.* Br. at 21-22, 27, 40-45, 52), but even assuming that one could bring an APA challenge to a Draft SEIS (which one cannot), such challenges to the SEIS process have been brought and belong in the new lawsuit, not this appeal. Notably, on October 28, 2011, the district court described the complaint in the new lawsuit as “raising many of the same arguments and claims raised in this case, but incorporating the findings of the final SEIS and associated ROD.” Ex. H at 3.

Thus, any NEPA claims cured by the new process are now moot, and any NEPA claims arising from the new process can (and must) be resolved in the new lawsuit. This Court cannot provide the Study Group with any meaningful relief in the case on appeal.

**D. This case does not fall under the exception to mootness for voluntary cessation because NNSA can never “resume” its allegedly illegal conduct of not preparing a new NEPA analysis.**

This case does not fall within the exception to the mootness doctrine for voluntary cessation. An agency’s voluntary cessation of allegedly wrongful conduct after litigation begins generally will not moot a case unless “two conditions are satisfied: ‘(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged

violation.” *Rio Grande Silvery Minnow*, 601 F.3d at 1115 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). NNSA’s completion of a Final SEIS and issuance of an Amended ROD based on the analysis in the SEIS meet both of those conditions. *See, e.g., Greater Yellowstone*, 572 F.3d at 1121; *see also SUWA*, 110 F.3d 727-29; *Rio Grande Silvery Minnow*, 601 F.3d at 1117-21 & n.15 (noting that “courts have expressly treated governmental officials’ voluntary conduct ‘with more solicitude’ than that of private actors”) (collecting cases). As this Court recognized in *Greater Yellowstone*: in the face of allegations of failing to prepare a NEPA analysis, once an agency has completed a new NEPA analysis “there is no reasonable expectation the alleged wrongs [of proceeding without NEPA coverage] . . . in question will be repeated,” and “it is thus impossible for the [agency] to return to its allegedly illegal conduct of failing to conduct an environmental analysis [of new information].” 572 F.3d at 1121.

Thus, this appeal has been overtaken by events and is definitively moot.

### **CONCLUSION**

For these reasons, NNSA respectfully requests that the Court grant the motion to summarily dismiss the case as moot.

Respectfully submitted,

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November 1, 2011  
90-1-4-13225

**EXHIBIT LIST:**

- A. Original Complaint, No. 1:10-cv-00760, filed August 16, 2010.
- B. District Court Memorandum Opinion and Order, No. 1:10-cv-00760, dismissing original suit for lack of jurisdiction.
- C. Amended ROD, 76 Fed. Reg. 64,344 (Oct. 18, 2011).
- D. New lawsuit's complaint, No. 6:11-cv-00946, filed October 21, 2011.
- E. Declaration of Dr. Donald Cook, Deputy Administrator for Defense Programs at NNSA, who oversees the proposed CMRR-NF.
- F. Declaration of Roger E. Snyder, Deputy Site Manager at LANL, who oversees the proposed CMRR-NF project at the site level.
- G. Declaration of Herman C. LeDoux, Federal Project Director for the proposed CMRR-NF project, who has knowledge of both the current status of the SIES process and the design process for the proposal.
- H. District Court Memorandum Opinion and Order, No. 1:10-cv-00760, denying injunction pending appeal on October 28, 2011.

## **CERTIFICATE OF DIGITAL SUBMISSIONS**

I submit that the foregoing document has been submitted in PDF format to the Tenth Circuit's Electronic Case Filing System; that all required privacy redactions have been made; and that the digital submission has been scanned for viruses with the Microsoft Forefront Client Security 1.115.998.0 program (last updated October 31, 2011) and, according to the program, the document is free of viruses.

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## CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c) and Tenth Circuit Rule 25.3, I hereby certify that on this date, November 1, 2011, I caused the foregoing document to be filed upon the Court through the use of the Tenth Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service is consistent with the Service Method Report:

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- G. Declaration of Herman C. LeDoux, Federal Project Director for the proposed CMRR-NF project, who has knowledge of both the current status of the SIES process and the design process for the proposal.
- H. District Court Memorandum Opinion and Order, No. 1:10-cv-00760, denying injunction pending appeal on October 28, 2011.

# **Exhibit A**

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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v.

Case No. \_\_\_\_\_

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.

**COMPLAINT FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF UNDER THE NATIONAL  
ENVIRONMENTAL POLICY ACT OF 1969**

I.

PRELIMINARY STATEMENT

1. This action arises under the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C.A. §§ 4321 *et seq.*, together with the implementing regulations for NEPA issued by the 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. This action also arises under the Administrative Procedure Act, 5 U.S.C.A. §§ 701 *et seq.*

2. This action challenges defendants' actions in planning, approving, and implementing the construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("Nuclear Facility") at the Los Alamos National Laboratory ("LANL") in Los Alamos, New Mexico. The proposed Nuclear Facility would be an approximately four billion dollar facility for storing and handling plutonium. Construction is currently expected to begin in 2011 and conclude in 2020.

3. The complaint seeks a declaratory judgment and mandatory injunction requiring defendants to comply with the National Environmental Policy Act of 1969 (NEPA), by preparing an environmental impact statement (EIS) regarding the proposed Nuclear Facility and its many subprojects. The complaint also seeks an injunction to prohibit all further investment in the Nuclear Facility, including all detailed design, construction, and obligation of funds, until an EIS is prepared.

4. Defendants prepared an EIS under the NEPA in 2003 for a much simpler and less environmentally impactful nuclear facility concept. Subsequently, defendants greatly expanded the scale, scope, cost, and geographic footprint of the proposed Nuclear Facility, while adding numerous additional buildings and project elements that were not part of the original proposal. The Nuclear Facility has expanded so greatly that defendants, at the request of the Senate Armed Services Committee and other authorities, are now conducting studies regarding the proposed size, scope, and cost of the Nuclear Facility and alternative means of constructing it. Defendants have never prepared an EIS analyzing the environmental impacts of the aggrandized Nuclear Facility now proposed and its alternatives. NEPA requires them to do so.

II.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C.A. § 1331 (federal question), and 28 U.S.C.A. § 1361 (mandamus); and 28 U.S.C.A. § 1651 (writs); and may issue a declaratory judgment and a preliminary and permanent injunction and further relief pursuant to 5 U.S.C.A. §§ 701 *et. seq.* (Administrative Procedure Act), 28 U.S.C.A. § 2201 (declaratory relief) and 28 U.S.C.A. § 2202 (injunctive relief). There is a present and actual controversy between the parties. Venue is properly vested in this Court pursuant to 28 U.S.C.A. § 1341(e) and the Rules of Procedure for the United States District Court for the District of New Mexico.

III.

PARTIES

6. Plaintiff the Los Alamos Study Group (“the Study Group”) is a non-profit corporation organized under the laws of the State of New Mexico, which focuses on educating the general public, federal and contractor management, members of Congress, and others on a range of inter-related policy issues, including Department of Energy (“DOE”) missions, programs, and infrastructure. The Study Group has approximately 2,691 members and supporters within a 50-mile radius of LANL, approximately 2,341 of whom live within a 30-mile radius of LANL. The Study Group and many of its members have been intimately involved in the analyses and education regarding LANL plutonium infrastructure and programs since October 1989. Given their proximity to LANL and the proposed Nuclear Facility, the Study Group members are adversely affected and will be irreparably harmed and aggrieved by the environmental impacts of

planning, constructing, and operating the proposed Nuclear Facility. Additionally, the Study Group and its members have no adequate remedy at law and must seek equitable relief to prevent the environmental consequences of defendants' continuing efforts to plan, construct and operate the proposed Nuclear Facility without preparing an applicable EIS, which is preceded by a meaningful scoping process.

7. The Study Group and its members have commented to the National Nuclear Security Administration ("NNSA") and to its predecessor, DOE Defense Programs ("DP"), regarding the matters raised in this Complaint on previous occasions over the last two decades. The Study Group commented on the scope of the now antiquated EIS and discussed the Nuclear Facility issues with NNSA officials on numerous occasions. Study Group representatives have traveled dozens of times to Washington, DC to meet with NNSA and other executive branch officials, as well as with members of Congress, their staff, and with congressional research, auditing, and oversight organizations regarding issues raised in this Complaint. To the limit of the Study Group's resources and abilities, and within the limits of the information available to the Study Group and to its members, the Study Group has carefully followed and engaged with the federal government on CMRR issues. The Study Group has diligently pursued and exhausted all of the administrative remedies available to it - and many more - over a decade-long period specifically concerning the proposed Nuclear Facility.

8. Defendant DOE is an executive branch department with jurisdiction and authority over LANL. DOE has a duty to comply with NEPA at its facilities, including LANL, where the proposed Nuclear Facility would be built.

9. Defendant the Honorable Stephen Chu is the Secretary of the Department of Energy and is named as a defendant in his official capacity.

10. Defendant NNSA is the agency within the DOE with direct jurisdiction and authority over all aspects of the proposed construction and operation of the Nuclear Facility, including NEPA compliance.

11. Defendant the Honorable Thomas Paul D'Agostino is the Administrator of the NNSA and is named as a defendant in his official capacity.

#### IV.

#### FACTUAL BACKGROUND

12. Defendants' Chemistry and Metallurgy Research Replacement (CMRR) project would complete two new buildings at LANL's Technical Area 55 (TA-55), to be devoted primarily to activities involving plutonium. These two buildings are: (A) a Radiological Laboratory, Utility, and Office building (RLUOB); and (B) the proposed Nuclear Facility.

13. RLUOB contains laboratories designed to handle small quantities of radioactive materials, including approximately a few grams of weapons-grade plutonium. The proposed Nuclear Facility, however, is being designed to store, handle, and process several tons of plutonium. Both new facilities would augment the capabilities of, and would be directly or indirectly connected to, LANL's main Plutonium Facility, Building PF-4. PF-4 is being thoroughly upgraded in a separate, but connected, major project.

14. The RLUOB structure is physically complete and is being outfitted. RLUOB is expected to be ready for full occupancy and use in approximately 2013.

15. Defendants have reported that they expect to begin initial construction on the proposed Nuclear Facility project in the coming fiscal year (FY2011). Defendants have requested \$225 million for the CMRR project from Congress for FY2011, including \$168.5 million for the proposed Nuclear Facility, an increase of \$110.3 million from the present fiscal year (FY2010), more than tripling the present appropriation. Congress has taken no final action on this request.

16. Other than the interstate highway system, the proposed Nuclear Facility is by far the largest proposed federal or state capital project in the history of New Mexico. The Nuclear Facility is expected to cost in the neighborhood of \$4 billion to build, roughly ten times as much as RLUOB, currently estimated at \$363 million. By comparison, inflation-corrected costs for three of the state's largest previous public construction projects, Elephant Butte Dam, Cochiti Dam, and the "Big I" highway interchange project in Albuquerque, are approximately \$222 million, \$344 million, and \$386 million, respectively. Of all government-funded projects undertaken in New Mexico, only the interstate highway system is of comparable cost.

17. At Los Alamos, estimated Nuclear Facility costs are comparable to the inflation-corrected costs of building and operating the whole laboratory for its first decade (1943-1952), including constructing all of the facilities and conducting all the activities of the Manhattan Project, and constructing the post-war Chemistry and Metallurgy Research (CMR) building and all other early post-war projects and facilities.

18. The primary purpose of the proposed Nuclear Facility is to facilitate an increase in the capacity of the TA-55 facilities to manufacture plutonium warhead cores, known as "pits." Several other projects underway and proposed are also part of this manufacturing upgrade, but

the proposed Nuclear Facility dwarfs all these other projects in cost, duration (approximately two decades from start to finish), and complexity.

19. The CMRR project was first announced in 1999 and was provided with conceptual planning funds by 2000. It was first funded by Congress as a formal engineering and design project in 2002 and first funded as a construction line item in 2003. Despite line item appropriations of more than \$289 million (roughly 7-8% of the estimated total cost) since 2002, the Nuclear Facility has never fully progressed through defendants' "preliminary design" stage.

20. NNSA has never prepared what it calls a "performance baseline" for the Nuclear Facility, which is a detailed scope of work, key project performance parameters, a reliable cost estimate, and an accepted completion schedule. Defendants have not made what they call "Critical Decision 2" or "Critical Decision 3," which formally allow detailed design and construction, respectively, and Congress has never authorized or appropriated funds for the actual construction of the proposed Nuclear Facility.

21. On July 23, 2002, NNSA filed a Notice of Intent (NOI) to prepare an EIS for the CMRR project. An EIS was issued on November 14, 2003 ("2003 EIS"). A Record of Decision (ROD) was issued on February 12, 2004 ("2004 ROD," 69 Fed. Reg. 69, pp. 6967-6972).

22. In the 2003 EIS, all of the alternatives analyzed, except the "No Action" alternative, appeared superficially similar. Each alternative included constructing facilities of the same type and size, in slightly different ways, at somewhat different maximum depths (50 ft vs. 75 ft.), at one of two adjacent technical areas at LANL. The 2003 EIS reported that the "above-ground" concept (i.e. less than 50 ft. deep) was the upper bound for impacts. The EIS did not mention the adverse engineering properties of the approximately 50-foot-thick layer of poorly-

consolidated volcanic ash beneath the site, beginning at an approximate depth of 75 feet. These adverse properties are now known to generate extensive additional project requirements and greatly expanded environmental impacts for what defendants called “below ground” construction options – those which approached 75 feet in depth.

23. In the ROD, NNSA chose its preferred alternative, which included “above-ground” construction that would not exceed 50 feet in depth.

24. In 2002, the total cost provided to Congress by defendants for both CMRR buildings was “\$350-500” million, not including administrative costs. In 2003, defendants provided to Congress a total cost for both buildings of “\$600 million,” including administrative costs. Since these initial years, projected costs for the Nuclear Facility have increased by approximately a factor of ten to roughly \$4 billion. In the 2003 EIS, defendants reported that the high cost of certain alternatives was a significant factor in rejecting them from NEPA analysis. Those “high” costs are now only a small fraction of the expected cost of the Nuclear Facility.

25. In early 2003, when defendants were eliminating possible alternatives from NEPA analysis, defendants reported to Congress that both buildings would be completed by the end of calendar year 2010. In their 2003 EIS, defendants assumed that construction would be completed even earlier, by the end of 2009. Presently, however, defendants do not expect to complete the proposed Nuclear Facility before 2020 and do not expect to begin operating it until 2022, which is a delay of approximately one decade from the original estimate. Defendants must now choose and implement interim actions to maintain or increase safety for the programs remaining in the CMR building, actions which were not mentioned, discussed, or analyzed in the

2003 EIS. These federal actions are in effect new unplanned components of the expanding Nuclear Facility project.

26. In 2003, when defendants were eliminating possible alternatives from NEPA analysis, the proposed Nuclear Facility was to consist of 60,000 square feet of floor area for handling large amounts of plutonium (DOE "Hazard Category 2" space) in an approximately 200,000 gross square foot building. The currently-proposed Nuclear Facility would provide about 36% less Hazard Category 2 space in about a 44% larger building, measured by floor area, leaving only 14% of the proposed floor area available for program use, which is about half the fraction available in 2003. In the several years that have passed since defendants vetted project alternatives prior to the now-antiquated NEPA analysis, projected unit costs per useful square foot have risen even farther and faster than projected overall Nuclear Facility costs, thereby widening the potential range of reasonable alternatives to the proposed Nuclear Facility.

27. In May 2003, and again in October 2004, defendants increased the Design Basis Threat (DBT), which is the hypothetical threat standard against which they must be able to defend all their nuclear facilities. These new DBT requirements disadvantaged the less-impactful "above ground" (less than 50 feet deep) construction plan, which was chosen in the 2004 ROD. For this reason and others, defendants abandoned "above ground" construction, as selected in the 2004 ROD, and substituted a design which includes excavation up to 75 feet in depth. Defendants chose this new design without providing public, agency, or tribal notice, without providing comment opportunities, and without any record of decision whatsoever.

28. This significant design change, in combination with the geology of the site and its constrained size, access, topography, and its existing heavy uses, profoundly transformed the

project and dramatically increased expected costs and environmental impacts across LANL and the region. However, it subsequently proved impossible even to build the facility at 75 feet in depth, without complete replacement or reengineering of the earth to a depth of 125 feet, a far more challenging concept at this site and one that was not mentioned or analyzed in the 2003 EIS and certainly not in the 2004 ROD.

29. On January 5, 2005 NNSA announced its intent to prepare a Supplement to the 1999 LANL Site-Wide EIS (SWEIS) and held one scoping hearing later that month. Completion and operation of the proposed Nuclear Facility was incorporated into all proposed alternatives, including the “No Action” alternative. Without further public notice NNSA later decided to prepare a new SWEIS instead of a Supplement to the SWEIS. A final SWEIS was published on April 4, 2008 (2008 SWEIS).

30. The 2008 SWEIS considered three alternative generic levels for all of LANL operations. Construction and operation of the original Nuclear Facility concept proposed in the 2003 EIS was part of the “No Action” and “Expanded Operations” alternatives. The 2008 SWEIS imported by reference the assumptions and findings of the 2003 EIS, and those assumptions and findings were not changed or updated. The 2008 SWEIS did not describe or analyze the Nuclear Facility proposed today.

31. On September 26, 2008, the first SWEIS ROD was issued, combining portions of the “No Action” and “Expanded Operations” alternatives, both of which included construction and operation of the original concept for the Nuclear Facility proposed in 2003. Defendants acknowledged, however, that “[n]ew information about seismic risks at LANL . . . may change how . . . facilities are constructed or renovated.”

32. On October 19, 2006, NNSA announced its Notice of Intent (NOI) to prepare another broad and generic EIS, which was labeled a “Supplement to the Stockpile Stewardship and Management Programmatic Environmental Impact Statement,” and subsequently renamed the Complex Transformation Supplemental Programmatic Environmental Impact Statement (CTSPEIS). The final CTSPEIS was published on October 24, 2008.

33. The CTSPEIS included the original Nuclear Facility concept proposed in 2003 as an element within larger possible program choices. The CTSPEIS neither mentioned any changes in the nature of the proposed Nuclear Facility, nor did it analyze the proposed Nuclear Facility’s environmental impacts in any way. Defendants responded, in response to public comment, that “[n]o [building] footprint additions [to the Nuclear Facility] are planned beyond that [footprint] already analyzed within the CMRR EIS [ the 2003 EIS]; therefore, because there will be no change to what has already been analyzed, no further facility NEPA analysis is planned.”

34. On December 19, 2008, NNSA issued two RODs pursuant to the CTSPEIS. The first CTSPEIS ROD included a decision to proceed with design, construction, and operation of a Nuclear Facility at LANL, citing the analyses in the 2003 EIS, the 2008 LANL SWEIS, as well as those in the CTSPEIS. The latter two analyses merely incorporated the 2003 EIS and did not update it in any way. None of these NEPA analyses addressed the Nuclear Facility as it is proposed today.

35. In November 2006, the JASON defense advisory group, at the request of Congress, articulated a new scientific consensus that most plutonium pits have credible lifetimes in excess of 100 years and therefore will not need replacement within the proposed Nuclear

Facility's useful life. This consensus, developed three years after the 2003 EIS, dramatically increased the viability of reasonable alternatives to the Nuclear Facility and obviated the fundamental purpose of building the Nuclear Facility in the first place.

36. In May 2007, defendants published an updated probabilistic seismic hazard assessment (PSHA) for LANL, which "significantly revised" defendants' understanding of the regional fault system. The overall seismic hazard to LANL and to the proposed Nuclear Facility, including both the magnitude and frequency of expected earthquakes, "increased significantly" from that reported in the 2003 EIS. Predicted accelerations doubled for the 10,000-year recurrence interval earthquake. The probability of an earthquake in the range of magnitude 7 in a given year increased by a factor of roughly 25. Earthquakes up to magnitude 7.3 are now believed possible. This new information has had far-reaching consequences for the nature of the proposed Nuclear Facility project and its expected environmental impacts, particularly given the adverse engineering properties of the earth beneath the proposed facility.

37. Defendants are presently designing the currently-proposed Nuclear Facility under a so-called "hotel concept," the purpose of which is to accommodate unstated future missions. This concept requires wide unsupported floor and roof spans, with relatively few internal walls, and thus has raised significant design and safety concerns. Upon information and belief, the "hotel concept" has contributed to the dramatic (roughly 20-fold) increase in expected structural concrete and steel requirements since the 2003 EIS, thereby significantly increasing the environmental impacts of construction. The "hotel concept," and possible reasonable alternatives to it, were never mentioned, discussed, or analyzed in the 2003 EIS.

38. In May 2008, the Defense Nuclear Facilities Safety Board (DNFSB) formally transmitted to defendants their serious concerns about the adequacy of Nuclear Facility design with respect to seismic and other safety issues. The FY2009 Defense Authorization Act (P.L. 110-417) subsequently withheld approximately half of the authorized FY2009 CMRR funding until DNFSB and NNSA could jointly certify that the serious issues raised by DNFSB had been resolved.

39. In May 2009, the Obama Administration presented its first budget request to Congress, formally ending the Reliable Replacement Warhead (RRW) program, the pits for which were to be manufactured at LANL's TA-55, with storage, testing, processing, and/or other plutonium handling activities occurring in the proposed Nuclear Facility. This was the only large-scale pit production mission ever formally planned for TA-55, and no further such mission has been authorized or planned since. At that time, defendants acknowledged to Congress:

It is recognized that many of the prior [CMRR project] planning assumptions have changed.....The decision about how far to proceed into final design [of the proposed Nuclear Facility] will be based on numerous ongoing technical reviews and other ancillary decisions NNSA management will be making during the period of FY 2009 - 2010. A future decision to proceed with construction of the Nuclear Facility and associated equipment has been deferred pending the outcome of the current ongoing Nuclear Posture Review and other strategic decision making.

40. Despite defendants' acknowledgments concerning the changed planning assumptions, and despite congressional testimony in the spring of 2009 suggesting the proposed Nuclear Facility project might be too large or might be entirely unnecessary, defendants chose not to initiate any NEPA analysis of the changed Nuclear Facility.

41. In July and August of 2009, the serious design issues raised by DNFSB were resolved and their resolution was formally transmitted by DNFSB to Congress. This resolution included, among several other agreed design changes, intensive remediation or replacement of the 50-foot thick stratum of unconsolidated volcanic ash beneath the proposed Nuclear Facility. This substantial change in the proposed Nuclear Facility was deemed necessary to prevent structural collapse and/or lateral sliding of the proposed Nuclear Facility in the event of a large earthquake.

42. In September 2009, the JASON advisory group reported to NNSA that the stockpile could be maintained indefinitely at current standards of reliability, safety, and security, without new pit production. Defendants then submitted a budget request to Congress which would conclude all active stockpile pit production at the end of FY2011. In April 2010, consistent with this budget request, the DOD and defendants established a policy of giving “strong preference” to stockpile management without pit manufacturing, which would be allowed only, “if critical... goals could not otherwise be met, and [only] if specifically authorized by the President and approved by Congress.”

43. In February 2010, defendant NNSA commissioned a review of the proposed Nuclear Facility project, including a review of “key planning assumptions” and “the magnitude of their impacts” on cost and management risk.

44. In May 2010, the Senate Armed Services Committee issued its markup of the FY2011 Defense Authorization bill, saying the proposed Nuclear Facility project had “*many* unresolved issues *including the appropriate size of the facility*” (emphasis added). The Committee went on to say:

Now that the Nuclear Posture Review is completed *the NNSA and the Department of Defense (DOD) are in a better position to ensure that the facility is appropriately sized....*The committee is very concerned that the NNSA follow the DOE 413 order series and project management and guidance. The NNSA is also directed to conduct a true independent cost estimate for the CMRR Nuclear Facility, phase III of the CMRR project. The committee is concerned that the phase III project [i.e. the Nuclear Facility] is being divided into multiple sub-projects. Notwithstanding this management approach the committee directs the CMRR baseline to reflect all phases and subprojects for the purposes of the cost and schedule baseline provision and to be accounted for as a single project (emphasis added).

45. On June 16, 2010, defendants held a public meeting and revealed a web site describing the extensive planned construction (and, *inter alia*, environmental impacts) associated with what defendants called the “Pajarito Construction Corridor,” in which the Nuclear Facility would be the largest proposed project. Some of these direct environmental impacts, connected actions, and cumulative impacts had never been mentioned by defendants before. Defendants also mentioned they were conducting internal studies of these heretofore unrevealed project alternatives and impacts, including utilities planning, traffic studies, site selection for ancillary facilities needed for the proposed project, and institutional impacts of the proposed project.

46. On July 6, 2010, the Comptroller General of the United States wrote defendant DOE, expressing his agency’s urgent concern, given defendants’ ambitious construction proposals, that defendant DOE “does not have a sound basis for making decisions on how to most effectively manage its portfolio of projects.”

47. On July 15, 2010 LANL Director Anastasio testified to Congress that:

[t]here is already a gap emerging between expectations and fiscal realities. I fear that some may perceive that the FY11 budget request meets all of the necessary budget commitments for the program; however, there are still significant financial uncertainties, for example, the design of the UPF [the proposed Uranium

Processing Facility in Tennessee] and CMRR are not complete and the final costs remain uncertain. As I look to the future, I remain concerned that science will be squeezed when trying to compete with capital infrastructure investments and life extension program funding priorities.

48. On July 20, 2010, defendant D'Agostino told the *Nuclear Weapons and Materials Monitor* that other fundamental reviews of the Nuclear Facility are planned besides the one(s) recently completed and underway, "including one by the Department of Defense," which will reexamine the proposed Nuclear Facility's "requirements" and "scope," asking, among other things: "Is it out of bounds?"

49. On July 27, 2010, former NNSA Deputy Administrator John Foster testified to Congress, requesting "a thorough scrub" of proposed Nuclear Facility requirements and suggesting that escalating costs at the proposed Nuclear Facility and another proposed facility could have "major" negative impacts on defendants' other national security programs:

In addition, budgets are estimated for new facilities, in particular CMRR at Los Alamos for research on plutonium and UPF, a uranium parts manufacturing plant at Oakridge in Tennessee. The Committee should understand that at present we do not yet have good cost estimates for the new facilities, each of which are expected to cost billions of dollars. There is general concern that their costs will exceed the preliminary estimates and that may force major reductions in other NNSA nuclear weapons activities to include warhead surveillance, the life extensions and science programs....I have suggested that the Nuclear Weapons Council initiate a thorough scrub of the necessary capabilities and construction costs for the new facilities to insure that safety, security, programmatic risks and costs are effectively managed.

50. As a result of the significant new circumstances and information that have changed the proposed Nuclear Facility project so dramatically over the past eight years, the expected environmental impacts of the proposed facility have also increased significantly relative to the 2003 EIS. Examples include:

A. Increased overall *acreage requirements for construction yards and offices*, parking lots, concrete batch plant, utilities, security infrastructure, excavation spoil disposal, storm water retention basin(s) temporary housing, and road realignments or bypasses.

B. The *locations directly affected* by construction have greatly expanded. The 2003 EIS anticipated direct construction impacts in TA-55 only, for construction limited to that location. NNSA now expects direct construction impacts in TA-55, TA-48, TA-63, TA-66, TA-46 and TA-50, and TA-54 or TA-36.

C. *Concrete and soil grout requirements* have greatly increased, from 6,255 yd<sup>3</sup> (for two or three buildings in the 2003 EIS) to 347,000 yd<sup>3</sup> of structural concrete and soil grout for the Nuclear Facility alone, a factor of more than 55.

D. The manufacture of the additional concrete has significant additional *greenhouse gas emissions*, which were not mentioned or analyzed in the 2003 EIS at all. Upon information and belief, production and delivery of concrete and grout alone for the proposed Nuclear Facility may now produce more than 100,000 metric tons of carbon dioxide, more than four times CEQ's proposed source threshold for EIS analysis and at least 55 times the emissions from this source in the original project.

E. The manufacture of this much additional concrete will result in significant *aggregate mining impacts*, which were not analyzed in the original EIS.

F. *Steel requirements* have greatly increased, from an estimated 558 tons (for two or three CMRR buildings in the 2003 EIS) to more than 15,000 tons for the Nuclear Facility today, a factor of more than 27.

G. *Expected peak employment* during proposed Nuclear Facility construction has increased, according to NNSA, from an estimated 300 in the 2003 EIS to an estimated 844 today. According to NNSA, this increment in transient workforce could affect local housing markets, possibly requiring temporary worker housing.

H. The anticipated *construction period* during which these construction impacts will occur has been lengthened from 34 months in the 2003 EIS to 144 months today, more than a factor of four.

I. Increasing the depth of excavation from 50 feet to 125 feet has increased the *excavation spoils to be disposed* from roughly 100,000 cubic yards to roughly 400,000 cubic yards, not including material already removed from the proposed Nuclear Facility site during RLUOB construction. Transport, storage, disposal, and reclamation of this waste will have significant environmental, aesthetic, and cultural impacts. Prompt permitting is not assured.

J. According to NNSA, defendants expect to use a major part of these *excavation spoils to cap hazardous chemical and nuclear material disposal areas* (MDAs), specifically

MDAs C and G, in lieu of other closure options for those sites, including whole or partial removal of waste. According to defendants, MDAs C and G contain roughly 14 million cubic feet of diverse nuclear and chemical wastes, including transuranic wastes. Decisions to: (a) leave these wastes in place; and (b) cover these sites with volcanic ash removed from the proposed Nuclear Facility excavation, were not mentioned or analyzed in the 2003 EIS. The decision to leave 14 million cubic feet of nuclear and chemical waste in shallow unlined disposal pits covered by this material would be a major federal action significantly affecting the quality of the human environment, with far-reaching impacts.

K. The proposed Nuclear Facility will not begin operations until 2022. The 2003 EIS assumed this would occur more than a decade sooner. The proposed Nuclear Facility project therefore now also includes *continued CMR operation for a decade longer* than described in the 2003 EIS, or, in the alternative, *compensatory interim actions*. By implication the Nuclear Facility project now includes, for at least the coming decade, elements of both the Preferred and the No Action alternatives of the 2003 EIS.

L. Construction of the proposed Nuclear Facility now requires construction of a *craft worker facility*, which was not part of the project analyzed in the 2003 EIS.

M. The proposed Nuclear Facility construction now requires an *electrical substation*, which was not part of the project analyzed in the 2003 EIS.

N. The proposed Nuclear Facility construction now requires traffic modifications, including *closure of Pajarito Road for two years* and *possible construction of temporary traffic bypass(es)*. These impacts and actions were not analyzed in the 2003 EIS.

O. The proposed Nuclear Facility construction now requires construction of a *truck inspection facility*, which was not part of the project analyzed in the 2003 EIS.

P. The proposed Nuclear Facility construction now requires construction of a *warehouse*, which was not part of the project analyzed in the 2003 EIS.

Q. Some of the 4,400 employees whose workplaces are accessed from Pajarito Road will be temporarily displaced during work on the proposed Nuclear Facility. Upon information and belief, this requires *temporary facilities for those "Pajarito Corridor" operations which may be displaced by construction*, which were not part of the project analyzed in the 2003 EIS.

R. The proposed Nuclear Facility is now expected to contain roughly 29 times as much structural concrete as shown in the 2003 EIS. *Final disposition of the proposed Nuclear Facility*, which would become contaminated during use with plutonium and other toxic substances, was not analyzed in the 2003 EIS and, upon information and belief, *is made much more problematic and expensive by the far greater volumes of building materials now expected to be used in the building*.

S. The new Nuclear Facility will *dramatically increase trucking of concrete ingredients and excavation spoils*, which were not analyzed in the 2003 EIS. Between 20,000 to 110,000 heavy truck trips to and from Los Alamos County, and within LANL, would be required for concrete ingredients and for storage and disposal of excavation spoils alone, not including all other deliveries and services. Trucking impacts will extend to at least three and to as many as five counties, depending on secondary project alternatives, sources, routes, and quantities.

51. The impacts summarized above will be exacerbated by the cumulative impacts of other construction activities planned in and on the same canyon and mesa or close nearby, at more or less the same time, which were not included in the 2003 EIS.

### **CLAIMS FOR RELIEF**

#### **Count I**

#### **Violation of NEPA and APA – Failure to Prepare an Applicable EIS for the Proposed Nuclear Facility and Failure to Implement Alternative Chosen in any Record of Decision.**

52. Plaintiff incorporates the allegations in paragraphs 1 through 51 the same as if fully set forth.

53. Defendants' decision to construct and operate the Nuclear Facility comprises a major federal action "significantly affecting the quality of the human environment" within the meaning of 42 U.S.C.A. § 4332(2)(C), 40 CFR 1508.3, 40 CFR 1508.14, 40 CFR 1508.18, and 40 CFR 1508.27.

54. Pursuant to 42 U.S.C.A. § 4332(2)(C) and the implementing CEQ regulations, defendants must prepare an applicable EIS "before decisions are made and before actions are taken," and "at the earliest possible time." 40 CFR 1500.1, 1501.2. Defendants are prohibited from taking any action that has an adverse environmental impact, limits reasonable alternatives to the proposed action, or prejudices agency decisions in the absence of an applicable EIS and subsequent final decision (40 CFR 1502.2(f), 40 CFR 1506.1).

55. Notwithstanding these statutory and regulatory directives, Defendants are implementing a Nuclear Facility proposal which differs substantially from, and has significantly much greater environmental impacts than, any alternative analyzed in the 2003 EIS or in any subsequent EIS. In short, the 2003 EIS is obsolete and inapplicable.

56. Defendants have not only made “substantial changes” to the proposed Nuclear Facility since the 2003 EIS that are relevant to environmental concerns (40 CFR 1502.9(c)(1)(i)), but there also exist “significant new circumstances [and] information relevant to environmental concerns and bearing on the proposed action or its impacts,” which have manifested themselves since the antiquated 2003 EIS and 2004 ROD were issued. 40 CFR 1502.9(c)(1)(ii).

57. As summarized in the Factual Background, defendants have been aware, since at least May 2009, of the substantial changes in the proposed federal action that are relevant to environmental concerns, the significant new circumstances relevant to environmental concerns, and the significant and expansive changes in “the scope of the proposed action...since the original EIS was prepared.” Defendants are also aware of the “importance, size, [and] complexity of the proposal,” all which warrant preparation of a new EIS. Thus, while a Supplemental EIS (“SEIS”) can be implemented under circumstances of mild change to remedy the deficiencies of an “old” EIS, those circumstances are absent in the present situation. (*see* CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” at 32).

58. In May 2009, defendants reported to Congress about the need to examine new project alternatives, a major element of the EIS scoping process (40 CFR 1501.7). *See* paragraph 39 *infra*. Consequently, defendants’ own acknowledgments underscore the need for a new EIS,

including the initial scoping process, to examine the environmental impacts of currently available alternatives to the expanded proposed Nuclear Facility (40 CFR 1501.7).

59. These acknowledgments have been underscored by requests from the Senate Armed Services Committee for a complete review of the size and cost of the presently-proposed Nuclear Facility project.

60. Moreover, according to Defendants' own policies implementing NEPA, the substantial and fundamental changes proposed for the new Nuclear Facility mandate an entirely new EIS, preceded by the required scoping process. DOE has described the circumstances which warrant a new EIS and a new scoping process, as opposed to a SEIS, in the Preamble to DOE's NEPA regulations (April 24, 1992, at 57 FR 15122) and in its NEPA guidance (Revised "Frequently Asked Questions on the Department of Energy's (DOE's) National Environmental Policy Act (NEPA) Regulations," August 1998, at 10b). As stated by DOE:

As explained in the Preamble to the NEPA final rulemaking published on April 24, 1992 (57 FR 15122), DOE believes that there is no need to repeat the public scoping process if the scope of the proposed action has not changed since the original EIS was prepared. Such an approach is consistent with 40 CFR 1502.9, which does not require public scoping for a supplemental EIS. However, as stated in the Preamble, *when the scope of the proposed action has changed, or the importance, size, or complexity of the proposal warrant, DOE may elect to have a scoping process.* (emphasis added)

61. It is incontrovertible that "the scope of the proposed action has ...changed since the original EIS was prepared" and that "the importance, size, or complexity of the proposal warrant" re-examination of the scope of the EIS, including re-examination of reasonable project alternatives. However, defendants have never analyzed their substantially changed Nuclear Facility project, with its additional project elements and its greatly expanded environmental

impacts, in any EIS. As a result, defendants have been and are continuing to implement a novel Nuclear Facility project alternative which differs substantially from, and has significantly different environmental impacts than, any alternative analyzed in any EIS, including the 2003 CMRR EIS.

62. Additionally, in contravention of the Administrative Procedure Act (5 U.S.C.A. §§ 701 *et. seq.*) as well as NEPA and its implementing regulations, defendants attempted to implement a different project alternative (“below-ground construction”) than the one chosen and justified in the 2004 ROD (“above-ground construction”). Defendants chose to implement a project alternative not chosen and justified in any ROD, in violation of 40 CFR 1505.2.

63. Moreover, defendants must publish a decision which selects an alternative “encompassed by the range of alternatives discussed in the relevant environmental documents and . . . described in the environmental impact statement” in a formal ROD (40 CFR 1502.2(e), 40 CFR 1505.1(e); 10 CFR 1021.210 (d); 40 CFR 1505.2). Contrary to these regulatory requirements, defendants ultimately chose to attempt to implement an alternative (construction to a depth of 125 feet) not included within the range of alternatives analyzed in the 2003 EIS, let alone one selected or even mentioned in the 2004 ROD.

64. Accordingly, defendants’ failure to prepare a new EIS with the required scoping process, including a re-examination of reasonable alternatives and followed by issuance of a new and accurate ROD, is arbitrary and capricious, and a violation of NEPA, the Administrative Procedure Act, and the CEQ and DOE regulations.

Count II

**Violation of NEPA – Failure to Develop EIS Addressing  
Connected Actions and Cumulative Environmental Impacts.**

65. Plaintiff incorporates the allegations in paragraphs 1 through 64 the same as if fully set forth.

66. Under NEPA, federal actions may be single and unconnected, or they may be “connected,” “cumulative,” or “similar.” Connected actions are those which automatically trigger other actions which may require an EIS, cannot or will not proceed without other actions, or are interdependent parts of a larger action and depend on the larger action for their justification (40 CFR 1508.25(a)(1)). “Cumulative actions” are those which, with other proposed action(s), have cumulatively significant impacts and should therefore be discussed in the same EIS (40 CFR 1508.25(a)(2)).

67. In addition to the new subprojects within the proposed Nuclear Facility, defendants are now also pursuing several connected actions which are geographically proximate, functionally related, and/or roughly contemporaneous, or which have cumulative impacts. These connected and cumulative actions include the following construction projects:

- A. The Nuclear Materials Safeguards and Security Upgrade Project (NMSSUP);
- B. The TA-55 Revitalization Project (TRP);
- C. The Radioactive Liquid Waste Treatment Facility (RLWTF);
- D. The TRU Waste Facility (TRU);
- E. Material Disposal Area C Closure;
- F. Material Disposal Area G Closure;

G. The Waste Disposition Project; and

H. RLUOB Occupancy.

68. Defendants have characterized the projects referenced above as “major projects” which are “near-concurrent” parts of a coordinated “Pajarito Construction Corridor” project nexus. None of these eight, with the exception of RLUOB Occupancy, was analyzed in the 2003 EIS, or in the context of decisions regarding alternatives to the proposed Nuclear Facility.

69. Defendants are also pursuing, now and in the coming decade, major new *programs* and *projects* involving plutonium, which are planned to take place in PF-4 and RLUOB at roughly the same time as the construction projects referenced in paragraph 67 above. These programs and projects are connected to the proposed Nuclear Facility and will have cumulative impacts that must be analyzed within an EIS (40 CFR 1508.25(c)).

70. Defendants have described the above programs and projects, including the proposed Nuclear Facility, as subprojects within a “Pajarito Construction Corridor.” On other occasions defendants have described many of the same or similar projects, including the proposed Nuclear Facility, as subprojects within “Integrated Nuclear Planning.” On yet other occasions defendants have described many of the same or similar projects as elements within a “Consolidated Plutonium Center” and a “Consolidated Nuclear Production Center.” The close affinities of these projects underscore the necessity of including the impacts of all these proposed facilities as connected or cumulative actions within the “full and fair” environmental impacts analysis required by 40 CFR 1502.1.

71. Defendants must analyze the full suite of impacts of the proposed Nuclear Facility and its necessary subprojects and elements, as well as the connected actions with which the

proposed Nuclear Facility is functionally interdependent. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA. Consequently, defendants should be enjoined from proceeding in any manner with the proposed Nuclear Facility without conducting a *de novo* EIS preceded by an open scoping process, one purpose of which will be to delineate the connected actions and cumulative impacts meriting inclusion and analysis.

Count III

**Violation of NEPA- Failure to Provide Required  
Mitigation Measures and Mitigation Action Plan.**

72. Plaintiff incorporates the allegations in paragraphs 1 through 71 the same as if fully set forth.

73. A central purpose of NEPA is to minimize and mitigate environmental impacts. The CEQ regulations formalize an obligation to study and specify appropriate mitigation measures in EISs. (40 CFR 1502.14 (f), 40 CFR 1502.16 (e) through (h)). Mitigation may include: avoiding impacts by not taking an action or part of an action; minimizing impacts by limiting the action; rectifying impacts by repairing or restoring the environment; reducing impacts by taking protective actions; and compensating for impacts by providing substitute resources. (40 CFR 1508.20).

74. Once the project as a whole is considered to have significant effects, all of its specific effects on the environment (whether or not each is deemed "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14. (CEQ, "Forty Questions," at 19a). Crafting and committing to mitigation measures is one of most important means by which NEPA protects the environment

and citizens, including minority populations, low-income populations, and Indian tribes. (Executive Order 12898 on Environmental Justice, February 11, 1994).

75. Moreover, the ROD itself must contain a concise identification of the mitigation measures which the agency has committed itself to adopt. The ROD must also state whether all practicable mitigation measures have been adopted, and if not, why not. (40 CFR 1505.2(c)). The ROD must identify the mitigation measures, monitoring, and enforcement programs that have been selected and plainly indicate that they are adopted and enforceable as part of the agency's decision.

76. In addition to mitigation measures discussed and crafted in EISs, DOE's NEPA regulations require Mitigation Action Plans. The pertinent regulation provides:

[f]ollowing completion of each EIS and its associated ROD, DOE shall prepare a Mitigation Action Plan that addresses mitigation commitments expressed in the ROD. The Mitigation Action Plan shall explain how the corresponding mitigation measures, designed to mitigate adverse environmental impacts associated with the course of action directed by the ROD, will be planned and implemented. (10 CFR 1021.331)

77. Because defendants have no EIS which addresses the currently-proposed Nuclear Facility, or any applicable ROD, defendants necessarily have omitted mitigation measures and a mitigation plan for the impacts yet to be identified and analyzed by themselves or by commenters. Additionally, defendants have no other specific and applicable mitigation measures, plans, or commitments in any other environmental document, including the SWEIS and CTSPEIS, or their associated RODs, or in any other EIS or ROD or subsequent to them.

78. Defendants' 2003 EIS inexplicably claimed that their then-proposed project would have no impacts which would merit mitigation measures. According to defendants, based on the analyses of the environmental consequences resulting from the proposed action, no

mitigation measures would be necessary because all potential environmental impacts allegedly would be below acceptable levels of promulgated standards.

79. Defendants' decision to forego a mitigation plan and identify mitigation measures was not related to, or based on, the current iteration of the Nuclear Facility. Defendants' failure to analyze and craft reasonable mitigation measures for the impacts of the proposed Nuclear Facility, to commit to those measures in an enforceable ROD, and to prepare a Mitigation Action Plan for the proposed Nuclear Facility prior to implementation, is arbitrary and capricious and a violation of NEPA and its implementing regulations. Accordingly, defendants should be enjoined from taking any further action with respect to the Nuclear Facility until such time as defendants comply with NEPA and prepare an EIS and issue a ROD with appropriate and enforceable mitigation measures, and prepare a Mitigation Action Plan pursuant to defendants' regulations.

Count IV

**Violation of NEPA – Failure to Integrate  
NEPA–Required Analysis in Decision-Making Processes  
for the Proposed Nuclear Facility.**

80. Plaintiff incorporates by reference the allegations in paragraph 72 through 79 the same as if fully set forth.

81. NEPA requires environmental analyses prior to agency decision-making. It does so for the purpose of influencing federal decisions. Consequently, agencies must “include in every recommendation or report on proposals for...major federal actions...a detailed [EIS]...” (42 U.S.C.A. § 4332(C)).

82. The purpose of NEPA's implementing regulations is to foster "better decisions." This is the reason NEPA requires EISs and the reason these EISs must be prepared and available prior to federal decisions and actions (40 CFR 1500.1). EISs assess "proposed agency actions, rather than justifying decisions already made." (40 CFR 1502.2(g)).

83. 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 the ongoing programs and actions of the Federal Government. Consequently, federal agencies are required to integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice, so that all such procedures run concurrently rather than consecutively. (40 CFR 1500.2)

84. NEPA's implementing regulations also require EISs to be explicitly linked with management and cost analyses prior to agency decision-making. Cost-benefit analyses and any related "important qualitative considerations" which are "relevant and important" to decisions must be indicated, included by reference, or appended to EISs. (40 CFR 1502.23).

85. Defendants' decision-making regarding the nature and scope of the proposed Nuclear Facility, and defendants' choices significantly affecting expected environmental impacts and costs, did not stop with the 2004 ROD. These processes continued, leading to project alternatives and impacts that lay far outside the range of choices and impacts discussed in the 2003 EIS, in violation of NEPA (40 CFR 1502.2(e), 40 CFR 1505.1(e); 10 CFR 1021.210 (d)). Upon information and belief, the scope, scale, and impacts of the proposed Nuclear Facility are subjects of current decision-making, uninformed by a NEPA scoping process and without any applicable EIS.

86. By May 2009, defendants admitted to Congress that the proposed Nuclear Facility planning assumptions had changed and that the new scope of any Nuclear Facility and any decision to proceed would be dependent on the outcome of a new Nuclear Posture Review (completed only in April 2010) and other strategic decision making.

87. By September 2009, major design changes to the Nuclear Facility project had occurred, partly as a result of an independent review process formalized by the FY2010 Defense Authorization Act (Public Law 110-417). According to defendants, these changes added approximately 225,000 additional cubic yards of excavation and an additional 225,000 cubic yards of concrete and/or grout. This major decision was not preceded by any applicable EIS or integrated with NEPA analysis.

88. New information available by May 2009 also included “significant” changes in seismic hazard and design requirements, as well as major new security requirements, both of which contributed to major design decisions which significantly escalated the costs and associated environmental impacts. These decisions were not preceded by any applicable EIS or integrated with NEPA analysis.

89. Moreover, defendants have prepared no applicable EIS, and are not integrating NEPA analysis with, the following decisions and plans, which have or are changing the Nuclear Facility proposal and its impacts:

A. Defendants’ ongoing study to keep CMR Wing 9 open indefinitely, the permanent closure of which was part of the proposed action in the 2003 EIS;

B. Defendants’ plans and interim actions to keep open parts of the CMR long past 2010, the closure of which was part of the proposed action in the 2003 EIS;

C. Defendants' current plans to conduct further Nuclear Facility project reviews in the near future, which, upon information and belief, include review of alternative sizes of the facility as well as its basic requirements;

D. Defendants' current studies of utilities, traffic impacts and road modifications, possible sites for ancillary facilities needed for the proposed project, institutional impacts, and other aspects of and alternatives to the proposed project; and

E. Defendants' current plans for moving program activities out of CMR and into RLUOB and PF-4, without reliance on the proposed Nuclear Facility.

90. It is now beyond dispute that the information in the 2003 EIS was not of "high quality" in critical areas (e.g. the nature and scope of the project, the seismic hazard, and the soils beneath the site), which have rendered its conclusions and environmental analysis obsolete for NEPA's purpose of informing federal decisionmakers. (40 CFR 1500.1(b)) Defendants' continued failure to integrate NEPA with their decision-making processes is an arbitrary and capricious misuse of agency discretion. Consequently, defendants should be enjoined from taking any further actions which may prejudice federal decisions to be made with respect to the proposed Nuclear Facility, pending the completion of a new EIS, preceded by the required scoping process and followed by issuance of a new ROD.

Count V

**Violation of NEPA – Denial of Review and Comment Opportunities.**

91. Plaintiff incorporates by reference the allegations in paragraphs 1 through 90 the same as if fully set forth.

92. NEPA's notice and comment provisions are a fundamental aspect of NEPA's method of environmental protection. Accordingly, "federal agencies shall to the fullest extent possible... (d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment." (40 CFR 1500.2(d)). EISs "shall provide full and fair discussion of significant environmental impacts and shall 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 CFR 1502.1)

93. To achieve meaningful comment and participation, NEPA's implementing regulations provide detailed requirements for agency, tribal, and public involvement. Agencies shall "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" (40 CFR 1506.6(a)), beginning with a notice of intent published in the Federal Register and proceeding to the scoping process (40 CFR 1501.7) and to the preparation of the EIS itself (40 CFR 1503.1).

94. In contravention of these requirements, defendants have not provided any notice or comment process involving the public, relevant agencies, and tribes concerning the nature of the proposed Nuclear Facility being designed today, reasonable alternatives to it, or the likely impacts of the proposed new project and its alternatives. Despite a period of six (6) years since the 2004 ROD, the public, agencies, and tribes have not been notified that today's proposed Nuclear Facility involves a much greater irreversible commitment of resources and is a far more impactful project than any alternative analyzed in the 2003 EIS, including the alternative chosen in the 2004 ROD. The most recent comment period for this project closed in June 2003, more than seven years ago. These procedural and informational violations gravely undermine the

independent scrutiny which is essential to implementing NEPA. They also harm citizens procedurally and informationally.

95. DOE's NEPA regulations authorize the production of Supplement Analyses (SAs) to discuss changed project parameters, circumstances, and impacts pertinent to deciding whether a supplemental EIS or a new EIS must be prepared pursuant to 40 CFR 1502.9(c). (10 CFR 1021.314(a)(1)). DOE must make the determination and the related SA available upon written request. (10 CFR 1021.314(c)(3)). Upon information and belief, defendants have prepared one or more SAs or other NEPA-related analyses, but despite, demand these analyses have not been made public or provided to plaintiff.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against defendants as follows:

A. Preliminarily and permanently enjoining all further investment in and contractual obligations for the Nuclear Facility, including but not limited to any portion of final design or construction of any project phase, portion or element, until defendants have completed a new EIS, including scoping, on the proposed Nuclear Facility and its alternatives in full compliance with NEPA and its implementing regulations;

B. Declaring that the defendants have violated the National Environmental Protection Act by:

1. failing to prepare an applicable EIS for the proposed Nuclear Facility, including failing to consider reasonable alternatives to the project overall, its design concept, and its construction strategy;

2. failing to analyze connected and cumulative actions and cumulative impacts in any EIS pertaining to the proposed Nuclear Facility;

3. failing to produce any mitigation plans or offer adequate mitigation measures with respect to environmental impacts of the proposed Nuclear Facility;

4. failing to integrate NEPA analyses into the Agency's decision making process with respect to the proposed Nuclear Facility; and

5. failing to provide notice and comment opportunities to plaintiff, citizens, and to the state of New Mexico, tribes, local governments, and other agencies, and failing to publicly release NEPA documents which defendants have prepared.

C. Declaring that the defendants have violated the Administrative Procedure Act by attempting to implement a project alternative not chosen in any ROD.

D. Requiring the defendants, through a mandatory injunction, to comply with all provisions of NEPA;

E. Requiring the defendants, through a mandatory injunction, to prepare a new and applicable EIS for the proposed Nuclear Facility, beginning with the scoping process and following all provisions of NEPA and its implementing CEQ and DOE regulations;

F. Awarding plaintiff costs of this action, including attorney's fees, expert witness fees, and other expenses, pursuant to the Equal Access to Justice Act, 28 U.S.C.A. § 2412; and

G. Granting such other and further relief as the Court deems proper.

Respectfully submitted by:

*[Electronically Filed]*

HINKLE HENSLEY, SHANOR &  
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*Attorneys for The Los Alamos Study Group*

JS 44 (Rev. 12-07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
The Los Alamos Study Group

(b) County of Residence of First Listed Plaintiff Bernalillo
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Hinkle, Hensley, Shanor & Martin, LLP
218 Montezuma, Santa Fe, NM 87501
(505) 982-4554

DEFENDANTS
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
County of Residence of First Listed Defendant District of Columbia

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation
PTF DEF
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 main columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 USCA sections 4321 et seq.; 5 USCA sections 701 et seq.

Brief description of cause:

Violation of NEPA and APA

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ 0.00

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE

DOCKET NUMBER

DATE

8.16.2010

SIGNATURE OF ATTORNEY OF RECORD

[Handwritten Signature]

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

# **Exhibit B**

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

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

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.]

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 Def’t. 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

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

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

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.

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

(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,

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.

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

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

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*

*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.

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

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

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

# **Exhibit C**

December 1, 2011, 1 p.m.–4 p.m.,  
Local Time.

The above-referenced meetings will be held at: DoubleTree by Hilton Hotel, 5400 Computer Drive, Westborough, Massachusetts 01581.

The above-referenced meetings are open to stakeholders.

Further information may be found at <http://www.iso-ne.com>.

The discussions at the meetings described above may address matters at issue in the following proceedings:

Docket No. ER11–4021, *ISO New England Inc., Northeast Utilities Service Company*.

Docket No. ER11–4022, *ISO New England Inc., Northeast Utilities Service Company*.

Docket No. ER11–4023, *ISO New England Inc., Northeast Utilities Service Company*.

Docket No. ER11–49, *National Grid Transmission Services Corporation*.

For more information, contact William Lohrman, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–8070 or [william.lohrman@ferc.gov](mailto:william.lohrman@ferc.gov).

Dated: October 11, 2011.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2011–26845 Filed 10–17–11; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### National Nuclear Security Administration

#### Amended Record of Decision for the Nuclear Facility Portion of the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, NM

**AGENCY:** National Nuclear Security Administration, U.S. Department of Energy.

**ACTION:** Amended Record of Decision.

**SUMMARY:** The National Nuclear Security Administration (NNSA) of the U.S. Department of Energy (DOE) is issuing this Amended Record of Decision (AROD) for the Nuclear Facility portion of the Chemistry and Metallurgy Research Building Replacement (CMRR) Project at the Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. After completing an EIS, NNSA issued a ROD for the CMRR Project on February 3, 2004, deciding to construct a two-building, partially above-ground, CMRR Facility in Technical Area-55 (TA-55) at LANL. This new facility would replace

the aging 60-year-old Chemistry and Metallurgy Research (CMR) Building at LANL, and would ensure the ability to continue to perform analytical chemistry and materials characterization operations using plutonium and other actinides in a safe, secure manner in support of NNSA mission activities. As the CMRR Project planning and design process has progressed over the past 8 years, the first building of the two-building CMRR Facility (the Radiological Laboratory/Utility/Office Building, also known as the RLUOB) has been constructed. During this same time period, primarily as a result of efforts to better understand the seismic environment at the selected construction site in TA-55, several design considerations and ancillary support requirements were identified for the CMRR Nuclear Facility (CMRR–NF) that had not been anticipated in 2003. These design considerations and additional ancillary support requirements were not analyzed in the 2003 CMRR EIS. To address this new information, NNSA recently completed a supplemental environmental impact statement, *Final 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* (the CMRR–NF SEIS). The CMRR–NF SEIS analyzes the potential environmental impacts of proposed construction changes to the CMRR–NF to address site seismic and safety considerations, as well as newly identified ancillary construction support requirements, such as additional equipment storage areas, soil storage areas, additional transportation needs, and worker parking areas under the Modified CMRR–NF Alternative and compares these impacts to those identified for the construction project selected in the 2004 ROD (No Action Alternative) and for continued operation of the existing CMR facility. NNSA has considered this analysis as well as comments submitted by the public on the Draft and Final CMRR–NF SEIS and has decided to select the Modified CMRR–NF Alternative for constructing and operating the CMRR–NF portion of the CMRR Project. NNSA will select the appropriate Excavation Option (Shallow or Deep) for implementing the construction of this building after initiating final design activities, when additional geotechnical and structural design calculations and more detailed engineering analysis will be performed to support completing the facility design.

**FOR FURTHER INFORMATION CONTACT:** For further information about the CMRR–NF SEIS or this CMRR–NF AROD, or to receive copies of the CMRR–NF SEIS, contact: Mr. George J. Rael, Assistant Manager Environmental Operations, NEPA Compliance Officer, U.S. Department of Energy, National Nuclear Security Administration, Los Alamos Site Office, 3747 West Jemez Road, Los Alamos, NM 87544. Mr. Rael may be contacted by telephone at 505–606–0397, or via e-mail at: [NEPALASO@doe.gov](mailto:NEPALASO@doe.gov). The CMRR–NF SEIS is posted at <http://www.nnsa.energy.gov/nepa> and also at <http://www.energy.gov/nepa/downloads/eis-0350-s1-final-supplemental-environmental-impact-statement>. For information on the DOE NEPA process, contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4600, or leave a message at (800) 472–2756. Additional information regarding DOE NEPA activities and access to many DOE NEPA documents are available on the Internet through the DOE NEPA Web site at: <http://www.energy.gov/nepa>.

#### SUPPLEMENTARY INFORMATION:

##### Background

LANL is a multidisciplinary, multipurpose research institution in north-central New Mexico, about 60 miles (97 kilometers) north-northeast of Albuquerque, and about 25 miles (40 kilometers) northwest of Santa Fe. Since the early 1950s, analytical chemistry (AC) and materials characterization (MC) work has been performed in the CMR Building at LANL. The CMR Building provides essential support for 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. The CMR Building is almost 60 years old and near the end of its useful life. Many of its utility systems and structural components are aged, outmoded, and deteriorated. In the 1990s, geological studies identified a seismic fault trace located beneath two of the wings of the CMR Building, which raised concerns about the structural integrity of the facility. Over the long term, NNSA cannot continue to operate the mission-critical AC and MC capabilities in the existing CMR Building at an acceptable

level of risk to worker safety and health. NNSA has already taken steps to minimize the risks associated with continued operations at the CMR Building.

To ensure that NNSA can fulfill its national security mission for the next 50 years in a safe, secure, and environmentally sound manner, NNSA proposed in 2002 to construct a CMR replacement facility, and this became the subject of the 2003 *Environmental Impact Statement for the Chemistry and Metallurgy Research Building Replacement Project, Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS-0350, CMRR EIS) and the subsequent 2004 ROD (69 FR 6967). Since the issuance of the 2004 ROD, new information on the seismic environment at Los Alamos, as well as revisions to safety system requirements, have become available, indicating that changes to the design of the CMRR-NF are appropriate. The need for additional construction support activities and ancillary construction work spaces has also been identified. These changes resulted in NNSA's decision to prepare a supplement to the 2003 CMRR EIS, the CMRR-NF SEIS, pursuant to the regulations of the Council on Environmental Quality (CEQ) for implementing NEPA (40 CFR Parts 1500-1508) and DOE's NEPA Implementing Procedures (10 CFR Part 1021). Decisions in this AROD are based in part on information and analyses contained in the CMRR-NF SEIS, DOE/EIS-0350-S1.

#### NEPA Process for the CMRR-NF SEIS

NNSA started the process for preparing the CMRR-NF SEIS by publishing in the **Federal Register** a Notice of Intent to prepare the CMRR-NF SEIS, inviting the public to participate in a scoping process to help shape NNSA's supplemental analysis (75 FR 60745, October 1, 2010). The public scoping period extended from October 1 through November 16, 2010. In preparing the Draft CMRR-NF SEIS, NNSA considered all scoping comments received during the scoping period. The Environmental Protection Agency (EPA) and NNSA simultaneously published Notices of Availability for the Draft CMRR-NF SEIS in the **Federal Register** on April 29, 2011 (76 FR 24021 and 76 FR 24018, respectively). These notices invited public comment on the Draft CMRR-NF SEIS from April 29 through June 13, 2011. NNSA later published another notice in the **Federal Register** on May 16, 2011, extending the public comment period through June 28, 2011 (76 FR 28222), for a total comment period of 60 days. Four public hearings

on the Draft CMRR-NF SEIS were held in Los Alamos, Española, Santa Fe, and Albuquerque, New Mexico, from May 23 through May 26, 2011. NNSA issued the Final CMRR-NF SEIS on August 26, 2011, and the EPA published a Notice of Availability for the Final CMRR-NF SEIS on September 2, 2011 (76 FR 54768).

#### Alternatives Considered

In the CMRR-NF SEIS, NNSA analyzed the potential environmental impacts associated with three alternatives for the CMRR-NF: (1) The No Action Alternative, (2) the Modified CMRR-NF Alternative, and (3) the Continued Use of CMR Building Alternative.

The No Action Alternative (2004 CMRR-NF) analyzed in the CMRR-NF SEIS consists of continuing to implement earlier NNSA decisions issued in the 2004 ROD based on the 2003 CMRR EIS and modified by subsequent NEPA decisions related to site infrastructure. NNSA determined that the building, as conceived in 2003, would not sufficiently meet subsequent safety and seismic requirements to allow the full suite of NNSA mission-assigned work to be conducted.

Two action alternatives were analyzed in the CMRR-NF SEIS: the Modified CMRR-NF Alternative, and the Continued Use of CMR Building Alternative. The Modified CMRR-NF Alternative consists of constructing and operating a new CMRR-NF at TA-55 adjacent to RLUOB, with certain design and construction modifications and additional support activities that address seismic safety, infrastructure enhancements, nuclear-safety-basis requirements, and sustainable design principles. Two construction options were considered under this alternative: the Deep Excavation Option and the Shallow Excavation Option. All necessary AC and MC activities could be performed within the modified CMRR-NF to support the full suite of NNSA mission work. The Continued Use of CMR Building Alternative would consist of continuing to perform a restricted suite of operations in the existing CMR Building with normal maintenance and component replacements at the level needed to sustain programmatic operations for as long as feasible. Administrative and radiological laboratory operations would be conducted in RLUOB at TA-55, and no construction activities would be associated with this alternative.

#### Preferred Alternative

As discussed in Volume I, Chapter 2, Section 2.9 of the CMRR-NF SEIS,

NNSA identified the Modified CMRR-NF Alternative as its preferred alternative in both the Draft and the Final versions of the document. However, NNSA did not identify a preferred construction option in the CMRR-NF SEIS.

#### Environmentally Preferable Alternative

Considering the long-term need to maintain its capability to conduct AC and MC operations at LANL, NNSA believes that the Modified CMRR-NF Alternative is the environmentally preferable alternative for meeting its full suite of mission work requirements. Replacing the aging CMR Building with a new facility that incorporates modern safety, security, and efficiency standards would improve NNSA's ability to protect human health and the environment both during normal operations and in the event of an accident or natural phenomena event, such as a wildfire or earthquake.

#### Environmental Impacts of Alternatives

NNSA analyzed the potential impacts of each alternative on: Land use and visual resources; site infrastructure; air quality (including greenhouse gases); noise; geology and soils; surface and groundwater quality; ecological resources; cultural and paleontological resources; socioeconomic; environmental justice; human health; waste management and pollution prevention; transportation; traffic; and cumulative impacts. NNSA also evaluated the potential impacts of each alternative associated with the irreversible or irretrievable commitments of resources, and the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity. In addition, NNSA evaluated impacts of potential accidents, including those tied to seismic risk, on workers and surrounding populations. These analyses and results are described in Volume I, Chapter 4 of the CMRR-NF SEIS. The CMRR-NF SEIS includes a classified appendix that analyzes the potential environmental impacts of intentional destructive acts (credible terrorist scenarios) that might occur at the CMRR-NF.

#### Comments on the Final Supplemental Environmental Impact Statement

Following publication of the Final CMRR-NF SEIS in August 2011, and prior to issuing this AROD, NNSA received 7 comment documents. The appendix to this AROD contains a summary of these comments and provides NNSA's responses for those

cases where in NNSA's view the comment documents introduce new concerns/issues that were not addressed in the Final SEIS. NNSA has concluded that none of the comments received necessitate further NEPA analysis.

**Decisions**

NNSA's decisions are based on its mission responsibilities and its need to sustain AC and MC work at LANL in a manner that allows it to fulfill these responsibilities in a safe and environmentally conscientious manner. The CMRR-NF would provide vitally essential technical support capabilities to NNSA's national security missions, which include maintaining the nation's nuclear weapons stockpile and nonproliferation programs. NNSA has decided to select the Modified CMRR-NF Alternative to continue AC and MC operations at LANL as described in Volume I, Chapter 2, Sections 2.3 and 2.4 of the CMRR-NF SEIS. NNSA will also initiate the facility disposition of the existing CMR Building and the CMRR-NF as operations cease in those structures. The benefits of implementing the Modified CMRR-NF Alternative include reliable, long-term, consolidated plutonium research and storage capabilities for the nuclear security enterprise with modern technologies and facilities; improved health and safety for workers and the public; improved operational efficiency; and reductions in the long-term cost of operating and maintaining the facility.

**Additional Background and Summary of the NEPA Comparison of Excavation Options**

When the probabilistic seismic hazards analysis was prepared in 2007 (LA-UR-07-3965), the CMRR Project team proposed and investigated changing the design for the CMRR-NF that had been selected in the 2004 ROD to increase the thickness in certain floors, the height between floors to provide access, and the thickness of the basemat to improve performance in a seismic event. With these changes, the overall building, measured from the bottom of the basemat to the top of the roof, would have been higher. The design was further revised to maintain the above-ground height of the building by providing a deeper building excavation. This design change resulted in the Deep Excavation Option. The Deep Excavation Option would entail excavating through the layer of poorly welded tuff at the construction site and filling the hole with low-slump concrete to the elevation of the bottom of the basemat, as discussed in Volume I, Chapter 2, Section 2.6.2 of the SEIS. The

environmental impacts associated with these activities are discussed in Volume I, Chapter 4, Section 4.3.

Scoping comments for the CMRR-NF SEIS requested that NNSA look for and analyze alternative design/construction options for the CMRR-NF, including those which might reduce cost and environmental impact by avoiding the need for a deep excavation. Consistent with the rationale in this request, NNSA performed a review of the requirements for the design of the CMRR-NF, which identified an opportunity to avoid the activities and costs associated with the additional excavation and concrete fill required for the Deep Excavation Option by raising the bottom of the basemat to near the original design elevation. Following this review, NNSA began analyzing this additional option for inclusion in the Draft SEIS. Under this design/construction option for the CMRR-NF, which came to be known as the Shallow Excavation Option, the overall building height (bottom of basemat to top of roof) would remain the same, but the top of the roof would be higher aboveground than it was in the conceptual and preliminary design. Geotechnical reviews performed for this Shallow Excavation Option concluded that the substrate is sufficiently strong to withstand the weight of the proposed CMRR-NF, such that intolerable amounts of seismically- and non-seismically-induced settlement and lateral shifting of the foundation would not occur. The allowable bearing pressure of the soil is much greater than the pressure caused by the buildings. Both the Deep and the Shallow Excavation options require the same sets of safety controls and the SEIS analysis indicates that they are expected to result in similar offsite environmental consequences. However, the Shallow Excavation Option reduces risk and provides some reductions in construction impacts and cost without affecting other building design requirements. Risk reduction would be realized by a decrease in: excavating, hauling, and storing soil (approximately 9,000 fewer truck trips depending on hauling capacity and 309,000 fewer cubic yards of soil excavated); scope of geotechnical monitoring; extent of slope stabilization; and safety precautions for working in a deep hole. Reductions in construction impacts would include a reduced project footprint for excavated spoils storage (20 fewer acres); fewer truck trips on- and off-site from LANL; fewer materials procured (a savings of 250,000 cubic yards of concrete); and reduced water use (8 million fewer gallons over the course of construction).

NNSA will begin the implementation of its decision to select the Modified CMRR-NF Alternative for constructing and operating the CMRR-NF portion of the CMRR Facility Project by conducting additional detailed design and analysis activities. Continuing forward into final design is expected to result in additional refinement of the information available to NNSA for making its selection of the construction option to be implemented. NNSA will select the appropriate Excavation Option for implementing the construction of this building after initiating final design activities when additional geotechnical and structural design calculations and more-detailed design engineering analysis will be conducted. In making its selection, NNSA will consider the data it obtains from these studies and analysis, the moderate distinctions in environmental impacts between the two excavation options, and other relevant factors such as additional evaluation of security features and more-detailed cost estimates.

**Mitigation Measures**

All practicable means to avoid or minimize environmental harm have been and will continue to be adopted and employed in the design, construction, and operation of the CMRR-NF. CMRR-NF construction activities will follow standard practices required by federal and state licensing and permitting requirements for minimizing construction impacts on air and surface-water quality, noise, operational and public health and safety, and accident prevention. As described in Volume I, Chapter 5 of the CMRR-NF SEIS, NNSA and LANL operate pursuant to a number of environmental laws and regulations, as well as several other controls, including DOE Orders, policies and contractual requirements. Many of these mandate actions that would mitigate potential adverse environmental impacts related to the construction and subsequent operation of the CMRR-NF. Based on consideration of these mandated mitigation actions, and the analyses of the environmental consequences provided in the CMRR-NF SEIS for this action, no additional mitigation measures would be necessary for many resource areas because the potential environmental impacts are expected to be well below acceptable levels set in promulgated standards.

A summary of all prior mitigation commitments for LANL that are either underway or to be initiated are included in the over-arching LANL SWEIS Mitigation Action Plan (SWEIS MAP).

Prior SWEIS MAP commitments include such actions as continued forest management efforts, trail management efforts, and implementation of a variety of site sampling and monitoring measures, as well as measures to reduce potable water use and implement resource conservation initiatives. A Mitigation Action Plan (MAP) for the CMRR–NF SEIS ROD will be issued by NNSA and made available at <http://www.doeal.gov/laso/NEPADocuments.aspx>. This MAP will include specific requirements for: potable water usage reduction measures; traffic flow improvements; and measures to meet electric power peak capacity demands. Starting in 2012, these new mitigation measures specific to the CMRR–NF project will be incorporated into the overall LANL SWEIS MAP. Reporting will be consolidated into subsequent MAP Annual Reports issued by NNSA and made publicly available at: <http://www.lanl.gov/environment/nepa/sweis.shtml>.

In addition, NNSA will continue its on-going efforts to support the local Pueblos and other tribal entities in matters of human health, and will participate in various intergovernmental efforts to protect indigenous practices and locations of concern. NNSA will continue to conduct government-to-government consultations with the Pueblos and other tribal entities to incorporate these matters into the SWEIS MAP, as deemed appropriate.

Issued at Washington, DC, this 12th day of October, 2011.

**Thomas P. D'Agostino,**  
 Administrator, National Nuclear Security Administration.

**Appendix to the CMRR–NF Amended ROD**

Following publication of the *Final 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*, DOE/EIS–0350–S1 (Final CMRR–NF SEIS) in August 2011, and prior to issuing of this Amended Record of Decision (AROD), the National Nuclear Security Administration (NNSA) received seven comment documents related to the Final CMRR–NF SEIS. Having reviewed and fully considered the comments received in the comment documents, NNSA has determined that these comments do not provide information that affects the analysis in the Final CMRR–NF SEIS.

NNSA has further determined that many of the issues in these comment

documents are either similar, or in some cases identical to, comments that were submitted on the Draft CMRR–NF SEIS which were addressed by NNSA in the Final CMRR–NF SEIS comment response document (Volume II of the FSEIS). These include comments related to NNSA's implementation of the NEPA process; the requirements for a supplemental environmental impact statement; the purpose and need for action; the range of alternatives evaluated; radioactive contaminants in the environment; consideration of geologic and seismic risks at LANL in facility design; hazards from earthquakes and wildfires; electrical and water usage; management of radioactive materials; waste management; concerns related to environmental cleanup; decontamination, decommissioning, and demolition of the CMRR–NF; pit production and stockpile stewardship; arms reduction and nonproliferation treaty compliance; and facility costs and potential other uses of funds. NNSA has determined that is appropriate to respond further to the following comments extracted from these seven documents and summarized below:

*Comment 1:* The CMRR–NF SEIS Comment Response Document (CRD) (Volume 2) did not include all comments received.

*Response:* NNSA endeavored to include in the CRD all comments that it received in response to the Draft SEIS but inadvertently overlooked one letter which was a variant of Campaign Y. In the CRD, NNSA categorized letters with similar language as “campaigns” for the purpose of providing a consolidated response. The omitted letter mirrored the Campaign Y letter, and also included comments on four additional issues: (1) Alternative designation in the SEIS, (2) electricity use at LANL during construction of the CMRR–NF, (3) transuranic waste disposal, and (4) the ability of the preferred site to support the weight of the proposed CMRR–NF. After reviewing these additional comments, NNSA has concluded that they were addressed in NNSA's responses to other comments received during the public comment period (*see, e.g.,* responses to comments 108–3, 153–5, 204–37, and 57–1, respectively). Therefore, NNSA does not believe that this inadvertent oversight affects the analysis in the Final SEIS or this decision document. No other commentors contacted NNSA to communicate that their comments were not included in the CRD.

*Comment 2:* The Final CMRR–NF SEIS does not state which Construction Option NNSA prefers for the Modified CMRR–NF Alternative (Shallow

Excavation Option or Deep Excavation Option).

*Response:* NNSA prepared the final CMRR–NF SEIS document in accordance with CEQ and DOE NEPA regulations which require the identification of a preferred alternative in a Final EIS document, by identifying the Modified CMRR–NF Alternative as its preferred Alternative. (See Volume I, Chapter 2, Section 2.9.) NNSA analyzed and presented within the CMRR–NF SEIS the full range of potential direct, indirect, and cumulative impacts for each of the two options (Shallow Excavation and Deep Excavation) that NNSA identified for construction of the preferred alternative.

Both the Deep and the Shallow Excavation options contemplate construction of essentially the same building structure to provide the same functional capabilities. Thus both options require the same sets of safety controls and key equipment. Further, as the SEIS analysis indicates, once construction is complete and operations commence, both options are expected to result in similar offsite environmental consequences. The additional geotechnical and structural design calculations and more detailed engineering analysis NNSA will conduct pursuant to the decision announced in this AROD, prior to selecting a construction option for implementation, are not expected to identify any additional environmental impacts associated with either excavation option beyond those analyzed and presented in the final SEIS.

*Comment 3:* The reference, *Interim Report, Update of the Probabilistic Seismic Hazard Analysis and Development of CMRR Design Ground Motions Los Alamos National Laboratory, New Mexico*, was not included in the April 2011 draft document, and therefore the public did not have an opportunity to review and comment on it.

*Response:* As discussed in the Final CMRR–NF SEIS, the reference, a 2009 update to the 2007 probabilistic seismic hazard analysis (PSHA), was not publicly available at the time the Draft CMRR–NF SEIS was prepared; however, it has subsequently been made available to the public upon request and has been incorporated into the Final CMRR–NF SEIS. Based on the 2009 study, the TA–55 horizontal and vertical peak ground acceleration values for a 2,500-year return period showed a reduction in acceleration values compared to the 2007 study. However, the more conservative acceleration values from the 2007 study are currently being used

for the seismic design of the CMRR–NF structure, and the public did have an opportunity to review and comment on those values. Regardless of whether the 2007 or 2009 study values are used, NNSA plans to construct the CMRR–NF to meet the requirements of a performance category 3 structure as discussed in the Final CMRR–NF SEIS.

*Comment 4:* LANL should immediately install a network of weak motion seismographs to improve knowledge of kappa.

*Response:* LANL has both weak and strong motion seismic networks that continue to be updated and improved. Numerous earthquakes have been recorded by the weak motion network and are part of the earthquake catalog referenced in the probabilistic seismic hazard analysis (PSHA). Inference of a value for kappa requires an earthquake recording that is on-scale and has significant bandwidth as documented in the 2007 PSHA. Because of this requirement, the number of records that can be used for estimating a value for kappa is limited. LANL has and will continue to improve and upgrade the seismic network. As additional seismic data are collected by the LANL weak and strong motion seismic arrays, the value of kappa will be further refined and its uncertainty reduced. However, further refinement of the value of kappa is not essential for the purposes of the environmental impact analysis.

[FR Doc. 2011–26881 Filed 10–17–11; 8:45 am]

BILLING CODE 6450–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Federal Advisory Committee Act; Advisory Committee on Diversity for Communications in the Digital Age

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission’s (FCC) Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”). The

Committee’s mission is to provide recommendations to the Commission regarding policies and practices that will further enhance diversity in the telecommunications and related industries. In particular, the Committee will focus primarily on lowering barriers to entry for historically disadvantaged men and women, exploring ways in which to ensure universal access to and adoption of broadband, and creating an environment that enables employment of a diverse workforce within the telecommunications and related industries. The Committee will be charged with gathering the data and information necessary to formulate meaningful recommendations for these objectives.

**DATES:** Tuesday, December 6, 2011 at 2 p.m.

**ADDRESSES:** Federal Communications Commission, Room TW–C305 (Commission Meeting Room, TW–C305), 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Barbara Kreisman, 202–418–1605; [Barbara.Kreisman@FCC.gov](mailto:Barbara.Kreisman@FCC.gov).

**SUPPLEMENTARY INFORMATION:** This is the first meeting of the Diversity Federal Advisory Committee under its current charter. At this meeting the new committee structure and other organizational matters will be discussed. Further, the substantive direction and goals of this committee will also be considered.

Members of the general public may attend the meeting. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. The public may submit written comments before the meeting to: Barbara Kreisman, the FCC’s Designated Federal Officer for the Diversity Committee by e-mail: [Barbara.Kreisman@fcc.gov](mailto:Barbara.Kreisman@fcc.gov) or U.S. Postal Service Mail (Barbara Kreisman, Federal Communications Commission, Room 2–A665, 445 12th Street, SW., Washington, DC 20554).

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations

should be submitted via e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). Such requests should include a detailed description of the accommodation needed. In addition, please include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Additional information regarding the Diversity Committee can be found at <http://www.fcc.gov/DiversityFAC>.

Federal Communications Commission.

**Barbara A. Kreisman,**  
Chief, Video Division, Media Bureau.

[FR Doc. 2011–26818 Filed 10–17–11; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL TRADE COMMISSION

### Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodin Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED SEPTEMBER 1, 2011 THRU SEPTEMBER 30, 2011

09/01/2011

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# **Exhibit D**

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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v.

Case No. \_\_\_\_\_

UNITED STATES DEPARTMENT OF  
ENERGY; THE HONORABLE STEVEN  
CHU, SECRETARY, DEPARTMENT OF  
ENERGY; THE NATIONAL NUCLEAR  
SECURITY ADMINISTRATION; THE  
HONORABLE THOMAS P. D'AGOSTINO,  
ADMINISTRATOR,

Defendants.

**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF  
UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969**

**I.**

**PRELIMINARY STATEMENT**

1. This action arises under the National Environmental Policy Act of 1969, as amended ("NEPA"), 42 U.S.C.A. §§ 4321 et seq., NEPA regulations issued by the Council on Environmental Quality ("the CEQ Regulations"), 40 C.F.R. §§ 1500-08, and NEPA regulations issued by the Department of Energy ("DOE"), 10 C.F.R. § 1021. This action also arises under the Administrative Procedure Act, 5 U.S.C.A. §§ 701 et seq.

2. This action challenges Defendants' reliance on a 2011 Supplemental Environmental Impact Statement ("2011 SEIS" or "SEIS") and subsequent amended record of decision ("amended ROD") as a purported justification for Defendants' continuing and unabated

implementation of the 2010-11 Chemistry and Metallurgy Research Replacement (“2010-11 CMRR”) project at Los Alamos National Laboratory (“LANL”).

3. The purpose of the CMRR project is to increase LANL’s capability to conduct experimental and industrial processes involving large quantities of plutonium, primarily in support of nuclear warhead core (“pit”) manufacturing. Since 2004, the CMRR project has consisted of two main buildings, the CMRR Nuclear Facility (“CMRR-NF”) and a support facility called the CMRR Radiological Laboratory, Utility, and Office Building (“CMRR-RLUOB”), together with ancillary buildings, facilities, and utilities. The CMRR-NF would include a storage vault for up to six metric tons of plutonium. CMRR-NF would function in tandem with LANL’s existing main plutonium facility, PF-4, which is being substantially upgraded. All three facilities (CMRR-NF, CMRR-RLUOB, and PF-4) would be adjacent to one another in LANL’s Technical Area 55 (TA-55), connected by tunnels.

4. The CMRR project has been conceived, designed, funded by Congress, and analyzed under NEPA as a single project. Defendants initially prepared an environmental impact statement (“EIS”) under NEPA in 2003 for a CMRR (the “2003 CMRR EIS”) that would have been much simpler and less environmentally impactful than the current version. A Record of Decision (the “2004 CMRR ROD”) was issued in early 2004, containing Defendants’ decision to proceed with that 2003 project.

5. Between 2004 and 2010 the scale and scope of the CMRR-NF project increased dramatically. There are several reasons for these changes: DOE/NNSA’s original environmental analyses and assumptions in the 2003 CMRR EIS were critically deficient. Their estimates of material requirements were grossly in error. New design requirements were also discovered or

imposed. For example, DOE/NNSA determined that their estimate of seismic hazard was significantly too optimistic. DOE/NNSA discovered that the thick stratum of loose volcanic ash beneath the proposed site created seismic vulnerabilities. Safety standards, such as the requirement for a “safety class” ventilation system, posed new challenges. New mission flexibility requirements were added. The electricity and water requirements of the new building had been greatly underestimated. A new transmission line to Los Alamos may be needed, a major project in itself.

6. Because of the imperatives arising from these and other factors, all alternatives presented in the 2003 CMRR EIS have now been rejected by Defendants. The CMRR EIS of 2003 is obsolete and irrelevant.

7. Since 2004, DOE/NNSA have greatly expanded the scale, scope, cost, and geographic footprint of the CMRR-NF, adding new buildings, construction yards, parking, and other project elements. Cost estimates have increased by a factor of ten or more. These enlarged plans have also greatly lengthened the design and construction schedule, moving the projected completion date from 2009 to 2023.

8. At the same time, nuclear weapons policy has significantly changed since 2003, requiring DOE/NNSA to reconsider the purpose and need for CMRR-NF. The Reliable Replacement Warhead (“RRW”), once a core justification for CMRR-NF, has been canceled. By the early 2020’s when CMRR-NF might be completed, nearly the whole weapons stockpile will have been upgraded by existing means, without CMRR-NF. There is a scientific consensus that existing pits will last far longer than previously expected and that stockpile maintenance

methods, which do not use new pits, will be effective indefinitely. The Administration's 2010 Nuclear Posture Review declares the policy, in general, not to manufacture plutonium pits.

9. Cost estimates for the 2010-11 CMRR-NF have reached \$6 billion and are widely expected to rise further. Public officials now acknowledge the need to reassess whether CMRR-NF is truly needed, and, if so, when. Defendants, at the request of congressional committees and other authorities, are conducting studies of the proposed timing and cost of the CMRR-NF and alternative means of constructing it. The House of Representatives has voted to delay construction until a later fiscal year. The Government Accountability Office is currently reviewing the CMRR-NF project.

10. The massive scale, cost, and impacts of the 2010-11 CMRR-NF make it an entirely different proposal from that of 2003. Defendants have never analyzed the full range of reasonable alternatives to the 2010-11 CMRR-NF, with the impacts of those alternatives weighed against the contemporary calculation of the need for such a facility.

11. NEPA demands such an analysis. The fundamental purpose of NEPA is to require federal agencies to analyze the reasonable alternatives fully, and to choose from among those alternatives, *before* the agency commits to a specific project. NEPA analysis properly takes place early in the design process. (40 C.F.R. § 1501.2). NEPA requires the agency to make an informed decision about fundamentally different approaches to serving the agency's need, based on an analysis of "all reasonable alternatives" (40 C.F.R. § 1502.14(a)), even alternatives outside the agency's current mandate. (Council on Environmental Quality, "NEPA's Forty Most Asked Questions, at 2b). NEPA also requires Defendants to refrain from taking

action that has an adverse environmental impact or limits their choice of alternatives until they have completed NEPA compliance.

12. Plaintiff previously sued Defendants in 2010 in Civil Action No. 1:10-CV-0760-JH-ACT in this Court, asserting NEPA claims based upon Defendants' implementation of the 2010-11 CMRR-NF project without any NEPA analysis of that project and its reasonable alternatives. Defendants then announced that they would supplement the 2003 CMRR EIS with a 2011 SEIS. The Final SEIS was issued on August 30, 2011, and on October 18, 2011 Defendants issued the amended ROD, announcing their decision to construct the 2010-11 CMRR-NF.

13. The SEIS contains neither any reasonable alternatives, nor a no action alternative, nor a contemporary discussion of purpose and need. The supposed "no action" alternative in the SEIS is construction of the 2003 CMRR-NF, the alternative chosen in the 2004 CMRR ROD but long since abandoned as unworkable. Defendants state in the SEIS that none of the alternatives in the 2003 CMRR EIS is reasonable, but they fail to analyze any current-day realistic alternatives. They also state, contradictorily, that they rely upon the analysis in the 2003 CMRR EIS in choosing to construct the current, and very different, 2010-11 CMRR-NF. Crucially, the SEIS *followed*, rather than *preceded*, Defendants' decision to construct the 2010-11 CMRR-NF, contrary to the purpose of NEPA.

14. Thus, the agencies' work called for by NEPA remains to be done. DOE/NNSA must objectively evaluate the 2010-11 CMRR-NF and all reasonable alternatives before making a further irrevocable commitment of resources and further prejudicing the objective analysis that NEPA requires. The EIS must "[r]igorously explore[s] and objectively evaluate[s] all reasonable

alternatives” (40 C.F.R. § 1502.14) to the 2010-11 CMRR-NF. That EIS has not been written; clearly, the SEIS does not provide the required NEPA analysis.

15. Nevertheless, Defendants have shown an unrelenting determination to build the CMRR-NF, despite the ballooning costs and widening environmental impacts. They have made irrevocable commitments of resources to this massive program, before, during, and after the 2011 SEIS, disregarding the lack of current and applicable NEPA analysis.

16. Defendants have built the CMRR-RLUOB, comprising approximately 6-9% of the total CMRR project cost, and are outfitting it for use. Defendants plan to proceed with the 2010-11 CMRR-NF, which is expected to ultimately comprise 91-94% of the total CMRR project cost, of which roughly 10% has been spent so far. CMRR-NF construction is currently expected to begin in late 2011 or early 2012 and conclude in the early 2020s.

17. When Defendants announced that they were preparing a SEIS, this Court dismissed the Plaintiff’s previous case based upon doctrines of prudential mootness and ripeness, stating that, should the SEIS prove unsatisfactory, Plaintiff could sue again. Judge Herrera’s Memorandum Opinion and Order dated May 23, 2011, at 15, 22) (Case No. 1:10-CV-760-JH-Act, Dkt. No. 55).

18. The SEIS is totally unsatisfactory as supposed NEPA compliance. The SEIS contains no analysis of reasonable alternatives to the 2010-11 CMRR-NF. In the SEIS, that 2010-11 CMRR-NF is the *only* alternative that Defendants consider reasonable. This is clearly not NEPA compliance. The SEIS fails to satisfy basic NEPA requirements in numerous other ways, detailed herein.

19. The Study Group has never had the opportunity to challenge the lack of NEPA analysis of the 2010-11 CMRR-NF. Defendants have never made a NEPA analysis of that project and its reasonable alternatives. Their course of conduct falls far short of the public environmental review that NEPA requires of federal decisionmakers before they can commit significant federal resources. Consequently, Plaintiff commences this new action to seek enforcement of NEPA and NEPA regulations.

20. This Complaint seeks a declaratory judgment and mandatory injunction, requiring Defendants to comply with NEPA by preparing an EIS that compares environmental impacts of the 2010-11 CMRR-NF and reasonable alternatives to it, including the alternative of no action, *before*, and not after, the decision whether to construct one of the alternatives. This Complaint also seeks an injunction, directing Defendants to rescind their prior decision to construct CMRR-NF and prohibiting all further investment in the CMRR and its support facilities, including all detailed design, construction, and obligation of funds, until an EIS based on development of reasonable alternatives is prepared and an alternative is validly selected.

## II.

### JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to 28 U.S.C.A. § 1331 (federal question), 28 U.S.C.A. § 1361 (mandamus); and 28 U.S.C.A. § 1651 (all writs); and may issue a declaratory judgment and a preliminary and permanent injunction and further relief pursuant to 5 U.S.C.A. §§ 701 *et. seq.* (Administrative Procedure Act), 28 U.S.C.A. § 2201 (declaratory relief) and 28 U.S.C.A. § 2202 (injunctive relief). There is a present and actual

controversy between the parties. Venue is proper in this Court pursuant to 28 U.S.C.A. § 1391(e).

### III.

#### PARTIES

22. Plaintiff the Los Alamos Study Group (“the Study Group”) is a non-profit corporation organized under the laws of the State of New Mexico. The Study Group sues as a representative of its members. The purposes of the Study Group include protecting the environment in and around LANL from adverse impacts and educating the general public, federal and contractor management, members of Congress, and others on a range of interrelated policy issues, including Department of Energy (“DOE”) and National Nuclear Security Administration (“NNSA”) missions, programs, and infrastructure. The Study Group has approximately 2,691 members and supporters within a 50-mile radius of LANL, approximately 2,341 of whom live within a 30-mile radius of LANL. The Study Group and many of its members have been intimately involved in analyses and education regarding LANL plutonium infrastructure and programs since October 1989. Given their proximity to LANL and the CMRR, Study Group members are adversely affected and will be irreparably harmed and aggrieved by the environmental impacts of planning, constructing, and operating the CMRR-NF. Additionally, the Study Group and its members have no adequate remedy at law and must seek equitable relief to prevent the environmental consequences of Defendants' continuing efforts to plan, construct and operate the proposed 2010-11 CMRR-NF without preparing an applicable and adequate EIS before, not after, the decision to construct this or any alternative not previously analyzed under NEPA, an EIS that includes reasonable alternatives and an alternative of no

action, preceded by a NEPA scoping process and with sufficient detail to compare the environmental impacts of alternatives objectively.

23. The Study Group and its members have commented to NNSA and its predecessor, DOE Defense Programs, regarding the matters raised in this Complaint over the last two decades. The Study Group commented on the scope of the now-obsolete 2003 EIS and has discussed the Nuclear Facility issues with NNSA officials on numerous occasions. Study Group representatives have traveled numerous times to Washington, D.C. to meet with NNSA and other executive branch officials, as well as members of Congress, their staffs, and congressional research, auditing, and oversight agencies regarding issues raised in this Complaint. To the limit of the Study Group's resources and abilities, and within the limits of the information available to the Study Group and to its members, the Study Group has carefully followed and engaged with the federal government on CMRR issues. The Study Group has diligently pursued and exhausted administrative remedies available to it over a decade-long period specifically concerning the CMRR.

24. Defendant DOE is an executive branch department with jurisdiction and authority over LANL. DOE has a duty to comply with NEPA at its facilities, including LANL, where the 2010-11 CMRR-NF would be built.

25. Defendant the Honorable Steven Chu is the Secretary of the Department of Energy and is named as a Defendant in his official capacity.

26. Defendant NNSA is the agency within the DOE with direct jurisdiction and authority over all aspects of the proposed construction and operation of the CMRR-NF, including NEPA compliance.

27. Defendant the Honorable Thomas P. D'Agostino is the Administrator of the NNSA and is named as a Defendant in his official capacity.

#### IV.

#### **FACTUAL BACKGROUND**

##### **A. Origins of the CMRR Project**

28. The CMRR project was first announced in 1999. Congress provided conceptual planning funds in 2000. CMRR was first funded by Congress as a formal engineering and design project in 2002 and first funded as a construction line item in 2003.

29. On July 23, 2002, NNSA published a Notice of Intent ("NOI") to prepare an EIS for the CMRR project. The CMRR EIS was issued on November 14, 2003. In that EIS, all of the construction alternatives analyzed are basically similar. Each would construct facilities of the same type and size, differing only in maximum construction depth (50 ft. vs. 75 ft.) and in whether the capabilities are to be housed in two new buildings or in three, at either of two adjacent technical areas at LANL. The 2003 EIS reported that the "above-ground" design (defined as less than 50 ft. deep) had the greatest impacts.

30. A ROD was issued on February 12, 2004 ("2004 CMRR ROD"), 69 Fed. Reg. 6967. In the 2004 CMRR ROD, NNSA chose its preferred alternative, which included "above-ground" construction of two buildings, a CMRR-NF and a support facility, now called CMRR-RLUOB, neither of which would exceed 50 feet in depth.

31. In 2002 Defendant agencies ("DOE/NNSA") told Congress that the total cost of both CMRR buildings would be "\$350-500" million, not including administrative costs. In

2003, DOE/NNSA estimated the cost of both buildings at “\$600 million,” including administrative costs.

32. In early 2003, Defendants reported to Congress that both buildings comprising the CMRR would be completed by the end of calendar year 2010. In their 2003 CMRR EIS, Defendants assumed that construction would be completed even earlier, by the end of 2009.

#### **B. Extension of the Schedule for the CMRR-NF**

33. DOE/NNSA deferred implementation of the decision contained in the 2004 CMRR ROD to construct the CMRR-NF. In 2008 DOE/NNSA completed a LANL Site-Wide EIS (the “2008 SWEIS”), which imported by reference and without change the assumptions and findings of the 2003 CMRR EIS concerning the 2003 CMRR-NF. Also in 2008, DOE/NNSA completed the Complex Transformation Supplemental Programmatic EIS (“CTSPEIS”), which stated that since there had been no “footprint” changes in the CMRR since the 2003 EIS no reanalysis of impacts was necessary and none was planned. In a December 19, 2008 CTSPEIS ROD, DOE announced that it would proceed to construct the CMRR-NF. However, in May 2009, Defendants told Congress that any decision to proceed would depend on the outcome of a new Nuclear Posture Review (completed in April 2010) and other strategic decision making.

#### **C. Changes in Design Requirements**

34. In 2003 through 2010 the CMRR-NF underwent numerous changes in design. Defendants increased their security requirements, disadvantaging “above ground” (less than 50 feet deep) construction. Defendants adopted a “hotel concept,” requiring CMRR-NF to accommodate unstated future missions, using wide unsupported floor and roof spans. The Defense Nuclear Facilities Safety Board (“DNFSB”) showed the need to upgrade several safety

systems so they would function in event of a fire or earthquake, including part of the ventilation system.

**D. Seismic Issues; Defendants' Response**

35. In May 2007, DOE/NNSA published an updated Probabilistic Seismic Hazard Assessment for LANL; the overall seismic hazard "increased significantly" from that reported in the 2003 CMRR EIS. Design-basis accelerations roughly doubled, affecting every aspect of the structure and its equipment. Moreover, Defendants learned of the adverse engineering properties of a 50-foot-thick layer of poorly-consolidated volcanic ash beneath the site, which would amplify the seismic accelerations and may allow a building to slide laterally. These design issues were provisionally resolved, inter alia, by planning intensive remediation or replacement of the 50-foot stratum of unconsolidated volcanic ash. It subsequently proved impossible even to build the facility to 75 feet in depth without complete replacement of the earth to a depth of 130 feet, requiring an additional 250,000 cubic yards of concrete. A shallower construction option is now also being considered.

**E. The 2003 CMRR EIS Misstated the Scale of Construction Required**

36. The 2003 EIS greatly understates the materials required (concrete, steel, land, water, electricity, fuel, transportation, etc.) for construction of the CMRR-NF and the CMRR-RLUOB. The 2005 Performance Baseline for CMRR-RLUOB required more than five times as much concrete and nine times as much steel as had been claimed necessary in the 2003 CMRR EIS. Further, the estimated quantities of these key materials for CMRR-NF in the 2003 EIS were very similar to those for CMRR-RLUOB, even though CMRR-NF has always been the far larger building. Thus, by May 2005, the design process had shown that the scale of construction

for both CMRR buildings would be far greater than estimated in the 2003 CMRR EIS, indicating much greater environmental impacts and increased schedule and cost.

**F. Purpose and Need**

37. Since 2004, the purpose and need of the CMRR have become uncertain. Its primary mission is to increase LANL's plutonium pit production rate. But in 2008 Los Alamos National Security, LLC ("LANS"), the Management and Operating contractor at LANL, met a contract requirement for pit capacity of 80 pits per year. Moreover, in May 2010 NNSA stated that 60 pits per year could be produced at LANL's PF-4 Plutonium Facility by 2021, without CMRR-NF.

38. In November 2006, the JASON defense advisory group, at the request of Congress, articulated a new scientific consensus that most plutonium pits have credible lifetimes in excess of 100 years—longer than the CMRR-NF's useful life. (Pit Lifetime, JSR-06-335). This consensus, developed three years after the 2003 CMRR EIS, dramatically increased the range of reasonable alternatives to the CMRR-NF and eliminated its main purpose.

39. In May 2009, the Administration formally ended the Reliable Replacement Warhead ("RRW") program. Previously, pits for RRW were planned to be manufactured at LANL's TA-55, with several plutonium handling activities occurring in the CMRR-NF. This was the only large-scale pit production mission ever planned for TA-55, and none has been authorized since. DOE/NNSA acknowledged to Congress:

It is recognized that many of the prior [CMRR project] planning assumptions have changed....The decision about how far to proceed into final design [of the proposed Nuclear Facility] will be based on numerous ongoing technical reviews and other ancillary decisions NNSA management will be making during the period of

FY 2009 - 2010. A future decision to proceed with construction of the Nuclear Facility and associated equipment has been deferred pending the outcome of the current ongoing Nuclear Posture Review and other strategic decision making. (May 2009 Congressional Budget Request).

40. In September 2009, the JASON advisory group reported that the nuclear weapons stockpile could be maintained indefinitely without new pit production. (Lifetime Extension Program, JSR-09-334). DOE/NNSA ended stockpile pit production at the end of FY2011.

41. In the Nuclear Posture Review Report (April 2010), the Department of Defense (“DOD”) and DOE/NNSA established a policy giving “strong preference” to stockpile management without pit manufacturing, which would be allowed only, “if critical... goals could not otherwise be met, and [only] if specifically authorized by the President and approved by Congress.”

**G. The Configuration of the 2010-11 CMRR-NF**

42. The 2010-11 CMRR-NF project differs radically from the project analyzed in the 2003 CMRR EIS and 2004 CMRR ROD. Consequently, environmental impacts of the CMRR-NF have increased significantly from those in the 2003 EIS. In light of the massive changes, an analysis of reasonable alternatives, and the impacts of such alternatives, should have been undertaken by DOE/NNSA, but this has not been done. Examples of the changes include:

a. Increased overall acreage requirements for construction yards and offices, parking lots, concrete batch plants, utilities, security infrastructure, excavation spoil disposal, storm water retention basins, and road realignments. In 2003, 27 acres were expected to be committed to construction; now at least 108 - 147 acres would be needed under the 2010-11 CMRR-NF plan. In the 2003 plan an additional 77,000 cubic yards or so would need excavation;

while in the current plan from 236,000 to 545,000 additional cubic yards would be excavated, beyond the 175,000 cubic yards already excavated.

b. The locations directly affected by construction have greatly expanded. The 2003 EIS anticipated direct construction impacts in TA-48, TA-50 and TA-55. NNSA now expects direct construction impacts in TA-3, TA-5, TA-36, TA-46, TA-48, TA-50, TA-51, TA-52, TA-54, TA-55, TA-63, TA-64, and TA-72, i.e. much of LANL.

c. Concrete and soil grout requirements have greatly increased, from 3,194 cubic yards in the 2003 EIS to 236,000 to 400,000 cubic yards, a factor of 74 to 125.

d. The manufacture of the additional concrete generates significant additional greenhouse gas emissions, an impact not mentioned or analyzed in the 2003 CMRR EIS. Commonly-used analyses under applicable assumptions show that production and delivery of concrete and grout for the 2010-11 CMRR-NF will produce more than 100,000 metric tons of carbon dioxide, more than four times CEQ's proposed source threshold for EIS analysis and roughly 74 - 125 times the emissions expected from the construction of the 2003 project from this component alone.

e. The manufacture of this much additional concrete will result in significant aggregate mining impacts, which were not analyzed in the 2003 CMRR EIS.

f. Steel requirements have greatly increased from an estimated 267 tons in the 2003 EIS to 18,560 tons for the CMRR-NF today.

g. The gross square footage of the CMRR-NF had been projected to be 200,000 square feet. Current plans call for a building of 408,000 sq. ft.

h. Expected peak employment during 2010-11 CMRR-NF construction has increased, according to NNSA, from an estimated 300 in the 2003 EIS to an estimated 790 today. According to NNSA, this increment in transient workforce could affect local housing markets, possibly requiring temporary worker housing.

i. The anticipated construction period during which these construction impacts will occur has been lengthened from 34 months in the 2003 EIS to 108 months today.

j. Increasing the depth of excavation from “less than 50” feet to 58 or 130 feet has increased the total excavation spoils to be disposed of from roughly 252,000 cubic yards to 411,000 to 720,000 cubic yards. Transport, storage, disposal, and reclamation of this waste will have significant environmental, aesthetic, and cultural impacts.

k. Defendants expect to use a major part of these excavation spoils to cap LANL hazardous and radioactive waste disposal areas, MDAs C and G, which contain roughly 14 million cubic feet of diverse radioactive and chemical wastes, including transuranic wastes. Decisions to: (a) leave these wastes in place; and (b) cover these sites with volcanic ash removed from the 2010-11 CMRR-NF excavation, were not mentioned or analyzed in the 2003 CMRR EIS. The much greater quantities of excavation spoils now foreseen prejudice these connected cleanup and capping decisions – major federal actions with significant environmental impacts – even more than in 2003.

l. The 2010-11 CMRR-NF would not begin operations until at least 2023. The 2003 CMRR EIS assumed this would occur more than a decade sooner. The CMRR-NF project therefore now assumes continued operation of the existing CMR for a decade longer than described in the 2003 CMRR EIS, or other compensatory interim actions.

m. Construction of the 2010-11 CMRR-NF now requires construction of a craft worker facility, office and support trailers, as well as personnel security and training facilities, which were not part of the project analyzed in the 2003 CMRR EIS.

n. The 2010-11 CMRR-NF construction now requires an electrical substation, as well as installation of overhead and/or underground power lines which were not part of the project analyzed in the 2003 CMRR EIS.

o. The 2010-11 CMRR-NF construction now requires traffic modifications, including the realignment of Pajarito Road, construction of a new one-half-mile road, turning lanes, intersections and other traffic flow measures, as well as the construction and use of 18 acres of additional car and bus parking areas in four technical areas. These impacts and actions were not analyzed in the 2003 CMRR EIS.

p. The 2010-11 CMRR-NF construction now requires installation and use of up to two additional concrete batch plants (for a total of three), which were not part of the project analyzed in the 2003 CMRR EIS.

q. The 2010-11 CMRR-NF construction now requires construction of a warehouse, which was not part of the project analyzed in the 2003 CMRR EIS.

r. The 2010-11 CMRR-NF construction now requires construction equipment and building materials storage areas, which were not part of the project analyzed in the 2003 CMRR EIS.

s. The 2010-11 CMRR-NF construction now requires 19.1 acres of excavation spoils storage areas in three technical areas and 2.5 acres for five stormwater detention ponds, which were not part of the project analyzed in the 2003 CMRR EIS. The 2010-

11 CMRR-NF construction now requires construction of an Office Complex in TA-48, which was not part of the project analyzed in the 2003 CMRR EIS. The 2010-11 CMRR-NF construction now requires laydown and support areas in six technical areas, which were not part of the project analyzed in the 2003 CMRR EIS.

t. The 2010-11 CMRR-NF is twice as large in terms of gross square footage and would contain roughly 74 times as much structural concrete as the CMRR-NF described in the 2003 CMRR EIS, as well as larger quantities of ducts, piping, partitions, and other internal components. Final disposition of the CMRR-NF, which would become contaminated during use with plutonium and other toxic substances, was not analyzed in the 2003 CMRR EIS and upon information and belief, would be significantly more difficult and expensive to achieve for the 2010-11 CMRR-NF.

u. The 2010-11 CMRR-NF will dramatically increase trucking of concrete components and excavation spoils, which were not analyzed in the 2003 CMRR EIS. Between 29,000 to 38,000 heavy truck trips to and from Los Alamos County, and within LANL, would be required for concrete components and for storage and disposal of excavation spoils alone, not including all other deliveries and services. Trucking impacts will extend to three to five counties, depending on sources, routes, and quantities.

43. The impacts summarized above will be exacerbated by the cumulative impacts of other Pajarito Construction Corridor construction activities planned for the area at more or less the same time, which were not included in the 2003 CMRR EIS.

44. Annual operations of the 2003 CMRR-RLUOB and CMRR-NF were expected to consume about 10.4 million gallons of water and 19,300 megawatt hours of electricity. The

2010-11 CMRR-NF are now estimated to require about 16 million gallons of water, 161,000 megawatt hours of electricity, and 58 million cubic feet of natural gas. (SEIS at S-31). The electrical load created by the 2010-11 CMRR-NF cannot be serviced without the addition of a third transmission line or re-conductoring two existing transmission lines to Los Alamos County. (*id.*)

45. The 2010-11 CMRR-NF would be by far the largest single federal or state capital project in the history of New Mexico. The CMRR-NF has experienced an approximately ten-fold cost escalation since 2003 and is now expected to cost \$4 to \$6 billion to build, if not more, more than ten times as much as CMRR-RLUOB, which is currently estimated to cost \$363 million. By comparison, inflation-corrected costs for three of the state's largest public construction projects, Elephant Butte Dam, Cochiti Dam, and the "Big I" highway interchange project in Albuquerque, are approximately \$231 million, \$358 million, and \$401 million, respectively. Of all government-funded projects undertaken in New Mexico, only the interstate highway system, built from many smaller separately-contracted projects, is of comparable cost.

46. A \$6 billion CMRR-NF is comparable in cost to the inflation-corrected costs of building and operating all of LANL for approximately its first decade and a half (1943-1957), including all facilities and activities of the Manhattan Project in New Mexico, the post-World War II CMR building, and all other post-WW II projects and facilities, including the design and development of the first deployed thermonuclear weapons, through approximately 1957.

**K. Administration Commitment to CMRR-NF**

47. The Vice President, in a letter dated September 15, 2010 to the Senate Foreign Relations Committee, declared the Administration's "unequivocal support" for the CMRR-NF.

He spoke of the President's "commitment to an immediate start to his modernization initiatives," including the CMRR-NF: "I write to assure the Committee of the Administration's strong support for this program." Further:

This Administration has expressed its unequivocal commitment to recapitalizing and modernizing the nuclear enterprise, and seeks to work with Congress on building a bipartisan consensus in support of this vital project.

48. A White House Fact Sheet dated November 17, 2010 expressly states its commitment to CMRR-NF. It promised to

Increase funding by \$4.1 billion increase over the next five years relative to the plan provided to Congress in May—including an additional \$315 million for the Uranium Processing Facility (Tennessee) and the Chemistry and Metallurgy Research Replacement (CMRR) facility (New Mexico);

and:

The Administration is committed to requesting the funds necessary to ensuring completion of these facilities. . .

49. NNSA management has said that "The Modified CMRR-NF is a unique facility, central to LANL's mission and critical to the national security of the United States." Deputy Administrator Cook swears to the "importance of the CMRR Project to our national defense." Administrator D'Agostino said on October 28, 2010 that "it is critical that we complete the design and construction of key facilities," including CMRR-NF.

**M. Predetermination of the Outcome of NEPA Reviews**

50. Based on their public statements and presentations, DOE/NNSA internally decided in 2009 or 2010 to construct the 2010-11 CMRR-NF at LANL TA-55 and therefore

predetermined the outcome of any NEPA analysis. Since then, DOE/NNSA have been making irrevocable commitments of resources to the construction of that version of the CMRR-NF. Such commitments include construction and equipping of the CMRR-RLUOB, contractual commitments to construct CMRR-NF, and continued detailed design and other preparations for construction of the CMRR-NF. No valid consideration of NEPA reasonable alternatives has taken place, or could take place, while DOE/NNSA continue to pursue their predetermined course.

51. The process that gave rise to the 2011 SEIS was fatally defective, since DOE/NNSA were predisposed to pursue and complete the 2010-11 CMRR-NF project to the exclusion of any other alternatives. That predisposition, and that fatally defective process, continue to this date. DOE/NNSA are committed to the objective of constructing the 2010-11 CMRR-NF as an organizational goal.

52. The history of DOE/NNSA's wholesale commitment to the CMRR-NF project casts great doubt upon their ability to prepare an EIS that evaluates the reasonable alternatives, and to weigh the alternatives objectively and make a choice objectively and in good faith, as NEPA requires. While that commitment persists, they are unable to take the "clear-eyed hard look" at the environmental consequences of the proposal and its alternatives that is required by law,<sup>1</sup> and NEPA is rendered a meaningless formality. To enable DOE/NNSA to comply in good faith with NEPA, the Court should give preliminary relief so that NEPA can function in this situation as Congress intended.

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<sup>1</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000).

**N. Unlawful Interim Action: Construction and Equipping of the CMRR-RLUOB**

53. DOE/NNSA have constructed the CMRR-RLUOB and have been equipping it prior to the issuance of the SEIS. Construction and equipping of the CMRR-RLUOB is an unlawful interim action, undertaken without NEPA compliance as to the CMRR project, of which CMRR-RLUOB is an important part. Such action constitutes a major investment in the CMRR project and will prejudice any attempt objectively to consider alternatives to that project.

54. The CMRR-RLUOB was planned and analyzed along with the CMRR-NF as part of the unitary CMRR project in the 2003 CMRR EIS, and in the 2004 CMRR ROD DOE/NNSA decided upon its construction simultaneously with the decision to build the CMRR-NF. The CMRR-RLUOB is described by DOE as “the first building of the two-building CMRR Facility” (2011 CMRR-NF ROD, 76 Fed. Reg. 64344), the “First Replacement Component” of the “multi-phased, two-building project,” and the CMRR-NF is the “Second Replacement Component.” The CMRR-RLUOB is “phase one of the planned Chemistry and Metallurgy Research Replacement (CMRR) at Technical area 55.” It is also called “Phase A.” Several elements of the CMRR-RLUOB serve the CMRR-NF. CMRR-RLUOB contains:

- a. a radiological lab section,
- b. a central utility building of 20,998 sq. ft., serving both CMRR buildings,
- c. offices to accommodate 350 people in both CMRR buildings.
- d. a personnel entrance control facility serves both CMRR buildings;
- e. a training center with laboratories serving all of TA-55;
- f. a parking lot for both CMRR buildings;

- g. fuel oil storage and backup electrical generation for both CMRR buildings;
- h. a facility incident command center for CMRR-NF and other nearby plutonium facilities;
- i. an operations center for both CMRR buildings.

55. NNSA broke ground for the CMRR-RLUOB in January 2006 and proceeded with construction. In May 2007 LANL's new seismic analysis made clear that seismic challenges would require redesign of the CMRR-NF. Work continued on the CMRR-RLUOB without interruption. Final design of equipment was authorized in 2007. The 2010 Congressional Budget Request stated that DOE/NNSA would proceed with final design and installation of special facility equipment for the CMRR-RLUOB. Capital appropriations for the CMRR-RLUOB would continue through FY 2013. Approximately \$329 million has been appropriated for its construction. In October 2010 about three years of equipment manufacture and installation remained, for which an additional \$108 million was sought. The CMRR-RLUOB is expected to be operational in 2013.

56. Thus, NNSA proceeded to build and equip CMRR-RLUOB, despite knowing from 2007, at the very latest, that seismic and other challenges meant that the CMRR-NF would not be built as stated in the 2004 CMRR ROD, and that the 2003 CMRR EIS did not describe the environmental impacts of any possible version of the CMRR-NF. But by constructing CMRR-RLUOB, at a cost to date of \$329 million, NNSA invested deeply in construction of the entire CMRR project, making it far more likely that NNSA would construct the CMRR-NF.

57. In the 2011 SEIS, discussed below, DOE/NNSA found it persuasive in evaluating alternative sites that “RLUOB (which contains a training facility, incident control center, and radiological laboratories, as well as offices for personnel who would work in the CMRR-NF) has already been constructed at TA-55.” (at S-23).

58. Defendants have been constructing the Nuclear Materials Safety and Security Upgrades (“NMSSUP”), a security structure, segments of which are designed to serve the 2011 CMRR-NF. Such construction likewise makes it more likely that Defendants will continue and construct the 2011 CMRR-NF.

59. In addition, the footprint of the CMRR-NF has been excavated in part, removing approximately 175,000 cubic yards, a large parking lot for both CMRR buildings and part of a tunnel to CMRR-NF has been built, and temporary field offices for CMRR-NF engineering staff have been built.

**O. DOE/NNSA Contractual Commitments**

60. NNSA has an annually-updated contract with LANS. LANS is the prime contractor for the CMRR project. For FY 2011 NNSA contracted with LANS for the issuance and execution of initial construction contracts for the CMRR-NF and continued finalizing of its design:

Measure 18.3 Delivery of CMRR and NMSSUP II

Expectation Statement:

LANS will accelerate and/or complete key Nuclear Materials Safety and Security Upgrades (NMSSUP) Phase II and CMRR milestones as well as integration and planning of the Pajarito Road corridor:

Completion Target:

This measure has been achieved when the Contractor has by September 30, 2011:

....

**B. CMRR**

Actions necessary to issue and execute construction contracts for Infrastructure Packages in FY 2011 are achieved on schedule.

Nuclear Facility basemat and structural design achieve planned maturity and schedule goals.

Demonstrate acceleration of the RLUOB REI scheduled completion from FY 2013 to FY 2012.

61. NNSA directed LANS to complete CMRR-NF construction by 2020 and to begin operation by 2022. The FY 2010 agreement calls upon LANS to develop integrated planning to support Pajarito Corridor construction:

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 to produce planning tools for:

- laydown, staging and warehousing.
- concrete batch plant strategy.
- parking and workforce transportation.
- security strategy.
- scope or schedule conflicts.
- master integrated schedule.
- multi-year staffing plan.
- FY 2011 and FY 2012 budgets.

If LANS meets each measure, it will receive an additional \$300,000.

**P. Final design of CMRR-NF**

62. DOE/NNSA presentations from 2010 show detailed final design being carried out of the Infrastructure Package, Pajarito Road Relocation, and Basemat Package prior to the issuance of the 2011 SEIS. The presentations show that construction will immediately follow design. Further, they state: “Design deliverables include all products necessary to construct.”

Steve Fong, CMRR Project Manager, has stated that the infrastructure package is ready for design-build contracting. The CMRR-NF project is divided into five phases or “chunks,” so that early chunks can get started before later ones have completed the design phase.

63. NNSA’s appropriations and obligations for final design of the CMRR-NF were \$39.4 million in FY 2008, \$92.2 million in FY 2009, and \$57 million in FY 2010. By the end of FY 2011, Defendant NNSA had been appropriated \$458 million for the CMRR-NF.

64. DOE regulations state that, while DOE is preparing a required EIS,

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. 10 C.F.R. § 1021.211.

65. A specific DOE regulation requires completion of NEPA review before preparation of detailed design:

(b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (e.g., normally in advance of, and for use in reaching, a decision to proceed with detailed design) . . . 10 C.F.R. § 1021.210(b)(emphasis supplied).

66. In accordance with this regulation, DOE NEPA guidance cautions against carrying out detailed design before completing NEPA compliance:

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

DOE/NNSA have, nevertheless continued with detailed design of the CMRR-NF, thereby limiting the choice of alternatives in any subsequent NEPA analysis.

**Q. DOE/NNSA continuing commitment to CMRR-NF**

67. DOE/NNSA have not wavered from their commitment to construct and operate the 2010-11 CMRR-NF, despite the massive and material changes in the CMRR-NF project, and the lack of any NEPA analysis of the 2010-11 CMRR-NF and its reasonable alternatives. The April 15, 2011 FY 2012 Stockpile Stewardship and Management Plan (“SSMP”), issued by DOE long before completion of the 2011 SEIS and subsequent amended ROD, confirms that DOE and NNSA are committed to construct the CMRR-NF at LANL TA-55 according to their current plans, regardless of their NEPA noncompliance. In the SSMP:

a. DOE states that its capacity to produce pits will be a capability of up to 80 pit per year and that, to ensure this future capacity, it must “Construct CMRR-NF.” (Table 2 at 35).

b. DOE reaffirms its commitment to construction of CMRR-NF:

The Administration is committed to fully funding the construction of the Uranium Processing Facility (UPF) and the Chemistry and Metallurgy Research Replacement-Nuclear Facility (CMRR-NF), and doing so in a manner that does not redirect funding from the core mission of managing the stockpile and sustaining the science, technology, and engineering foundation. The resources for CMRR and UPF in the FY 2012 budget will increase funding over the FY 2012 number in the 2011 FYNSP.” (at 38)(See also 62, to the same effect)

c. DOE firmly predicts completion of CMRR-NF:

Based on the current pace of design, the NNSA expects construction of the nuclear facility buildings to be completed by 2020 for both projects and anticipates operational functionality on or before 2023 for CMRR-NF and 2024 for UPF. (at 39)

- d. DOE's "Defense Programs Integrated Priority List—Capital Projects"

(Fig. 6 at 40-41) carries the CMRR-NF at the very top of the list.

- e. Discussing future budgets, DOE again confirms its commitment to

CMRR-NF:

Readiness in Technical Base and Facilities (RTBF)—UPF and CMRR-NF Construction. These two nuclear capabilities are required to ensure the United States can maintain a safe, secure, and reliable arsenal over the long term. . . . The capability for processing uranium and plutonium research are critical functions required through the 21st century regardless of the size of the stockpile. The 2010 NPR Report concluded that the United States needed to build these facilities; the Administration remains committed to their construction. (at 63)

- f. DOE states that the CMRR-NF project "will be funded" with a cost range of \$3.7 to \$5.9 billion. (at 65)

- g. DOE summarizes the status of the CMRR-NF project:

Construction is scheduled to complete by 2020; the facility is scheduled to be fully operational by 2023. The updated cost range is estimated (based on 45 percent design maturity) at \$3.7 billion to \$5.86 billion. (at 147)

## **R. 2011 CMRR-NF SEIS**

68. On September 2, 2011, EPA published notice of the availability of the 2011 SEIS (76 Fed. Reg. 54768). The SEIS stated, as had the Draft SEIS, that DOE/NNSA would not consider whether to build the CMRR-NF:

Because NNSA decided in the 2004 ROD to build the CMRR . . . this SEIS is not intended to revisit that decision.” (SEIS at v-vi).

69. The 2011 SEIS analyzes three so-called alternatives: (1) the construction of the CMRR-NF pursuant to the 2004 CMRR ROD, termed the “no action alternative,” (2) the construction of the 2010-11 CMRR-NF, and (3) continued use of the existing CMR Building, with minor upgrades and repairs. (id.). However, DOE/NNSA eliminated the 2004 design from consideration:

Based on new information learned since 2004, the 2004 CMRR-NF would not meet the standards for a Performance Category 3 (PC-3) structure as required to safely conduct the full suite of NNSA AC and MC mission work. Therefore, the 2004 CMRR-NF would not be constructed. (at S-8).

The patent infeasibility of this design was the reason it was so greatly changed, and the *raison d’être* of the SEIS itself.

70. DOE/NNSA also stated that continued use of the CMR without upgrades would not meet their needs, thereby eliminating that supposed alternative:

This alternative does not completely satisfy NNSA’s stated purpose and need to carry out AC and MC operations at a level to satisfy the entire range of DOE and NNSA mission support functions. However, this alternative is analyzed in the CMRR-NF SEIS as a prudent measure in light of possible future fiscal constraints. (at S-23).

The infeasibility and lack of safety of this alternative (together with the cost of CMR upgrades, then considered high) was the reason for the CMRR project in the first place.

71. Since DOE/NNSA had eliminated from consideration alternative (1), to construct the 2004 CMRR-NF, and alternative (3), to continue use of the CMR, they left only alternative (2), to construct the 2010-11 CMRR-NF. DOE/NNSA listed some possible other alternatives

with cursory explanations of why they were rejected prior to analysis. (at S-23 through S-26). All alternatives to the preferred action were rejected for environmental (*i.e.*, NEPA) analysis.

72. In fact, numerous alternatives to the 2010-11 CMRR-NF, not considered in the SEIS, are reasonable and should be analyzed for environmental impact, cost, and efficiencies, especially since the CMRR budget has increased by a factor of approximately ten. Alternatives include upgrading parts of the existing CMR; constructing one or more smaller CMRR-NF buildings by eliminating elements such as a large vault, below-ground construction, or construction over a weak substrate; use of the Plutonium Facility, PF-4, for certain operations; postponement of decision pending better assessment of mission need; use of existing facilities at Savannah River Site, Idaho National Laboratory, or Lawrence Livermore National Laboratory; or relocating specific functions within the pit manufacturing process. Defendants' NEPA documents fail to analyze these alternatives.

73. DOE/NNSA issued the 2011 amended ROD, reflecting their determination to construct the Preferred Alternative, construction of the 2010-11 CMRR-NF. (76 Fed. Reg. 54344)(Oct. 18, 2011).

74. The SEIS is the only final NEPA document issued by DOE/NNSA that discusses the 2010-11 CMRR-NF. The analysis in the SEIS contains several major deficiencies:

a. The discussion of alternatives is a critical part of an EIS, since the purpose of an EIS is to inform decisionmakers of the impacts and available alternatives. (40 C.F.R. §1502.1). Regulations require an EIS to explore "all reasonable alternatives." (40 C.F.R. § 1502.14). However, there is no discussion or analysis of reasonable alternatives to the 2010-11 CMRR-NF.

b. NEPA regulations require projects that constitute a single course of action to be evaluated in a single EIS. (40 CFR § 1502.4). The SEIS does not discuss or analyze the other planned and ongoing projects that form part of a single course of action to modernize nuclear weapons production at LANL.

c. An EIS must contain a description of the affected environment for each alternative. (40 C.F.R. § 1502.15). This discussion is omitted from the SEIS, because there is no analysis of reasonable alternatives.

d. Regulations (40 C.F.R. § 1502.16) call for discussion of the environmental consequences of all the alternatives considered. This includes short-term versus long-term impacts, irreversible or irretrievable commitments of resources, direct and indirect impacts, impacts of alternatives and mitigation measures, possible conflicts with existing land use plans, energy requirements, resource requirements, conservation potential, urban quality impacts, and mitigation means. Since DOE/NNSA have not introduced any alternatives, the SEIS does not meet this NEPA requirement.

e. Under 40 C.F.R. § 1502.23, DOE/NNSA must attach any cost-benefit analysis relevant to the choice among alternatives. Since DOE/NNSA do not discuss any alternatives in the SEIS, no such analyses are attached.

75. NEPA regulations state that the ROD must identify all alternatives considered by the agency and identify and discuss all factors weighed by the agency in considering alternatives and explain how they entered into its decision. (40 C.F.R. § 1505.2). Since DOE/NNSA have narrowed the range of alternatives to one, the 2011 amended ROD avoids such detailed consideration of alternatives.

76. The 2011 amended ROD includes no commitments to mitigation measures even as to the selected alternative, the 2010-11 CMRR-NF. Under applicable regulations, a ROD must “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and if not, why they were not.” The 2011 amended ROD states only that a Mitigation Action Plan will be issued in the future and, thus, fails to meet this requirement. (76 Fed. Reg. at 64347).

**S. Connected actions**

77. Defendants are pursuing several connected actions which are geographically proximate, functionally related, roughly contemporaneous, and which have cumulative impacts. These connected and cumulative actions include the following construction projects:

- a. The Nuclear Materials Safeguards and Security Upgrade Project (NMSSUP);
- b. The TA-55 Revitalization Project (TRP);
- c. The Radioactive Liquid Waste Treatment Facility (RLWTF);
- d. The TRU Waste Facility (TRU);
- e. Construction of an adequate electrical supply for the CMRR project and

Los Alamos County as a whole, which apparently must now far exceed the capacity predicted in the SWEIS just three years ago.

78. Defendants have characterized the first four of these projects as “major projects” which are “near-concurrent” parts of a coordinated “Pajarito Construction Corridor” project nexus. These projects are components of Defendants’ program to modernize and increase nuclear weapons production capacity, and they are functionally related and interdependent with

one another and with the CMRR-NF. None of these five was analyzed in the 2003 CMRR EIS or the 2011 SEIS, or otherwise in the context of decisions regarding alternatives to the CMRR-NF.

79. In addition, Defendants are pursuing the following actions, which will have impacts that are cumulative with the impacts of the CMRR-NF and the other projects listed above:

- a. Material Disposal Area C Closure;
- b. Material Disposal Area G Closure;
- c. The Waste Disposition Project.

80. Defendants have described the above programs and projects, including the proposed Nuclear Facility, as subprojects within a “Pajarito Construction Corridor.” On other occasions Defendants have described the same or similar projects, including the CMRR-NF, as subprojects within “Integrated Nuclear Planning.” On yet other occasions Defendants have described the same or similar projects as elements within a “Consolidated Plutonium Center” and a “Consolidated Nuclear Production Center.” The close affinity of these projects underscores the necessity of including the impacts all these proposed facilities as connected or cumulative actions within the “full and fair discussion of significant environmental impacts” required by 40 CFR § 1502.1.

## **CLAIMS FOR RELIEF**

### **CLAIM I**

#### **Failure To Analyze Alternatives In An EIS**

81. Plaintiff incorporates by reference the allegations in paragraphs 1 through 80 with the same force and effect as if fully set forth.

82. Defendants' decision contained in the February 12, 2004 CMRR ROD to construct and operate the CMRR project constitutes a decision to undertake major federal action "significantly affecting the quality of the human environment" within the meaning of 42 U.S.C.A. §§ 4332(2)(C), 40 C.F.R. § 1508.3, 40 C.F.R. § 1508.14, 40 C.F.R. § 1508.18, and 40 C.F.R. § 1508.27.

83. Defendants' reported decision contained in the October 1, 2011 CMRR-NF amended ROD, to construct and operate the 2010-11 CMRR-NF reports a prior internal decision to undertake a major federal action "significantly affecting the quality of the human environment" within the meaning of 42 U.S.C.A. §§ 4332(2)(C), 40 C.F.R. § 1508.3, 40 C.F.R. § 1508.14, 40 C.F.R. § 1508.18, and 40 C.F.R. § 1508.27.

84. Defendants are implementing a 2010-11 CMRR-NF proposal which differs substantially from, and has significantly much greater environmental impacts than, any alternative analyzed in the 2003 CMRR EIS. In short, the 2003 CMRR EIS is inapplicable to the current project and obsolete.

85. Defendants have been aware, since early 2005, of the strong likelihood of substantial changes in the proposed federal action to build and operate the CMRR project that are relevant to environmental concerns, the significant new circumstances relevant to environmental concerns, and the significant and expansive changes in "the scope of the proposed action...since the original EIS was prepared." Defendants are also aware of the "importance, size, [and]

complexity of the proposal,” all which warrant preparation of a new EIS. (40 C.F.R. § 1502.9(c); 10 C.F.R. § 1021.314).

86. The substantial and fundamental changes proposed for the 2010-11 CMRR-NF mandate, in substance, an entirely new EIS, preceded by the required scoping process. DOE has described the circumstances which warrant a new EIS and a new scoping process, as opposed to a SEIS, in the Preamble to DOE’s NEPA regulations (April 24, 1992, at 57 Fed. Reg. 15122) and in its NEPA guidance (Revised “Frequently Asked Questions on the Department of Energy’s (DOE’s) National Environmental Policy Act (NEPA) Regulations,” August 1998, at 10b). As stated by DOE:

As explained in the Preamble to the NEPA final rulemaking published on April 24, 1992 (57 FR 15122), DOE believes that there is no need to repeat the public scoping process if the scope of the proposed action has not changed since the original EIS was prepared. Such an approach is consistent with 40 CFR 1502.9, which does not require public scoping for a supplemental EIS. However, as stated in the Preamble, when the scope of the proposed action has changed, or the importance, size, or complexity of the proposal warrant, DOE may elect to have a scoping process.

87. It is incontrovertible that “the scope of the proposed action has ...changed since the original EIS was prepared” and that “the importance, size, or complexity of the proposal warrant” re-examination of the scope of the EIS, including re-examination of reasonable alternatives.

88. However, Defendants have never analyzed their substantially changed 2010-11 CMRR-NF project, with its additional project elements, its greatly expanded environmental impacts, and its newly enlarged range of reasonable alternatives, in any EIS. Defendants have

been and are continuing to implement a novel CMRR-NF project alternative which differs substantially from, and has significantly different environmental impacts than, any alternative analyzed in any EIS, including the 2003 CMRR EIS.

89. Pursuant to 42 U.S.C.A. § 4332(2)(C) and the implementing CEQ regulations, Defendants must prepare an EIS “before decisions are made and before actions are taken,” and “at the earliest possible time.” 40 C.F.R. §§ 1500.1, 1501.2. An EIS is required to “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.” 40 C.F.R. § 1502.14. The regulations state:

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. 40 C.F.R. § 1502.14.

90. Further, Defendants are prohibited from taking any action that has an adverse environmental impact, limits reasonable alternatives to the proposed action, or prejudices agency decisions in the absence of an applicable EIS and subsequent final decision (40 C.F.R. § 1502.2(f), 40 C.F.R. § 1506.1).

91. Despite these regulatory requirements, Defendants have failed to prepare an EIS that analyzes the 2010-11CMRR-NF and all reasonable alternatives, considering all in detail, including alternatives outside agency jurisdiction. The 2003 CMRR EIS does not consider the

2010-11 CMRR-NF and does not consider any currently-reasonable alternatives to it. The 2011 SEIS does not consider any alternatives to the 2010-11 CMRR-NF, listing only the 2003 CMRR-NF and the existing CMR as alternatives but expressly stating that they are not acceptable. Numerous reasonable alternatives exist to the 2010-11 CMRR-NF, but they have not been analyzed as required by NEPA and NEPA regulations. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

## CLAIM II

### **Failure To Include Current Information About "Purpose And Need"**

92. Plaintiff incorporates by reference the allegations in paragraphs 1 through 91 with the same force and effect as if fully set forth.

93. NEPA regulations require that the EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. The SEIS states that "[t]he purpose and need for NNSA action has not changed since the issuance of the 2003 CMRR EIS." (at 1-11). That statement and the discussion of purpose and need in the SEIS are misleading and inaccurate in that, in the years since the 2003 CMRR EIS, Defendants have received additional information concerning the anticipated life of plutonium pits and stockpile requirements and additional policy directions concerning pit manufacture that materially change the purpose and need for a facility such as CMRR-NF. The SEIS is incomplete and inaccurate for failure to include such information. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

### CLAIM III

#### Failure To Include “No Action” Alternative

94. Plaintiff incorporates by reference the allegations in paragraphs 1 through 93 with the same force and effect as if fully set forth.

95. Defendants’ reported decision contained in the October 1, 2011 CMRR-NF amended ROD, to construct and operate the 2010-11 CMRR-NF reports a prior internal decision to undertake a major federal action “significantly affecting the quality of the human environment” within the meaning of 42 U.S.C.A. §§ 4332(2)(C), 40 C.F.R. § 1508.3, 40 C.F.R. § 1508.14, 40 C.F.R. § 1508.18, and 40 C.F.R. § 1508.27.

96. Pursuant to 42 U.S.C.A. § 4332(2)(C) and the implementing CEQ regulations, Defendants must prepare an EIS “before decisions are made and before actions are taken,” and “at the earliest possible time.” 40 C.F.R. §§ 1500.1, 1501.2. An EIS is required to “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.” 40 C.F.R. § 1502.14. The regulations state: “In this section agencies shall . . . (d) Include the alternative of no action.” 40 C.F.R. § 1502.14.

97. In violation of this regulation, Defendants have failed to include the alternative of no action in the SEIS that analyzes the 2010-11 CMRR-NF. Moreover, the alternative of no action is a reasonable alternative, because analyses conducted by Defendant agencies show that there is no current need for pit production capacity in excess of that now available. Defendants’ failure to include the no-action alternative is arbitrary and capricious and a violation of NEPA.



## CLAIM IV

### **Predetermination Of Outcome Of NEPA Analyses**

98. Plaintiff incorporates by reference the allegations in paragraphs 1 through 97 with the same force and effect as if fully set forth.

99. By their statements and actions it is apparent that Defendants have predetermined the outcome of agency NEPA analyses before those analyses have been conducted. At present, despite the issuance of the SEIS, Defendants have not prepared an EIS concerning the 2010-11 CMRR-NF that complies with NEPA and its regulations. Nevertheless, Defendants have already decided that NEPA analyses would lead them to decide to construct that facility.

100. Defendants' decision is shown, among other things, by their repeated statements of the necessity to construct CMRR-NF, their recurrent announcements during 2009, 2010, and 2011 of their decision and plans to construct the 2010-11 CMRR-NF and of the specific scheduled steps that will be involved in such construction, their contracting with LANS and others to carry out construction, their construction and equipping of the CMRR-RLUOB, their continuation of detailed design of the 2010-11 CMRR-NF, and the explicit statements by high-level Administration figures of their commitment to build the 2010-11 CMRR-NF in New Mexico.

101. Defendants have made irrevocable commitments of resources to the project to build the 2010-11 CMRR-NF by (a) constructing CMRR-RLUOB, with common parking lot and partial tunnel to CMRR-NF, which constitutes the first phase of the CMRR project and is designed to serve as a support facility for the planned CMRR-NF, (b) contracting with LANS to enter into construction contracts to build the 2010-11 CMRR-NF, and (c) pressing forward with

detailed design of the 2010-11 CMRR-NF, which is the final design stage needed before construction begins. On information and belief, having issued the amended ROD based on the SEIS, Defendants now plan and intend to carry out construction of the 2010-11 CMRR-NF.

102. Defendants' predetermination violates 40 C.F.R. § 1505.1, which requires agencies to adopt procedures "[r]equiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions." Predetermination, in which agency decisions precede preparation of NEPA documents, renders the NEPA process irrelevant and invalid. Defendants' action based on predetermination is arbitrary and capricious and a violation of NEPA.

## **CLAIM V**

### **Failure To Issue A Record Of Decision**

103. Plaintiff incorporates by reference the allegations in paragraphs 1 through 102 with the same force and effect as if fully set forth.

104. Defendants decided to build the 2010-11 CMRR-NF sometime in 2009 or 2010. Under NEPA regulations, an agency is required to "prepare a concise public record of decision." 40 C.F.R. § 1505.2. The record of decision is required to "[s]tate what the decision was" and to "[i]dentify all alternatives considered by the agency in reaching its decision." (*id.*). No public record of the 2009-2010 agency decision was made or issued, nor did Defendants state what the decision was or identify the alternatives considered, in violation of NEPA and 40 C.F.R. § 1505.2. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

## CLAIM VI

### Failure To Select From Among Alternatives Analyzed In EIS

105. Plaintiff incorporates by reference the allegations in paragraphs 1 through 104 with the same force and effect as if fully set forth.

106. In 2009 or 2010, Defendants decided to construct the 2010-11 CMRR-NF, which is an entirely different project from the 2003 CMRR-NF alternative selected in the 2004 CMRR ROD. NEPA regulations require that the alternative selected by the agency must come from among those analyzed in NEPA documentation. Thus, 40 C.F.R. § 1505.1 mandates the adoption of agency procedures:

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents . . .

Further, 40 C.F.R. § 1502.2(e) requires that:

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

107. Moreover, Defendants must publish a decision which selects an alternative “encompassed by the range of alternatives discussed in the relevant environmental documents and . . . described in the environmental impact statement” in a ROD (40 C.F.R. § 1505.1(e); 10 C.F.R. § 1021.210(d); 40 C.F.R. § 1505.2). Defendants ultimately chose to attempt to implement an alternative not included within the range of alternatives analyzed in the 2003 CMRR EIS, let alone one selected or even mentioned in the 2004 CMRR ROD.

108. However, the 2010-11 CMRR-NF is not analyzed in the 2003 CMRR EIS. The selection of an alternative that was not analyzed in that EIS is a NEPA violation. Defendants' selection of that alternative in 2009 or 2010 is arbitrary and capricious and a violation of NEPA.

## CLAIM VII

### **Failure To Integrate NEPA Analyses With Decisionmaking**

109. Plaintiff incorporates by reference the allegations in paragraph 1 through 108 with the same force and effect as if fully set forth.

110. NEPA requires that environmental analyses be completed prior to agency decision-making, so that the NEPA process and its resulting documents can influence federal decisions. Consequently, agencies must “include in every recommendation or report on proposals for...major federal actions...a detailed [EIS]...” (42 U.S.C.A. § 4332(C)). The purpose of NEPA’s implementing regulations is to foster “excellent action” and “better decisions.” For this reason NEPA requires that EISs be prepared and available prior to federal decisions and actions (40 C.F.R. § 1500.1). EISs assess “proposed agency actions, rather than justifying decisions already made.” (40 C.F.R. § 1502.2(g)). The primary purpose of an EIS is to serve as an action-forcing device to insure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the Federal Government.

111. Consequently, federal agencies are required to integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively. (40 C.F.R. § 1500.2). NEPA’s implementing regulations also require EISs to be explicitly linked with management and cost analyses prior to agency decision-making. Cost-benefit analyses and any related “important qualitative considerations” which are “relevant and important” to decisions must be indicated, included by reference, or appended to EISs. (40 C.F.R. § 1502.23).

112. Defendants' decision-making regarding the nature and scope of the CMRR-NF, and Defendants' choices significantly affecting expected environmental impacts and costs, did not stop with the 2004 ROD. These processes continued, leading to selection of alternatives that lie far outside the range of choices and impacts discussed in the 2003 EIS, in violation of NEPA and applicable regulations. (40 C.F.R. § 1502.2(e), 40 C.F.R. § 1505.1(e); 10 C.F.R. § 1021.210 (d). Upon information and belief, the scope, scale, and impacts of the CMRR-NF are subjects of current decision-making, uninformed by a NEPA scoping process and without any applicable EIS. Defendants' continued failure to integrate NEPA with their decision-making processes is an arbitrary and capricious abuse of agency discretion.

### **CLAIM VIII**

#### **Interim Actions Prejudicial To NEPA Process**

113. Plaintiff incorporates by reference the allegations in paragraphs 1 through 112 with the same force and effect as if fully set forth.

114. The objective "hard look" required by NEPA processes can be thwarted by interim actions that influence the agency decisionmaking process. Therefore, Defendants are prohibited from taking any interim action that prejudices NEPA decisionmaking:

- (a) Until an agency issues a record of decision as provided in § 1505.2 . . . no action concerning the project shall be taken which would:
  - (1) Have an adverse environmental impact; or
  - (2) Limit the choice of reasonable alternatives. 40 C.F.R. § 1506.1.

In addition, regulations state:

- (f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision. 40 C.F.R. § 1502.2(f).

115. Further, a specific DOE regulation requires completion of NEPA review before preparation of detailed design (10 C.F.R. § 1021.210(b)), and DOE NEPA guidance cautions against carrying out detailed design before completing NEPA compliance.

116. Notwithstanding these regulatory requirements, Defendants have taken several interim actions that are prejudicial to the final decision whether to construct the 2010-11 CMRR-NF. These include:

- a. construction and equipment of the CMRR-RLUOB, which is a \$329 million support facility for the CMRR-NF;
- b. construction of a large parking lot, sized to support the future CMRR-NF;
- c. construction of part of the tunnel leading from CMRR-RLUOB to the future CMRR-NF;
- d. construction of those portions of the NMSSUP II project that are designed to protect a future CMRR-NF;
- e. detailed design of the 2010-11 CMRR-NF, which is continuing and proceeds in violation of specific DOE NEPA regulations.
- f. contracting with LANS for the completion of CMRR-NF construction contracts; and
- g. contracting with LANS for assistance, with the irreversible federal commitment of hundreds of millions of dollars, in coordinating a complex construction effort.

117. These interim actions, taken before the completion of NEPA analyses, constitute investments by Defendants in the completion of the 2010-11 CMRR-NF, create a schedule advantage for that CMRR-NF compared to reasonable alternatives, lend momentum to

Defendants' commitment to construct that CMRR-NF, wrongfully influence Defendants' decisionmaking process, violate NEPA regulations and constitute NEPA violations. Defendants' taking of these interim actions is arbitrary and capricious and a violation of NEPA.

## CLAIM IX

### Denial Of Review And Comment Opportunities

118. Plaintiff incorporates by reference the allegations in paragraphs 1 through 117 with the same force and effect as if fully set forth.

119. NEPA's notice and comment provisions are an intrinsic aspect of NEPA's method of environmental protection. Accordingly, regulations state that "federal agencies shall to the fullest extent possible... (d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment" (40 C.F.R. § 1500.2(d)) and that EISs "shall provide full and fair discussion of significant environmental impacts and shall 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)

120. To enable meaningful comment and participation, regulations provide detailed requirements for agency, tribal, and public involvement. Agencies shall "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" (40 C.F.R. § 1506.6(a)), beginning with a Notice of Intent published in the Federal Register and proceeding to the scoping process (40 C.F.R. § 1501.7) and to the preparation of the EIS itself (40 C.F.R. § 1503.1).

121. In contravention of these requirements, Defendants provided no notice or comment process involving the public, relevant agencies, and tribes concerning the 2010-11

CMRR-NF, reasonable alternatives to it, or the likely impacts of that project and its alternatives. Defendants reached their decision to construct the 2010-11 CMRR-NF in 2009 or 2010, before any public processes involving the SEIS. The public processes involving the SEIS were fundamentally inadequate, since the scope of the SEIS omitted any consideration of reasonable alternatives to the 2010-11 CMRR-NF. Defendants' artificially limited public process is arbitrary and capricious and a violation of NEPA.

## **CLAIM X**

### **Failure To Discuss Impacts Of Connected Actions**

122. Plaintiff incorporates the allegations in paragraphs 1 through 121 with the same force and effect as if fully set forth.

123. Under NEPA, federal actions may be single and unconnected, or they may be “connected,” “cumulative,” or “similar.” Connected actions are those which automatically trigger other actions which may require an EIS, cannot or will not proceed without other actions, or are interdependent parts of a larger action and depend on the larger action for their justification. (40 C.F.R. § 1508.25(a)(1)). “Cumulative actions” are those which, with other proposed action(s), have cumulatively significant impacts and should therefore be discussed in the same EIS. (40 C.F.R. § 1508.25(a)(2)).

124. Defendants must analyze in an EIS the full suite of impacts of the 2010-11 CMRR-NF and its subprojects and elements, the connected actions with which the proposed CMRR-NF is functionally interdependent, and the actions which will have cumulative impacts. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

## CLAIM XI

### **The 2011 SEIS Relies Upon An Analysis And A Decision That Has Been Rejected**

125. Plaintiff incorporates by reference the allegations in paragraphs 1 through 124 with the same force and effect as if fully set forth.

126. The 2011 SEIS states that the Defendants will not “revisit” the decision to maintain CMR capabilities at LANL, because that decision was made in the 2004 CMRR ROD and in the 2008 Complex Transformation SPEIS ROD. (SEIS at 1-15, 1-16). In fact, the 2004 CMRR ROD and the 2008 CTSPEIS ROD decided not merely to “maintain CMR capabilities” at LANL but to construct a specific facility—the 2003 version of the CMRR-NF—at LANL. See 69 Fed. Reg. 6967, 6972; 73 Fed. Reg. 77644. The No Action alternative in the SEIS is to construct the 2003 CMRR-NF, and Defendants state in the SEIS:

Under the No Action Alternative, NNSA would implement the decisions made in the 2004 CMRR EIS ROD, the Complex Transformation SPEIS ROD, and the 2008 LANL SWEIS RODs.” (SEIS at 1-12)

127. The SEIS proceeds to describe the 2003 CMRR-NF. (id.). However, the SEIS states that, after further investigation, the decision to build the 2003 CMRR-NF has been rejected:

As it was envisioned to be constructed in the CMRR EIS, the 2004 CMRR-NF could not satisfy current facility seismic and nuclear safety requirements. Therefore, the 2004 CMRR-NF would not be able to safely function at a level sufficient to fully satisfy DOE and NNSA mission support needs, and thus would not fully meet DOE’s stated purpose and need for taking action. The 2004 CMRR-NF would not be constructed. (SEIS at 1-12).

128. Moreover, key data in the 2003 CMRR EIS was clearly in error as to the requirements for principal materials, such as concrete and steel, required for construction of the CMRR project, as then envisioned. Such data were important to the determination of the environmental impacts of the project discussed in the 2003 CMRR EIS. Therefore, the analyses in the 2003 CMRR EIS could not be relied upon for any relevant purposes.

129. With the analyses and decision contained in the 2004 CMRR ROD and the 2008 CTSPEIS ROD being clearly unreliable, and now being rejected, Defendants are in no position to premise their 2011 SEIS and amended ROD upon those rejected RODs.

130. Defendants seek to portray the sequence of NEPA analyses as though they were following a “tiering” process, in which a programmatic EIS and ROD are followed by a site-specific EIS and ROD. (40 C.F.R. § 1502.20). But tiering requires that the previous EIS and ROD be valid and in force. Here, Defendants have rejected the analyses and decisions concerning CMRR-NF that are contained in the previous RODs. Therefore, Defendants cannot premise their 2011 SEIS upon such RODs. By doing so, Defendants have violated NEPA by failing, *inter alia*, to analyze the proposed 2010-11 CMRR-NF and all reasonable alternatives, failing to examine the direct and indirect impacts of all such alternatives, and failing to identify mitigation methods for all such alternatives. Defendants' action in basing their SEIS upon RODs that Defendants have rejected is arbitrary and capricious and a violation of NEPA.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court:

A. Issue a preliminary and permanent injunction, directing Defendants to halt all further investment in and contractual obligations for the CMRR-NF, including but not limited to

any portion of final design or construction of any project phase, portion or element, until Defendants have fully complied with NEPA's EIS requirements, including scoping, on the 2010-11 CMRR-NF and its alternatives in full compliance with NEPA and its implementing regulations;

B. Issue a declaratory judgment declaring that Defendants have violated NEPA by:

1. failing to prepare an applicable EIS for the 2010-11 CMRR-NF, including failing to consider reasonable alternatives to the project overall, its design concept, and its construction strategy;

2. failing to include current information about purpose and need in the 2011 SEIS;

3. failing to include the "no action" alternative in the 2011 SEIS;

4. predetermining the outcome of NEPA analyses concerning the CMRR-NF;

5. failing to issue a ROD stating the 2009-10 decision to build the 2010-11 CMRR-NF;

6. failing to select a CMRR-NF alternative from among the alternatives analyzed in the 2003 EIS;

7. failing to integrate NEPA analyses with agency decisionmaking concerning the CMRR-NF;

8. taking interim actions prejudicial to the NEPA process concerning the CMRR-NF;

9. denying notice and comment opportunities to the Study Group, citizens, and the State of New Mexico, tribes, local governments, and other agencies;

10. failing to analyze connected and cumulative actions and cumulative impacts in any EIS pertaining to the 2010-11 CMRR-NF;

11. relying in the 2011 SEIS and amended ROD upon CMRR-NF analyses that had been rejected.

C. Issue a declaratory judgment declaring that Defendants have violated the Administrative Procedure Act by attempting to implement a project alternative not chosen in any ROD.

D. Issue a mandatory injunction requiring Defendants to comply with all provisions of NEPA;

E. Issue a mandatory injunction requiring Defendants to:

1. prepare a new and applicable EIS for the 2010-11 CMRR-NF, beginning with the scoping process and following all provisions of NEPA and its implementing CEQ and DOE regulations;

2. conduct a de novo EIS preceded by an open scoping process, one aim of which is to delineate connected actions and cumulative impacts meriting inclusion and analysis;

3. take no further actions which may prejudice federal decisions to be made with respect to the 2010-11 CMRR-NF pending the completion of a new EIS, preceded by the required scoping process and followed by issuance of a new ROD;

4. (1) withdraw their 2004 CMRR ROD that determined to build CMRR-NF at LANL TA-55, (2) withdraw DOE/NNSA "Critical Decision 1," which records their decision

to build CMRR-NF at LANL TA-55, (3) suspend any expenditures on the CMRR-NF, including expenditures for detailed design of the 2010-11 CMRR-NF, completion of CMRR-RLUOB, and equipping of CMRR-RLUOB, (4) carry out a preparatory analysis of the purpose and need of the CMRR-NF, and (5) conduct business case analyses of all reasonable alternatives, to provide basic information for a new EIS.

F. Allow Plaintiff to recover the costs of this action, including attorney's fees, expert witness fees, and other expenses, pursuant to the Equal Access to Justice Act, 28 U.S.C.A. § 2412; and

G. Grant such other and further relief as the Court deems just and proper.

HINKLE HENSLEY, SHANOR &  
MARTIN, L.L.P.

*/s/ Thomas M. Hnasko*

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Dulcinea Z. Hanuschak  
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and

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Santa Fe, NM 87507  
(505) 983-1800

# **Exhibit E**

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

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**THE LOS ALAMOS STUDY  
GROUP,**

**Plaintiff,**

**v.**

**UNITED STATES DEPARTMENT  
OF ENERGY, et al.,**

**Federal Defendants.**

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

**DECLARATION OF DONALD L. COOK**

I, Donald L. Cook, Ph.D., pursuant to Title 28, United States Code, Section 1746, declare:

1. I am the Deputy Administrator for Defense Programs at the National Nuclear Security Administration (“NNSA”), a semi-autonomous agency within the Department of Energy (“DOE”). I have held this position since June 2010, when I was confirmed by the United States Senate. As Deputy Administrator, I am responsible for managing the U.S. nuclear security enterprise of laboratories and manufacturing facilities. Prior to my Senate confirmation, I served as Managing Director and Chief Executive Officer of

the Atomic Weapons Establishment in the United Kingdom from 2006 to 2009. From 1977 to 2005, I worked at Sandia National Laboratories, in Albuquerque, New Mexico, in Pulsed Power Sciences, Microtechnologies, Infrastructure, and Security. I am a graduate of the University of Michigan, and obtained my Ph.D. from the Massachusetts Institute of Technology. I am a Fellow of the American Association for the Advancement of Science and the Institute of Physics, and I am a member of the American Physical Society and the American Nuclear Society.

2. I oversee the proposed Chemistry and Metallurgy Research Replacement Project (“CMRR Project”), which is the subject of this litigation. This declaration provides information on the role of NNSA, the importance of the CMRR Project to our national defense, and the breadth of environmental analysis NNSA has performed and will perform to evaluate the potential environmental impacts of the proposed CMRR Project. The information contained herein is based on my personal knowledge and information provided to me during the performance of my official duties.

**Background on the Proposed CMRR Project**

3. NNSA was established by Congress in 2000 as a semi-autonomous agency within the Department of Energy. NNSA is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. NNSA performs vital national security work by ensuring that the nuclear weapons in the U.S. stockpile are safe, secure, and reliable.
  
4. In the mid-1990s, Congress passed the National Defense Authorization Act, which implemented Presidential Decision Directive 15 instructing DOE "to establish a stewardship program to ensure the preservation of the core intellectual and technical competence of the U.S. in nuclear weapons." In response to this direction from the President and Congress, DOE developed the Stockpile Stewardship and Management Program to provide a single, integrated technical program for maintaining the continued safety and reliability of the nuclear weapons stockpile. The activities undertaken at DOE's Los Alamos National Laboratory ("LANL") in Los Alamos, New Mexico – a laboratory administered by NNSA – are essential to this mission.

5. One of LANL's most important facilities is the Chemistry and Metallurgy Research ("CMR") Building. The CMR Building has unique capabilities for performing special nuclear material analytical chemistry, materials characterization, and actinide research and development. These capabilities support a number of critical national security missions, including nuclear nonproliferation programs; the manufacturing, development, and surveillance of pits (the fissile cores of nuclear warheads); life-extension programs; dismantlement efforts; waste management; material recycle and recovery; and research.
  
6. The CMR Building, a Hazard Category 2 nuclear facility (a facility with significant nuclear material and nuclear operations with the potential for significant onsite consequences), is almost 60 years old. Many of its structures, systems, and components are aged, outmoded, and deteriorated. In 1999, a seismic fault trace was discovered beneath two wings of the CMR Building, raising some concerns about its structural integrity. Over the long term, NNSA cannot continue to operate the assigned LANL mission-critical CMR support capabilities in the existing CMR Building at an acceptable

level of risk to worker safety and health.

7. Since 1999, NNSA has taken steps to minimize the worker health and safety risks associated with continued operations at the CMR Building. NNSA has limited CMR operations to the minimum set of activities that support core mission requirements or that leverage CMR capabilities. It has reduced the radioactive and combustible materials inventory and the operational footprint. Programmatic operations have ceased in three of the six laboratory wings, and new technical safety requirements are currently being implemented that reduce the radioactive material-at-risk allowed in the building. During the next few years, certain functions, such as sample management, will be relocated to other facilities within LANL to further reduce the material-at-risk in the CMR Building. Through all of these actions, LANL is striving to reduce the worker health and safety risks of operating CMR while continuing to meet national security commitments.
  
8. To ensure that NNSA can fulfill its mission-critical capabilities for the next 50 years in a safe, secure, and environmentally sound manner, DOE proposed in the late 1990s to develop a new, long-term facility where current CMR

activities could be carried out without the worker health and safety risks associated with operating the present CMR Building. This effort became known as the CMRR Project. As part of the proposed CMRR Project, a new nuclear facility (“CMRR-NF”) would be constructed, allowing CMR capabilities to be replaced and relocated.

### **Status of the NEPA Determination Process**

9. DOE has undertaken extensive environmental review of the proposed CMRR Project pursuant to the National Environmental Policy Act (“NEPA”). On July 23, 2002, NNSA published a Notice of Intent to prepare the CMRR Environmental Impact Statement (“EIS”) and invited public comment on the CMRR EIS proposal. NNSA also hosted two public scoping meetings on the proposed CMRR Project in August of 2002. After analyzing the potential environmental impacts and considering public comments, NNSA issued the Final EIS for the proposed CMRR Project in November 2003 (“2003 EIS”). In the EIS, DOE analyzed the potential impacts of four distinct alternatives, together with four construction options for each of the alternatives involving new construction.

10. NNSA published its Record of Decision (“ROD”) on February 12, 2004 (“2004 ROD”) announcing that the new 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 functions building, now referred to as the Radiological Laboratory Utility Office Building (“RLUOB”).
  
11. According to the original design analyzed in the 2003 EIS, the proposed CMRR-NF was to have a footprint of 300 by 275 feet, with one story below ground and one story above ground. Excavation for the building would go no deeper than 50 feet, and construction was expected to last 34 months.
  
12. Since 2004, new developments have arisen that required changes to the CMRR-NF design. Specifically, a site-wide analysis of the geophysical structures that underlay the area occupied by LANL was prepared. In light of this new geologic information regarding seismic conditions at the site, and more detailed information on the various support functions, actions, and

infrastructure needed for construction, changes were made to the proposed design of the CMRR-NF. In addition, design modifications have been made to ensure the facility implements updated DOE nuclear safety basis 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.

13. These changes from the original proposed design relate to structural aspects of the building, as opposed to the mission or purpose. The current design for the laboratory consists of an enlarged footprint, a deeper foundation, thicker walls, ceilings, and floors, and additional infrastructure. The current planned footprint is 342 by 304 feet, with three levels below ground and one-and-a-half levels above ground. Two concrete batch plants and approximately 560 tons of structural steel will be needed for construction, and an additional 75 feet of excavation will be required to meet seismic design requirements. Based on an enhanced understanding of the geology, current design practices will require excavation of the building footprint to an average depth of 125 feet. The resulting hole will be backfilled up to 60 feet with a lean, low-

slump concrete to stabilize the soil and support additional facility mass. All excavated soil and rock material from the CMRR-NF site will be transported to storage areas within LANL and ultimately be reused in various construction and landscaping projects. Construction of the CMRR-NF will take longer and cost more than the proposed design analyzed in the 2003 EIS.

14. Despite these design changes, the purpose and need for the CMRR Project have not changed, nor has the scope of operations to be carried out in the proposed CMRR-NF. The quantity of special nuclear material that could be handled and stored in the CMRR-NF would remain constant at six metric tons. The laboratory space where key mission operations would be performed in the facility is 22,500 square feet, which is significantly reduced from what was contemplated prior to the design modification. The design changes proposed for the CMRR-NF are primarily a function of seismic and other safety concerns and are not dictated by programmatic changes.
  
15. On July 1, 2010, Plaintiff's counsel sent a letter to DOE Secretary Dr. Steven Chu and NNSA Administrator Thomas P. D'Agostino requesting that DOE halt any and all CMRR-NF design activities, make no further contractual

obligations, and seek no further funding until a new EIS was prepared based on the updated CMRR-NF design. On July 30, 2010, I responded to Plaintiff's counsel in a letter and stated NNSA's intention to prepare a Supplement Analysis pursuant to 10 C.F.R. 1021.314(c)(2) to assist NNSA in determining whether the 2003 EIS should be supplemented, a new environmental impact statement should be prepared, or no further NEPA documentation was required.

16. On September 21, 2010, I determined for prudential reasons to pursue the preparation of a Supplemental Environmental Impact Statement ("SEIS") to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF (See Exhibit 1). A Notice of Intent to prepare an SEIS appears in the October 1, 2010 issue of the Federal Register (See Exhibit 2).
  
17. NNSA will conduct a public scoping process as part of the preparation of the SEIS. The scoping process will involve two public scoping meetings to assist NNSA in identifying potential impacts, alternatives, and mitigation strategies that should be analyzed in the SEIS. Other federal agencies,

Native American tribes, agencies of the State of New Mexico, and the general public are on notice of our intention to prepare an SEIS and will have an opportunity to participate in establishing the scope of the environmental analysis. In addition, NNSA will make a draft of the SEIS available to the public for a 45-day comment period. During this period, interested members of the public and stakeholders will have an opportunity to comment on the Draft SEIS, and all comments received will be considered in the preparation of the Final SEIS.

18. The Final SEIS will help me and other decision makers at DOE determine how best to proceed.

#### **Status of the Proposed CMRR Project**

19. To date, approximately \$210 million has been expended on the proposed CMRR-NF design. This accounts for six years of building design and analysis. Currently, 283 personnel (including LANL staff and contractors) are employed on the proposed CMRR-NF Project.

20. NNSA is still evaluating aspects of the relative sizing and layout of the proposed CMRR-NF, and the overall project design is presently less than 50 percent complete.
  
21. No CMRR-NF construction is underway, nor will any occur as long as the SEIS is being prepared. If one were to visit the proposed CMRR-NF site today, one would see a partially excavated slope, slightly larger than the footprint of the proposed facility, and small diameter bore holes. The slope and bore holes were excavated in 2006 solely for the purpose of geological examination. The samples from this excavation revealed the seismic concerns that prompted the amended CMRR-NF design. The area was later used as construction laydown space for the RLUOB – the administrative office and support functions building adjacent to the proposed CMRR-NF. The size of the excavation is consistent with the CMRR Project selected in the 2004 ROD, and no excavation or construction is planned during Fiscal Year 2011.
  
22. Construction of the RLUOB is complete, and building outfitting is currently underway. Occupancy will occur at the end of next year, with radiological

operations scheduled to begin in 2013.

23. Once the SEIS process is completed, if NNSA decides to proceed with construction of the proposed CMRR-NF, the building would become operational in 2022.

### **Importance of Continuing the CMRR Design Process**

24. Compliance with Plaintiff's request to "halt any and all design activities, make no further contractual obligations, and seek no further funding" for the proposed CMRR Project would involve firing most, if not all, of the 283 LANL and contract staff employed on the CMRR-NF Project in a time of economic hardship.
25. Continuing the design process on its current track allows NNSA to advance its national security mission to manage the nation's nuclear weapons and further nuclear nonproliferation efforts. Between October 2010 and June 2011, the expected SEIS period, the overall design is expected to advance by only about 15 percent. The design activities during this period will enhance

our understanding of the requirements for the project and will save a substantial amount of time and taxpayer money in the event that construction ultimately goes forward. NNSA will not undertake any excavation or grading activities until the SEIS process is completed.

26. I swear under the penalty of perjury that the foregoing is true and correct.

Dated this 4th day of October, 2010 in Washington, D.C.

A handwritten signature in black ink, appearing to read "Don Cook", written over a horizontal line.

DONALD L. COOK  
Deputy Administrator for Defense Programs

## **Exhibit 1 to the Declaration of Dr. Donald L. Cook**



Department of Energy  
National Nuclear Security Administration  
Washington, DC 20585



September 21, 2010

MEMORANDUM FOR DISTRIBUTION

FROM: DONALD L. COOK  
DEPUTY ADMINISTRATOR  
FOR DEFENSE PROGRAMS

SUBJECT: Supplemental Environmental Impact Statement Determination for  
the Chemistry and Metallurgy Research Building Replacement  
Nuclear Facility

Pursuant to the National Environmental Policy Act of 1969, as amended (NEPA), the National Nuclear Security Administration (NNSA) has determined to prepare a Supplemental Environmental Impact Statement (SEIS) for the proposed Chemistry and Metallurgy Research Building Replacement Nuclear Facility, (CMRR-NF). Mr. John A. Tegtmeier, Program Integration Team, AMNSM, at LASO will serve as the Document Manager for the CMRR-NF SEIS.

The Council on Environmental Quality's implementing regulations for NEPA (40 CFR Part 1502.9[c] [1] and [2]) and DOE's NEPA implementing regulations (10 CFR 1021.314) require the preparation of a supplement to an EIS when there are substantial changes to a proposal or when there are significant new circumstances or information relevant to environmental concerns. DOE may also prepare a supplemental EIS at any time to further the purposes of NEPA. In this instance, for example, new information about the geologic environment at Los Alamos has become available and there have been changes proposed to the CMRR-NF project since the Final Environmental Impact Statement for the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico, 2003 CMRR EIS (DOE/EIS-0350) was completed and the 2004 Record of Decision was issued. In furtherance of NEPA, NNSA has decided to prepare a supplemental environmental impact statement to analyze the potential environmental impacts associated with the construction and operation of the CMRR-NF. The process of preparing the SEIS will include public participation to establish the scope of the issues to be addressed in the analysis.

Please direct any questions regarding this determination to Mary E. Martin, NNSA NEPA Compliance Officer, at (202) 586-9438.



DISTRIBUTION:

C. Borgstrom, GC/HQ  
M. Martin, NA-50  
M. Thompson, NA-10  
M. Urie, NNSA GC  
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K. Smith, LASO  
H. Le-Doux, LASO  
J. Tegtmeier, LASO  
S. DeRoma, LASO  
G. Rael, LASO

## **Exhibit 2 to the Declaration of Dr. Donald L. Cook**

## DEPARTMENT OF ENERGY

### Bonneville Power Administration

#### Availability of the Bonneville Purchasing Instructions (BPI) and Bonneville Financial Assistance Instructions (BFAI)

**AGENCY:** Bonneville Power Administration (BPA), DOE.

**ACTION:** Notice of document availability.

**SUMMARY:** Copies of the Bonneville Purchasing Instructions (BPI), which contain the policy and establish the procedures that BPA uses in the solicitation, award, and administration of its purchases of goods and services, including construction, are available in printed form for \$30, or without charge at the following Internet address: <http://www.bpa.gov/corporate/business/bpi>. Copies of the Bonneville Financial Assistance Instructions (BFAI), which contain the policy and establish the procedures that BPA uses in the solicitation, award, and administration of financial assistance instruments (principally grants and cooperative agreements), are available in printed form for \$15 each, or available without charge at the following Internet address: <http://www.bpa.gov/corporate/business/bfai>.

**ADDRESSES:** Unbound copies of the BPI or BFAI may be obtained by sending a check for the proper amount to the Head of the Contracting Activity, Routing DGP-7, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208-3621.

**FOR FURTHER INFORMATION CONTACT:** Manager, Communications, 1-800-622-4519.

**SUPPLEMENTARY INFORMATION:** BPA was established in 1937 as a Federal Power Marketing Agency in the Pacific Northwest. BPA operations are financed from power revenues rather than annual appropriations. BPA's purchasing operations are conducted under 16 U.S.C. 832 *et seq.* and related statutes. Pursuant to these special authorities, the BPI is promulgated as a statement of purchasing policy and as a body of interpretative regulations governing the conduct of BPA purchasing activities. It is significantly different from the Federal Acquisition Regulation, and reflects BPA's private sector approach to purchasing the goods and services that it requires. BPA's financial assistance operations are conducted under 16 U.S.C. 839 *et seq.* and 16 U.S.C. 839 *et seq.* The BFAI express BPA's financial assistance policy. The BFAI also comprise BPA's rules governing

implementation of the principles provided in the following Federal Regulations and/or OMB circulars: 2 CFR Part 220 Cost Principles for Educational Institutions (Circular A-21); 2 CFR Part 225 Cost Principles for State, Local and Indian Tribal Governments (Circular A-87); Grants and Cooperative Agreements with State and Local Governments (Circular A-102); Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations (Circular A-110); 2 CFR Part 230 Cost Principles for Non-Profit Organizations (Circular A-122); and Audits of States, Local Governments and Non-Profit Organizations (Circular A-133)

BPA's solicitations and contracts include notice of applicability and availability of the BPI and the BFAI, as appropriate, for the information of offerors on particular purchases or financial assistance transactions.

Issued in Portland, Oregon, on September 17, 2010.

**Damian J. Kelly,**  
Manager, Purchasing/Property Governance.  
[FR Doc. 2010-24672 Filed 9-30-10; 8:45 am]  
BILLING CODE 6450-01-P

## DEPARTMENT OF ENERGY

### National Nuclear Security Administration

#### Notice of Intent To Prepare a 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, NM

**AGENCY:** U.S. Department of Energy (DOE), National Nuclear Security Administration (NNSA).

**ACTION:** Notice of intent.

**SUMMARY:** The Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (NEPA) (40 CFR 1502.9[c][1] and [2]) and DOE's NEPA implementing regulations (10 CFR 1021.314) require the preparation of a supplement to an environmental impact statement (EIS) when there are substantial changes to a proposal or when there are significant new circumstances or information relevant to environmental concerns. DOE may also

prepare a supplemental EIS at any time to further the purposes of NEPA. Pursuant to these provisions, the NNSA, a semi-autonomous agency within the DOE, intends to prepare a supplemental environmental impact statement (SEIS) to assess the potential environmental impacts of the construction and operation of the nuclear facility portion of the Chemistry and Metallurgy Research Building Replacement Project (CMRR-NF) at Los Alamos National Laboratory (LANL), Los Alamos, New Mexico.

The CMRR Project, including the CMRR-NF, was the subject of NNSA's *Final Environmental Impact Statement for the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS-0350; the CMRR EIS) issued in November 2003, and a February 2004 Record of Decision (ROD) (69 FR 6967). Over time, due in large part to detailed site geotechnical investigations, some aspects of the CMRR-NF Project have changed from what was foreseen when the CMRR EIS was prepared. The potential environmental impacts of these proposed changes will be analyzed in the CMRR-NF SEIS.

**DATES:** NNSA invites stakeholders and members of the public to submit comments and suggestions on the scope of the SEIS during the SEIS scoping period, which starts with the publication of this Notice and will continue for 30 days until November 1, 2010. NNSA will consider all comments received or postmarked by that date in defining the scope of this SEIS. Comments received or postmarked after that date will be considered to the extent practicable. Two public scoping meetings will be held to provide the public with an opportunity to present comments, ask questions, and discuss concerns regarding the SEIS with NNSA officials. Public scoping meetings will be held on October 19, 2010, at the White Rock Town Hall, 139 Longview Drive, White Rock, New Mexico and October 20, 2010, at the Cities of Gold Casino Hotel, Pojoaque, New Mexico. Both meetings will begin at 4 p.m. and end at 7 p.m. The NNSA will publish additional notices regarding the scoping meetings in local newspapers in advance of the scheduled meetings. Any necessary changes will be announced in the local media.

Any agency, state, pueblo, tribe, or unit of local government that desires to be designated a cooperating agency should contact Mr. John Tegtmeier at the address listed below by the closing date of the scoping period.

**ADDRESSES:** Written comments or suggestions concerning the scope of the CMRR–NF SEIS or requests for more information on the SEIS and public scoping process should be directed to: Mr. John Tegtmeier, CMRR–NF SEIS Document Manager, U.S. Department of Energy, National Nuclear Security Administration, Los Alamos Site Office, 3747 West Jemez Road, TA–3 Building 1410, Los Alamos, New Mexico, 87544; facsimile at 505–667–5948; or e-mail at: [NEPALASO@doeal.gov](mailto:NEPALASO@doeal.gov). Mr. Tegtmeier may also be reached by telephone at 505–665–0113.

In addition to providing comments at the public scoping meetings, all interested parties are invited to record their comments, ask questions concerning the EIS, or request to be placed on the EIS mailing or document distribution list by leaving a message on the SEIS Hotline at (toll free) 1–877–427–9439. The Hotline will provide instructions on how to record comments and requests.

**FOR FURTHER INFORMATION CONTACT:** For general information on the NNSA NEPA process, please contact: Ms. Mary Martin (NA–56), NNSA NEPA Compliance Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, or telephone 202–586–9438. For general information about the DOE NEPA process, please contact: Ms. Carol Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, telephone 202–586–4600, or leave a message at 1–800–472–2756. Additional information about the DOE NEPA process, an electronic archive of DOE NEPA documents, including those referenced in this announcement, and other NEPA resources are provided at <http://nepa.energy.gov>.

**SUPPLEMENTARY INFORMATION:** LANL is located in north-central New Mexico, 60 miles north-northeast of Albuquerque, 25 miles northwest of Santa Fe, and 20 miles southwest of Española in Los Alamos and Santa Fe Counties. It is located between the Jemez Mountains to the west and the Sangre de Cristo Mountains and Rio Grande to the east. LANL occupies an area of about 25,600 acres [10,360 hectares] or approximately 40 square miles and is operated for NNSA by a contractor, Los Alamos National Security, LLC. It is a multidisciplinary, multipurpose institution engaged in theoretical and experimental research and development. LANL has been assigned science, research and development, and

production mission support activities that are critical to the accomplishment of the NNSA’s national security objectives as reflected in the Stockpile Stewardship and Management Programmatic EIS (DOE/EIS–0236) and the Complex Transformation Supplemental Programmatic EIS (DOE/EIS–0236–S4). LANL’s main role in NNSA mission objectives includes a wide range of scientific and technological capabilities that support nuclear materials handling, processing and fabrication; stockpile management; materials and manufacturing technologies; nonproliferation programs; research and development support for national defense and homeland security programs; and DOE waste management activities.

The capabilities needed to execute the NNSA mission activities require facilities at LANL that can be used to handle actinides and other radioactive materials in a safe and secure manner. (The actinides are any of a series of 14 chemical elements with atomic numbers ranging from 89 (actinium) through 103 (lawrencium)). Of primary importance are the facilities located within the Chemistry and Metallurgy Research (CMR) Building and the Plutonium Facility (located at Technical Areas (TAs) 3 and 55, respectively), which are used for processing, characterizing, and storage of special nuclear material. (Special nuclear material is defined by the Atomic Energy Act of 1954 as plutonium, uranium-233, or uranium enriched in the isotopes uranium-233 or uranium-235). Most of the LANL mission support functions previously listed require analytical chemistry, material characterization, and actinide research and development support capabilities that currently exist within the CMR Building and are not available elsewhere. Other unique capabilities are located at the adjacent Plutonium Facility. Work is sometimes moved between the CMR Building and the Plutonium Facility to make use of the full suite of capabilities that these two facilities provide. CMR Building operations and capabilities are currently restricted in scope due to safety and security constraints; it cannot be operated to the full extent needed to meet NNSA operational requirements.

The CMR building contains about 550,000 square feet (about 51,100 square meters) of floor space on two floors divided between a main corridor and seven wings. It was constructed in the early 1950s. DOE maintained and upgraded the building over time to provide for continued safe operations. However, beginning in 1997 and 1998, a series of operational, safety, and

seismic issues surfaced regarding the long-term viability of the CMR Building. In January 1999, the NNSA approved a strategy for managing operational risks at the CMR Building. The strategy included implementing operational restrictions to ensure safe operations. These restrictions are impacting the assigned mission activities conducted at the CMR Building. This strategy also committed NNSA to develop plans to relocate the CMR capabilities elsewhere at LANL to maintain support of national security and other NNSA missions. The CMRR EIS was prepared and issued in 2003, followed by a ROD in 2004.

The CMRR EIS analyzed four action alternatives: (1) The construction and operation of a new CMRR facility at TA–55; (2) the construction of a new CMRR facility at a “greenfield” location within TA–6; (3) a “hybrid” alternative maintaining administrative offices and support functions at the existing CMR building with a new Hazard Category 2 laboratory facility built at TA–55; and, (4) a “hybrid” alternative with the laboratory facility being constructed at TA–6. The CMRR EIS also analyzed a no action alternative where the existing CMR building would continue to be kept in service. In the 2004 ROD, NNSA announced its decision to implement the preferred alternative (alternative 1): To construct a new CMRR facility which would include a single above-ground, consolidated nuclear material-capable, Hazard Category 2 laboratory building (construction option 3) with a separate, adjacent administrative office and support functions building, now referred to as the CMRR Radiological Laboratory/Utility/Office Building (CMRR RLUOB). Upon completion, the CMRR Facility would replace the CMR Building, operations would be moved to the new CMRR Facility, and the vacated CMR Building would undergo decommissioning, decontamination, and demolition. (While the CMRR RLUOB has been constructed in TA–55 at LANL, the installation of laboratory equipment has not been completed and operations have not begun). Since 2004, the planning process for the construction and operation of the CMRR–NF has continued to progress and take into consideration newly gathered site-specific data and safety and security requirements.

*Purpose and Need:* The NNSA’s purpose and need for proposing the construction and operation of the CMRR–NF have not changed since the CMRR EIS was prepared and issued in 2003. NNSA needs to provide the physical means for accommodating the CMR Building’s functional, mission-critical nuclear capabilities, and to

consolidate activities for safer and more efficient operations. In the 2003 CMRR EIS, NNSA analyzed the potential environmental impacts associated with the proposed relocation of LANL analytical chemistry (AC) and materials characterization (MC), and associated research and development capabilities that currently exist primarily at the existing CMR building, to a newly constructed facility, and operation of the new facility for the next 50 years. In the May 2008, *Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS-0380), the CMRR was considered and its potential environmental impacts analyzed as a part of the No Action Alternative and each of the action alternatives for continued operation of LANL.

The potential environmental impacts associated with the construction and operation of the CMRR-NF were also analyzed within certain alternatives in the Complex Transformation SPEIS (DOE/EIS-0236-S4) as part of the proposal to reconfigure and streamline NNSA's nuclear security enterprise. NNSA issued two RODs based on the Complex Transformation SPEIS analysis in December 2008. In the SPEIS ROD for operations involving plutonium, uranium, and the assembly and disassembly of nuclear weapons (73 FR 77644), NNSA announced its decision to retain plutonium manufacturing and research and development at LANL, and in support of these activities, to proceed with construction and operation of the CMRR-NF at LANL as essential to its ability to meet national security requirements regarding the nation's nuclear deterrent.

### Proposed Action and Alternatives

*Proposed Action:* The Proposed Action is to construct the CMRR-NF at TA-55. Over time some aspects of the proposed CMRR-NF Project plans have changed. These proposed changes include, for example:

- Changes to the CMRR-NF structure required for seismic safety based on new information from additional geotechnical investigations conducted at the site. These changes involve incorporating additional structural steel and concrete into the building construction and increasing the quantity of material that must be excavated for the building foundation;
- Changes to the infrastructure to support the CMRR-NF construction activities, such as concrete batch plants, construction material lay-down areas and warehouses, and temporary office trailers and parking areas. Some of these

changes involve the use of additional acreage. Most of these proposed changes are temporary in duration;

- Changes to the CMRR-NF structure to ensure 10 CFR part 830 nuclear safety basis requirements are met for facility engineering controls to ensure protection of the public, workers, and the environment; and
- Changes to incorporate additional sustainable design principles and environmental conservation measures. These changes minimize the environmental impacts of construction and operation of the CMRR-NF.

The potential environmental impacts of these and similar changes will be analyzed in the CMRR-NF SEIS.

*No Action Alternative:* The No Action alternative would be the construction of the CMRR-NF and the ancillary and support activities as announced in the 2004 ROD.

*CMR Alternative 1:* Do not construct a replacement facility to house the capabilities planned for the CMRR-NF. Continue to perform analytical chemistry, material characterization, and actinide research and development activities in the CMR Building, with no facility upgrades, while performing routine maintenance at the level needed to sustain programmatic operations for as long as feasible.

*CMR Alternative 2:* Same as CMR Alternative 1, but includes making the extensive facility upgrades needed to sustain CMR programmatic operations for another 20 to 30 years.

Preliminary Identification of Environmental Issues. NNSA has tentatively identified the following issues for analysis in this SEIS. Additional issues may be identified as a result of the scoping process.

1. Potential impacts to air, water, soil, visual resources and viewsheds.
2. Potential impacts to plants and animals, and to their habitats, including Federally-listed threatened or endangered species and their critical habitats.
3. Potential impacts from irretrievable and irreversible consumption of natural resources and energy, including transportation issues.
4. Potential impacts to cultural resources, including historical and prehistorical resources and traditional cultural properties.
5. Potential impacts to infrastructure and utilities.
6. Potential impacts to socioeconomic conditions.
7. Potential environmental justice impacts to minority and low-income populations.
8. Potential cumulative impacts from the Proposed Action and alternatives

together with other past, present, and reasonably foreseeable actions at LANL.

*CMRR-NF SEIS Preparation Process:* The scoping process for a NEPA document is an opportunity for the public to assist the NNSA in determining the alternatives and issues for analysis. Alternatives may be added, deleted, or modified as a result of scoping. The purpose of the scoping meetings is to receive oral and written comments from the public. The meetings will use a format to facilitate dialogue between NNSA and the public and will be an opportunity for individuals to provide written or oral statements. NNSA welcomes specific comments or suggestions on the content of these alternatives, or on other alternatives that should be considered. The above list of issues to be considered in the SEIS analysis is tentative and is intended to facilitate public comment on the scope of the SEIS. It is not intended to be all-inclusive, nor does it imply any predetermination of potential impacts. The CMRR-NF SEIS will describe the potential environmental impacts of the alternatives, using available data where possible and obtaining additional data where necessary. Copies of written comments and transcripts of oral comments will be available as soon as practicable after the public scoping meeting on the Internet at: <http://www.doedal.gov/laso/NEPADocuments.aspx>.

Following the scoping period announced in this Notice of Intent, and after consideration of comments received during scoping, NNSA will prepare a *Draft Supplemental Environmental Impact Statement for the Construction of the Chemistry and Metallurgy Replacement Project's Nuclear Facility at Technical Area-55 Within Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS-0350-S1). Comments received on the Draft SEIS during the planned 45-day comment period will be considered and addressed in the Final SEIS, which NNSA anticipates issuing by July 2011. NNSA will issue a ROD no sooner than 30 days after publication by the Environmental Protection Agency of a Notice of Availability of the Final SEIS.

Issued in Washington, DC, this 28th day of September 2010.

**Thomas P. D'Agostino,**

*Administrator, National Nuclear Security Administration.*

[FR Doc. 2010-24681 Filed 9-30-10; 8:45 am]

BILLING CODE 6450-01-P

# **Exhibit F**

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

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**THE LOS ALAMOS STUDY GROUP,**

**Plaintiff,**

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

**v.**

**UNITED STATES DEPARTMENT OF  
ENERGY, et al.,**

**Federal Defendants.**

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**DECLARATION OF ROGER E. SNYDER**

I, Roger E. Snyder, pursuant to Title 28, United States Code, Section 1746, declare:

1. I am the Deputy Site Manager at the Los Alamos Site Office of the National Nuclear Security Administration (“NNSA”), a semi-autonomous agency within the Department of Energy (“DOE”). I have held this position since December 2007. As Deputy Site Manager, I am responsible for operations at the Los Alamos National Laboratory (“LANL”). Prior to serving in this capacity, I served as Assistant Manager for National Security Missions and the Assistant Manager for Projects. Prior to June 2005, I worked for NNSA headquarters in the Washington DC area. I am a graduate of the University of Illinois with B.S. in Civil Engineering and the University of Maryland with M.S. in Civil Engineering.
2. I oversee, at the site level, the proposed Chemistry and Metallurgy Research Facility Replacement (“CMRR”) Project. This declaration provides information on the current status of the CMRR Nuclear Facility (“CMRR-NF”), relationships to other site projects and

operations, and efforts underway and in support of the CMRR-NF Supplemental Environmental Impact Statement (“SEIS”). It also addresses the national security and international policy implications should the court issue an injunction precluding further funding of project design for the CMRR-NF. The information contained herein is based on my personal knowledge and information provided to me during the performance of my official duties.

### Background on the Proposed CMRR Project

3. The CMRR Project consists of the acquisition of two structures. The CMRR Radiological Laboratory Utility Office Building (“RLUOB”) was the first facility procured and is now physically complete with equipment installation underway. The CMRR-NF is the second, more substantial facility, and is currently under design.
4. The CMRR Project is intended to provide a suite of capabilities, including analytical chemistry and material characterization, actinide research and development, and special nuclear materials storage. These capabilities currently reside in the existing Chemistry and Metallurgy Research Facility (“CMR”) at LANL, a facility which became operational in 1952. The CMR is designated as a “mission critical” facility.
5. CMRR capabilities represent a suite of analytical chemistry tools that are not unique to any single program, but are necessary for all programmatic operations involving special nuclear materials. CMRR capabilities are not tied to any one program or weapons type. In addition to supporting NNSA stockpile stewardship and stockpile management objectives, the capabilities are needed to support many other programs, such as nonproliferation sponsored activities, space missions, and other energy security missions assigned to LANL. For

example, CMRR capabilities are necessary for the manufacturing of power system components for long range space missions, as well as for nuclear forensics key to non-proliferation and counterterrorism. Moreover, the missions supported by CMR (and therefore CMRR-NF, as its potential replacement) directly relate to and integrate with the balance of the Nation's nuclear weapons complex, including seven sites in addition to LANL, which collectively maintain and certify the U.S. nuclear deterrent.

6. The *Final Environmental Impact Statement for the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS0350) ("CMRR EIS") was issued in November 2003 and confirms that pit fabrication will not be carried out in the CMRR-NF. Rather, the mission of the CMRR Project includes support for existing pit production activities, along with other mission critical activities. Pit fabrication (which includes metal preparation, foundry, machining, assembly, and post assembly processing) activities are conducted in PF-4 (an existing plutonium facility at TA-55). No other facility at LANL has this capability. Pit production (which includes fabrication) has been evaluated as part of multiple Programmatic and Site-Wide EIS analyses.
7. The CMRR-NF has always been predicated upon fulfillment of the functionality and capability documented in the Secretary of Energy's July 2, 2002, Approval of Mission Need. The mission need was confirmed by the Nuclear Posture Review ("NPR") issued in April of this year. The mission assignment to LANL was analyzed under the *Final Programmatic Environmental Impact Statement for Stockpile Stewardship and Management* (DOE/EIS-0236), issued in 1996, and its associated Record of Decision ("ROD"). This mission

assignment remains unchanged for purposes of the CMRR-NF SEIS, which is currently under preparation.

8. The 2003 CMRR EIS was based upon the best available conceptual information at that time. Since 2003, changes in building codes, security requirements, new seismic investigation information, new energy and sustainability requirements, and other factors have been integrated into the proposed CMRR-NF design, and our understanding of the necessary support systems and facility characteristics has evolved. For example, new seismic information was a principal factor identifying the need for thicker, stronger walls and floors. This added substantial mass to the facility and, in at least one alternative design under consideration, would drive removal and replacement of a weaker zone of soil underneath the proposed building. As part of design efforts other options are being studied. The end result of design will be a building that will survive the updated earthquake criteria without any change in mission functionality or capability.
9. The current design for the proposed CMRR-NF, which is still subject to change through design maturation, contemplates the same scope of operations necessary to meet mission requirements as the facility contemplated in the 2003 CMRR EIS. The space currently proposed for chemistry operations and materials characterization represents the smallest capability size option.
10. Public information meetings, specific to the CMRR Project, are held twice a year. See Attachment 1. Advance notice of the meetings is provided in the local newspaper and through stakeholder mailing lists. At these meetings, project staff members present a status overview of the entire project and then are available to answer project-related questions. An

agenda is prepared for each meeting, which typically lasts two hours. Meeting transcripts are available on the LANL website (<http://www.lanl.gov/orgs/cmrr/publicmeetings/index.shtml>).

One or more of Plaintiff's members regularly attend these meetings. See Attachment 1. Mr. Mello and/or his wife have attended since 2007. A CMRR-specific website (<http://www.lanl.gov/orgs/cmrr>) is available to the public and stakeholders for current project information. The CMRR Project was addressed (with updated information as available) in the 2008 *Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS-0380)), as well as the 2008 *Complex Transformation Supplemental Programmatic Environmental Impact Statement* (DOE/EIS-0236-S4). LANL held a Construction Forum in June 16, 2010, in part to inform the public on ongoing and proposed projects at LANL, including CMRR-NF.

11. Pajarito Road is on government property and has been restricted from public use since late 2001. It is routinely closed for purposes of nuclear material movements and other security concerns. Any traffic delays resulting from such closures would impact only those employed at LANL or working in support of LANL operations. Transit to and from the site is possible on other federally owned roadways.

#### Current Status of the Project

12. CMRR-NF construction will not be authorized or executed during the SEIS period. No contracts or contract options for the physical construction of CMRR-NF will be awarded pending outcome of the SEIS.

13. As part of the normal development of a design basis and future revised cost estimates, the Department may seek bids and/or quotes to use in revised cost estimates or for evaluation of system options. However, in such cases, the government and LANL are under no obligation to act on these bids and/or quotes. Because there are no such binding commitments, the taxpayer will not incur additional cost should the SEIS and ROD not support furtherance of the preferred alternative.
14. Final design contracts for the CMRR-NF have been deferred. Certain design efforts are continuing as a means to resolve unknowns and to continue to enhance our understanding of requirements, quantities, and impacts. Much of the knowledge we gain from current design efforts will assist in preparation of the SEIS and evaluation of the alternatives presented during the scoping period. For example, development of a suitable concrete design mix will enable development of higher fidelity estimates for water and aggregate requirements for the SEIS. During the period of the SEIS, it is estimated that CMRR-NF design will only advance about 15 percent.
15. The CMRR-NF has not established a performance baseline, as design uncertainties continue to be addressed. A timeline for Critical Decision 2 (Approve Performance Baseline) has not yet been finalized. The Performance Baseline will provide Congress with the definitive cost and schedule for the CMRR-NF Project. In light of the SEIS, a definitive path forward will not be established until issuance of a ROD by NNSA. Critical Decision 2 is required prior to Critical Decision 3 (Approve Start of Construction).

Status of Construction Activities at Los Alamos

16. In 2006, DOE authorized and funded the excavation and removal of material in the proposed CMRR-NF location, as identified and approved in the 2004 ROD. The purpose of the excavation was to facilitate seismic mapping and analysis of the area as part of site characterization activities. The characterization data reduced associated design uncertainties and confirmed the suitability of the site for the CMRR-NF. The area, excavated roughly down to the grade of the neighboring roadway, also served as a construction laydown area for RLUOB and now its equipment installation phase. No further excavation is planned in this area until a ROD is issued following the SEIS.
17. LANL is an operating site with ongoing plutonium operations comprising an area nearly as large as the District of Columbia. Most plutonium operations are located in Technical Area 55 (“TA-55”). There are a number of ongoing projects that directly support these existing operations irrespective of a decision to construct the CMRR-NF. The Nuclear Material Safeguards and Security Upgrade Project, Phase II (“NMSSUP2”), is presently in construction and will replace the security perimeter around the existing plutonium facilities – not the proposed CMRR-NF. The Radioactive Liquid Waste Treatment Facility at TA-50 (near TA-55) is presently in design to replace the 50-year-old existing facility with a smaller modern facility. The TRU Waste Facility Project recently began design on a smaller modern complex to replace existing solid transuranic waste management facilities at TA-54 that are scheduled to be closed and removed by 2015 per a Consent Order with the State of New Mexico. These projects represent capabilities essential for ongoing operations and have been appropriately addressed in prior National Environmental Policy Act (“NEPA”) analyses.

These projects are not dependent upon construction of CMRR-NF, nor does CMRR-NF

necessitate their construction. The LANL website

(<http://www.lanl.gov/construction/projects.shtml>) contains information pertaining to all of these projects, including current status information for the benefit of the public and stakeholders.

18. The TA-55 Reinvestment Project addresses essential safety and environmental monitoring systems within existing TA-55 facilities that are approaching end of life. The existing plutonium facility and infrastructure systems are aging and, as a consequence, are beginning to require excessive maintenance. As a result, the facility is experiencing increased operating costs and reduced system reliability. It is becoming more costly and cumbersome to comply with safety and regulatory requirements, which are critical to mission essential operations, due to the physical conditions of facility support systems and equipment. The TA-55 Reinvestment Project will enhance safety and enable cost effective operations so that the facility can continue to support critical missions and activities. TA-55 Reinvestment Project efforts were selected utilizing a risk-based prioritization process that considered the current condition of the equipment, risk of failure to the worker, the environment, and the public, and risk of failure to programmatic and facility operations. The TA-55 Reinvestment Project only addresses the existing plutonium facilities, principally the PF-4 facility, and is required irrespective of any action relative to the CMRR-NF.

19. The NMSSUP2 commenced construction in 2009 and is not part of the CMRR-NF Project. The NMSSUP2 supports the continued viability of plutonium missions by upgrading and replacing the perimeter security and entry control systems of the existing plutonium facilities at TA-55. These improvements are necessary to protect critical national assets against terrorist or adversarial threats and meet evolving DOE/NNSA security requirements. The

proposed CMRR-NF site lies outside of the security perimeter upgraded by NMSSUP2. The CMRR-NF Project scope includes the expansion of the existing security perimeter around the CMRR-NF.

20. The existing TA-50 radioactive liquid waste facility characterizes, treats, and disposes of radioactive liquid waste by chemical adjustment of pH, neutralization, chemical assisted flocculation and floc removal, collection and dewatering of sludge solids, solidification of sludge solids in concrete, sedimentation and filtration, ion exchange, and addition of water treatment chemicals. The current facility is oversized, nearly 50 years old, and does not meet modern safety and reliability expectations. This is the only such operable facility onsite and addresses radioactive liquid wastes from multiple facilities including those outside of TA-55. The Radioactive Liquid Waste Treatment Facility (“RLWTF”) Project will replace the existing treatment capability at TA-50, involving both the transuranic and low-level waste operations, as well as construction of a zero liquid discharge capability. The RLWTF Project is presently in design and is required irrespective of any action relative to the CMRR-NF.

21. DOE signed an Order of Consent (“Consent Order”) with the State of New Mexico, effective March 1, 2005. The Consent Order requires DOE to complete a “fence-to-fence” cleanup of LANL by December 29, 2015. “Fence-to-fence” means removal and/or remediation of contaminants that reside in the environment at LANL. As part of the Consent Order, the State of New Mexico has identified four Material Disposal Areas (“MDAs”) in TA-54. The site TRU waste storage and process facilities reside in MDA G. MDA G will undergo a phased closure, consistent with the Consent Order, scheduled to be completed by December 29, 2015. It will not be feasible, practical, or realistic to attempt to keep the TRU facilities operational in the midst of Area G closure activities. Therefore, the TRU waste management

capability must be reconstituted elsewhere onsite. The majority of newly generated TRU waste managed at the facility is associated with existing plutonium operations at CMR and TA-55. The facility will support all operations at LANL that generate TRU waste. The TRU Waste Facility Project is presently in design and is required irrespective of any action relative to the CMRR-NF.

22. If one were to visit TA-55 today, then one would see a significant amount of ongoing NMSSUP2 construction, a completed RLUOB facility, an area of prior excavation in which the CMRR-NF construction has been proposed, and a current expansion of an active parking lot to offset parking lost due to the construction of RLUOB and NMSSUP2, as well as for anticipated RLUOB staff. See Attachment 2. These activities were last analyzed in the 2008 LANL SWEIS. None of the ongoing construction activities are connected to the proposed CMRR-NF.

23. In addition, well drilling activities are presently occurring in the vicinity of Material Disposal Area C. See Attachment 2. This work is being performed as part of site characterization tasks in support of the Consent Order agreement with the State of New Mexico.

24. Temporary security lighting is in use during removal and reconstruction of the security perimeter as part of the NMSSUP2. This is on the northern most area of the Pajarito plateau, which is the closest to the public, whereas the proposed CMRR-NF site is on the opposite side of TA-55 (the southern side).

Importance of the Project

25. CMRR is a critical component of the Nation's ongoing efforts to modernize the Nation's nuclear infrastructure and to ensure a safe, secure, and effective nuclear arsenal over the long term. This is confirmed by the 2010 NPR, which provides a roadmap for implementing the President's agenda to reduce nuclear dangers and pursue the goal of a world without nuclear weapons, while simultaneously advancing broader U.S. security interests. See Attachment 3. According to the NPR, "[i]ncreased funding is needed for the Chemistry and Metallurgy Research Replacement Project at Los Alamos National Laboratory to replace the existing 50-year old facility . . . ." Id. at xv.
26. The 2009 America's Strategic Posture Report confirms the urgency of CMRR-NF construction. See Attachment 4. According to the Report, the existing CMR building is "decrepit" and is "maintained in a safe and secure manner only at a high cost." Id. at 50. The Report concludes that replacement of the CMR building is even more urgent than the replacement of a Uranium Processing Facility at the Y-12 Facility in Tennessee – another high-priority project. This is because the CMR facility "makes a direct contribution to maintaining intellectual infrastructure that is in immediate danger of attrition," and "a short-term loss of plutonium capabilities may hurt the weapon program more than a short-term loss of enriched uranium capabilities." Id.
27. Timely construction of the CMRR-NF is also critical to the United States' commitment to renew and strengthen the Nuclear Non-Proliferation Treaty ("NPT") and to enter into new treaty obligations, including the New Strategic Arms Reduction Treaty ("START") and the Comprehensive Test Ban Treaty ("CTBT"). The United States is resolved to meeting its

obligations to pursue nuclear disarmament under Article VI of the NPT and intends to make demonstrable progress toward this goal over the next decade. To ensure that the Senate can consider new treaty obligations, NNSA must fulfill its mission to modernize and maintain the Nation's nuclear weapons complex, and replacement of the aging CMR building is a critical component of this mission.

#### Effects of an Injunction

28. In a recent FY2011 Budget Assessment, NNSA stated that “[i]n order to support program requirements, CMRR-NF construction must be complete by 2020 and it must be fully operational by 2022.” See Attachment 5. If NNSA is enjoined from pursuing project design until completion of the SEIS, the project schedule could be delayed by more than a year, as a result of the lengthy process of soliciting and selecting new contractors. See Declaration of Herman LeDoux, Federal Project Director for the CMRR Project at the Los Alamos Site Office of NNSA, ¶ 18.
29. Such a delay in the CMRR-NF Project schedule would have significant national security impacts. It would result in mission interruption and would require NNSA to reconstitute capabilities deferred by the reduced operations posture within the existing CMR facility, placing LANL missions and DOE/NNSA programs at further risk. In addition, commitments have been made as part of the NPR to address failing infrastructure, including CMR. These commitments would be abrogated if the project is delayed, with possible implications on foreign policy postures and at significant additional cost to the taxpayer.
30. Since 1999, NNSA has limited operations within the CMR building in an effort to minimize the worker health and safety risks associated with continued operations. See Declaration of

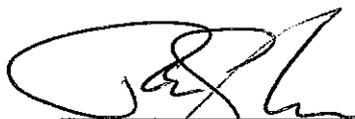
Donald L. Cook, NNSA Deputy Administrator for Defense Programs, Dkt. 9-1, ¶ 7. As long as LANL is forced to continue this reduced operations strategy, important characterization and chemistry capabilities will be unavailable to support mission requirements. Examples of such capabilities include materials characterization instruments and analytical chemistry techniques, all of which support the full mission suite at LANL that involves special nuclear materials.

31. The strategy NNSA has implemented to mitigate impacts from reduced operation of the CMR building is entirely dependent on a fixed start-up date for operation of the new CMRR-NF. The decision to suspend certain operations in the CMR was predicated on a 2018 CMRR-NF completion date with operations beginning in 2022.

32. I certify that Attachments 1, 2, 3, 4, and 5 are true and correct copies of documents used during the course of my usual business.

I swear under the penalty of perjury that the foregoing is true and correct.

Dated this 20th day of December, 2010, in Los Alamos, New Mexico.



Roger E. Snyder  
Deputy Site Manager  
Los Alamos Site office

# **Exhibit G**

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

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**THE LOS ALAMOS STUDY GROUP,**

**Plaintiff,**

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

**v.**

**UNITED STATES DEPARTMENT OF  
ENERGY, et al.,**

**Federal Defendants.**

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**DECLARATION OF HERMAN C. LEDOUX**

I, Herman C. LeDoux, pursuant to Title 28, United States Code, Section 1746 declare:

1. I am the Federal Project Director for the Chemistry and Metallurgy Research Building Replacement (CMRR) Project at the Los Alamos Site Office (LASO) of the National Nuclear Security Administration (NNSA), a semi-autonomous agency within the Department of Energy (DOE). I have held this position since June 2005. Prior to serving in this capacity, I served as the Assistant Manager for Projects and the LASO Deputy Site Manager. I am a graduate of the University of New Mexico with a B.S. in Civil Engineering.
2. This declaration provides information on the current status of the CMRR Nuclear Facility (CMRR-NF), existing National Environmental Policy Act (NEPA) coverage under the 2003 CMRR Environmental Impact Statement (CMRR EIS) and other analyses, and why the current design process for the Project should continue. The CMRR-NF Project is currently in the design

phase, and construction of the CMRR-NF building has not begun. The information contained herein is based on my personal knowledge and information provided to me during the performance of my official duties.

3. The *Final Environmental Impact Statement for the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS0350)(CMRR EIS) was issued in November 2003, and a Record of Decision (ROD) was issued in February 2004 (69 Fed. Reg. 6967). The 2003 CMRR EIS analyzed the potential environmental impacts associated with replacing the existing Chemistry and Metallurgy Research (CMR) Building, as well as the potential environmental impacts associated with the reasonable alternatives to replacing the CMR building. In the 2004 ROD, NNSA stated its decision to, among other things, construct two new buildings in Technical Area-55 (TA-55) at the Los Alamos National Laboratory (LANL) to replace the aging CMR building located within LANL's Technical Area-3 (TA-3).

4. The 2004 ROD consisted of a decision to construct: (1) an above ground building to house administrative office and support functions, now referred to as the Radiological Laboratory Utility Office Building (RLUOB); (2) and a below ground building to house consolidated special nuclear material (SNM)<sup>1</sup>-capable Hazard Category 2 work space, CMRR-NF. Both buildings would have multiple stories, each with floor space for operations and for building operational requirements for the safety of the public, the workers, and for the protection of the environment.

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<sup>1</sup> Special nuclear material includes plutonium, uranium enriched in the isotope 233 or the isotope 235, and any other material that the U.S. Nuclear Regulatory Commission determines to be special nuclear material.

5. In addition to the 2003 CMRR EIS and the resulting 2004 ROD, the potential environmental impacts associated with the construction and operation of the CMRR-NF were analyzed in the May 2008 *Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS-0380) as a part of the No Action Alternative and each of the action alternatives for continued operation of LANL. The potential environmental impacts associated with the construction and operation of the CMRR-NF were also analyzed as part of the analysis of certain alternatives in the October 2008, *Complex Transformation Supplemental Programmatic Environmental Impact Statement* (DOE/EIS-0236-S4).

6. Since the 2004 CMRR ROD, some aspects of the proposed CMRR-NF Project plans have changed from what was foreseen when the 2003 CMRR EIS was prepared. As a result, DOE and NNSA are preparing a Supplemental Environmental Impact Statement (SEIS) to analyze the potential environmental impacts associated with those proposed changes and their reasonable alternatives.

7. As a result of the decisions made in the 2004 ROD, project personnel have engaged in an iterative planning process for the RLUOB and the CMRR-NF at TA-55. The construction of the RLUOB has been completed.

8. In concept as analyzed in the 2003 CMRR EIS, the CMRR-NF was anticipated to include approximately 200,000 gross square feet of interior floor space. The current interior floor space in the proposed CMRR-NF, which is still subject to change through design maturation, is approximately 400,000 gross square feet due to changes in safety requirements, updated building

codes associated with the construction and operation of a more robust nuclear facility, and other technical considerations. However, the current interior mission space allocated for chemistry operations and material characterization activities within the CMRR-NF is the same or less than contemplated in the 2003 CMRR EIS.

9. In my experience, DOE and NNSA engage in an iterative process before making a final design decision. Since the 2004 ROD, new building codes, new security requirements, new site seismic requirements,<sup>2</sup> energy and sustainability initiatives, and safety basis integration requirements have been combined with an evolved understanding of the support systems and facility characteristics required for safe and secure operations. The planning and design work for the CMRR-NF have followed this iterative process pattern in order to account for these modifications and to improve worker and public safety.

10. As decided in the 2004 ROD, the CMRR-NF was to have both above and below ground components. As conceived, the above ground laboratory space would have included a grated walking space that would permit workers to perform inspection, maintenance and repair on the utility systems. During the iterative design process, however, new seismic information became available in 2007. As a result, the design engineering team focused on the need for additional

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<sup>2</sup> Prior to 2007, the seismic design requirements at LANL were based on a Probabilistic Seismic Hazards Assessment (PSHA) which was completed in 1995. Field investigations since then revealed that large earthquakes occur more frequently and that small earthquakes occur less frequently than previously thought. This information was incorporated into a complete update to the 1995 PSHA. This Update to the PSHA (UPSHA) was completed in 2007. As a result of this update, the seismic design ground motions resulting from a projected seismic event increased approximately 50%. Accordingly, LANL invoked more stringent seismic design requirements in its Engineering Standards Manual to account for that increase. The CMRR-NF Project adopted those more stringent design requirements.

structural stability and replaced the open-grated walking space with a hardened structural floor. This hardened floor area, known as the interstitial floor level, is now designed to be part of the facility. This enclosed, hardened floor area, while not part of the mission space for operations, would count as floor space within the building and would run across the entire length of the building, except in the proposed vault sections.

11. A similar design evolution occurred with the basement level. As a result of the need to design a more robust structure, the design of the mezzanine level would include splitting a large portion of the upper and lower parts of the basement into two floors. Like the interstitial floor, the mezzanine utility floor would run across the entire building, except in the proposed vault sections. Photos of a similar design in the already-constructed RLUOB building are visible in Attachment 1. This change in the design of the interstitial and mezzanine floors accounts for a large portion of the revised internal square footage estimate. The proposed footprint sits well within the site analyzed in the 2003 CMRR EIS. The analyzed site is constrained by the location of the RLUOB building on the east, the existence of the security fence on the west and north, and the roadway and canyon edge on the south.

12. Another proposed change in the design of the CMRR-NF that accounts for the increase amount of floor space involves the relocation of water tanks that serve fire protection systems from outside the building's exterior walls to the inside the building.

13. Incorporating new seismic information for the site was a principal factor for requiring the design of thicker, stronger walls and floors that added mass to the proposed building. These required enhancements will result in a building that would survive the revised earthquake criteria

without an adverse impact on mission functionality, capability, safety of the public, the workers, or the environment.

14. Design of the CMRR-NF is not complete, nor will it be completed by the time the SEIS is completed. In fact, continuing the design process will provide important information for the analysis in the SEIS needed to understand and address uncertainties associated with the construction of the CMRR-NF. Continuing with the design effort is expected to provide beneficial and reliable information related to the following:

a. CMRR-NF Building Elevation--Continuing the design work will lessen the risk of inaccuracies in the calculations associated with the performance of the building structure during projected seismic or postulated accident events analyzed in the SEIS. Continuing the design effort will inform decision-makers regarding the viability of construction options, including those regarding the depth of the foundation of the proposed building; the amount of engineered fill necessary to replace any soils removed to accommodate the foundation; the quantity of concrete needed for construction; constructing more of the building above grade; and the various safety and security implications of building designs.

b. Potential realignment of Pajarito Road--Design options include no realignment of the road and a partial shift of the road a number of feet to the south where the road runs adjacent to the proposed building site of the CMRR-NF. The use of the Pajarito Road, the amount and type of construction traffic that would be needed to support the construction of the CMRR-NF and the activities associated with the various construction

alternatives analyzed in the SEIS are directly impacted by the design efforts underway. Continuing with the design effort will assist the project personnel to understand the potential environmental impacts associated with the construction alternatives that will be analyzed in the SEIS.

c. Potential construction of a new electrical substation--No determination has been made whether the power demands of the proposed CMRR-NF will necessitate the construction of a new electrical substation or whether the existing electrical infrastructure is sufficient. The design effort, including the extent to which energy efficient features can be incorporated into the design of the proposed CMRR-NF and the other action alternatives that will be analyzed in the SEIS, will determine the electricity demands. As a result, the potential environmental impacts associated with the construction of a new electrical substation will be analyzed in the SEIS.

d. Potential construction of two concrete batch plants--Based on up-to-date information, no determination has been made whether it may be necessary to construct one or two concrete batch plants as part of the construction of the proposed CMRR-NF. As a result, the potential environmental impacts associated with the construction and operation of up to two concrete batch plants will be analyzed in the SEIS. Factors to be considered in making this determination include the amount of concrete needed for the CMRR-NF and the need for redundancy should one plant require maintenance or repair. Continuing with the design effort will assist DOE and NNSA in calculating the amount of concrete needed for construction of the proposed building and a more accurate analysis of the air quality impacts, among others.

15. The CMRR-NF project team is currently composed of federal employees, LANL management and operating (M&O) contractor employees, and subcontractor employees employed by various architectural and engineering (A/E) firms. Many of the employees working on the design of the proposed CMRR-NF specialize in the design of buildings housing nuclear materials or operations involving nuclear materials.

16. The procurement process that results in the selection of A/E firms for this type and magnitude of project normally requires approximately 12 months. The existing A/E firms have been working on various aspects of the CMRR-NF project since 2004. This work has included design activities, seismic studies, and Value Engineering<sup>3</sup> studies. If the Court were to enjoin the work of these A/E firms for a period of approximately eight months, the period expected to complete the SEIS and issue a ROD, DOE/NNSA and its M&O contractor would be faced with a decision to continue to pay the costs associated with the A/E contracts and an idle workforce or terminate the contracts and face the prospect of terminating 170 A/E contract employees or reassigning these employees to other projects. The monthly cost associated with maintaining the availability of this specialized engineering expertise is approximately \$1 million in labor costs. If these 170 A/E contract employees were terminated or reassigned, it is likely that LANL would lose their specialized expertise.

17. In addition, if the Court were to enjoin the existing work on the CMRR-NF Project, the DOE/NNSA M&O contractor would be faced with the decision concerning the future of

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<sup>3</sup> Value Engineering is a systematic method to improve the “value” of goods or products and services, in our case design, by using an examination of function. Value, as defined, is the ratio of function to cost. Value can therefore be increased by either improving the function or reducing the cost. It is a primary tenet of Value Engineering that basic functions be preserved and not be reduced as a consequence of pursuing value improvements.

approximately 125 employees currently dedicated to the CMRR-NF Project. If these employees could not be transferred to other productive work at LANL, these employees may face the prospects of unemployment in a difficult economy.

18. After a cessation of work and the termination of the A/E contracts, the effort to select new A/E contractors would take at least one year from when a decision whether to resume is made. The amount of time depends upon the procurement process followed. If a non-competitive process<sup>4</sup> were available, the procurement process could take up to 12 months beginning with the preparation of a new scope of work to the signing of new contracts. If a competitive process were required, the process to select new A/E contractors would involve additional steps and take longer than a non-competitive process.

19. Stopping the design work at this juncture and having to select new A/E contractors after a cessation of design work for approximately eight months would have an immediate cost impact from the point of cessation. The hiatus in the progress of the work from delaying the schedule on the CMRR-NF would cost the American taxpayer between \$6 million and \$8 million per month.<sup>5</sup>

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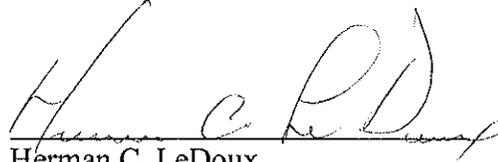
<sup>4</sup> If the current A/E design agents are still available and interested, the government would determine if it was in its best interest to re-establish the contracts and whether these contracts could be justifiably sole-sourced.

<sup>5</sup> This \$6 million to 8 million estimate is derived by using an escalation factor of 2 % and 3%. Cost escalation is experienced by the economy worldwide and accounts for the time value of money. Historic data on escalation rates indicate that they are difficult to accurately predict although the generally accepted average range is 2 to 3%. When the median value of the entire cost range of the project (\$3.7 billion to 5.8 billion) is escalated, approximately \$100 million per year must be added for the time value of money.

20. I certify that Attachment 1 is a true and correct copy of documents used during the course of my usual business.

I swear under the penalty of perjury that the foregoing is true and correct.

Dated this 20<sup>th</sup> day of December, 2010, in Los Alamos, N.M.



Herman C. LeDoux  
Federal Project Director  
Los Alamos Site Office

# **Exhibit H**

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 *Motion for Injunction Pending Appeal*, filed July 21, 2011 [Doc. 64]. The Court, having carefully considered the briefs and relevant law, having reviewed its previous decision in this matter, and being otherwise fully informed, finds that Plaintiff's motion is not well taken and should be DENIED.

**BACKGROUND**

The factual background of this case is presented in much greater detail in the Court's previous Memorandum Opinion and Order [Doc. 55], and, in this document, the Court will provide only those facts necessary to disposition of this motion. Plaintiff filed its Complaint in this matter on August 16, 2010 [Doc. 1]. It challenged 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"). Plaintiff sought a declaratory judgment and mandatory injunction requiring Defendants to prepare a new Environment Impact Statement ("EIS") regarding the CMRR-NF and also sought to prohibit all further investments in the CMRR-NF project, including any funds for detailed design or construction, until a new EIS is completed.

Following the filing of Plaintiff's suit, NNSA's Deputy Administrator announced that the NNSA would complete a Supplemental Environmental Impact Statement ("SEIS") to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF project. On April 22, 2011, the NNSA released a draft of the SEIS to the public. This release began a public comment period, which was to culminate in the release of a final SEIS.

On January 6, 2011, pursuant to a referral from the Court, the Magistrate Judge filed his Proposed Findings and Recommended Disposition [Doc. 25]. The Magistrate Judge recommended that Plaintiff's Complaint be dismissed in its entirety based on the doctrine of prudential mootness. Plaintiff timely filed its objections to this recommended disposition. Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court reviewed *de novo* the findings and recommendations to which Plaintiff objected. In addition to reviewing all of the materials submitted by the parties, the Court also heard two days of testimony and argument on the matter prior to issuing its ruling. On May 23, 2011, the Court issued a Memorandum Opinion and Order [Doc. 55] in which it held that the Magistrate Judge properly applied the doctrine of prudential mootness to dismiss this case. The Court also held that, in the alternative, the case must be dismissed because it was not ripe. *See* Doc. 55 at 15. Plaintiff appealed this decision to

the Tenth Circuit on July 1, 2011. *See* Doc. 59. This appeal has not yet been fully briefed.

Plaintiff then filed the instant motion, seeking an injunction, pending appeal, that directs Defendants to cease any activities that have the effect of advancing the CMRR-NF project. Plaintiff argues that, unless enjoined, Defendants “are likely to undertake interim actions that will preclude NEPA compliance.” Doc. 64 at 2. On September 2, 2011, the Environmental Protection Agency published a Notice of Availability of the Final SEIS for the CMRR-NF project, and, on October 18, 2011, the NNSA published the final Record of Decision (“ROD”) for the CMRR-NF project. *See* Doc. 71. On October 21, 2011, Plaintiff filed a new Complaint raising many of the same arguments and claims raised in this case, but incorporating the findings of the final SEIS and associated ROD. *See* Case No. 11cv946 RHS/WDS.

### **DISCUSSION**

In determining whether to grant an injunction pending appeal, an applicant must show that: (1) it is likely to prevail on the merits of the appeal; (2) it will be irreparably harmed absent the injunction; (3) other parties will not be substantially harmed if the injunction is granted; and (4) the public interest favors a stay. *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *United States v. Various Tracts of Land in Muskogee & Cherokee Counties*, 74 F.3d 197, 198 (10th Cir. 1996). A preliminary injunction, such as the one sought here, “is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (emphasis in original). If a movant fails to meet its burden on any of the four requirements for injunctive relief, the petition must be denied. *See Sprint Spectrum, L.P., v. State Corp. Comm’n.*, 149 F.3d 1058, 1060 (10th Cir. 1998); *Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997).

The Court's opinion upholding the Magistrate Judge's finding that Plaintiff's Complaint should be dismissed based on the doctrine of prudential mootness, and its alternative holding that Plaintiff's case was not ripe, rested on the fact that the SEIS process was ongoing. The Court found that it would be imprudent to halt all activities, including design analysis, prior to the completion and issuance of the final ROD, because it would essentially be issuing an advisory opinion. *See* Doc. 55 at 15. The Court also held that, while the SEIS process was ongoing, and it was unclear what form the SEIS and final ROD would take, there was no ripe final agency action for the Court to review. *See id.* at 16.

In contending that it is likely to prevail on appeal, Plaintiff's motion presents largely the same factual background, arguments, and case law that the Court has already carefully considered and rejected in making its initial ruling. To prevail on appeal, Plaintiff must first demonstrate that the Court abused its discretion in applying the doctrine of prudential mootness to this case and that the Court incorrectly found that no "final agency action" under the Administrative Procedures Act had yet occurred to give the Court jurisdiction over the action. It must then demonstrate that Defendants were proceeding with the CMRR-NF project in violation of NEPA. By merely repeating many of the same arguments that it made in its initial round of briefing and at oral argument on its Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition, Plaintiff has done little to demonstrate that it is likely to prevail on the merits in its appeal.

When it issued its decision dismissing this case, the Court based its determination on the fact that the SEIS process was ongoing and that the form that the final ROD would take could not be known. It noted that Plaintiff had the ability to participate in the SEIS comment process in an attempt to ensure that its perspectives are heard. *See* Doc. 55 at 15. It further stated that if,

when the SEIS process was complete, Plaintiff believes that its perspectives were not adequately considered, it would have the opportunity to file a new action. That is precisely what Plaintiff has now done, filing a new lawsuit that challenges Defendants' actions on the basis of the completed SEIS and final ROD. *See* Case No. 11cv946 RHS/WDS. This new lawsuit appears to be the proper vehicle to contest Defendants' plans to move forward with the CMRR-NF project, as the issuance of the completed SEIS and final ROD constitute the necessary "final agency action" that was missing in this case.<sup>1</sup> *See Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1250 (10th Cir. 2001); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Bennett Hills Grazing Ass'n v. United States*, 600 F.2d 1308, 1309 (9th Cir. 1979).

#### **CONCLUSION**

The fact that a completed SEIS and final ROD have now been issued does not affect the propriety of the Court's dismissal of Plaintiff's case that occurred prior to the issuance of these documents. Because Plaintiff has failed to make a clear showing that it has a substantial likelihood of prevailing on the merits on appeal, the Court need not address the other requirements for injunctive relief.

**IT IS THEREFORE ORDERED** that Plaintiff's *Motion for Injunction Pending Appeal* [Doc. 64] is DENIED.

  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup> The Court notes that Plaintiff's new lawsuit also seeks an injunction. *See* Case No. 11cv946 RHS/WDS at Doc. 1. Thus, even though the Court denies the injunction sought pending appeal in this case, Plaintiff has another opportunity to obtain an injunction in the newly-filed case.

## **CERTIFICATE OF DIGITAL SUBMISSIONS**

I submit that the foregoing document has been submitted in PDF format to the Tenth Circuit's Electronic Case Filing System; that all required privacy redactions have been made; and that the digital submission has been scanned for viruses with the Microsoft Forefront Client Security 1.115.998.0 program (last updated October 31, 2011) and, according to the program, the document is free of viruses.

s/Robert P. Stockman  
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Environment & Natural Res. Div.  
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(202) 353-1834  
robert.stockman@usdoj.gov

## CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c) and Tenth Circuit Rule 25.3, I hereby certify that on this date, November 1, 2011, I caused the foregoing document to be filed upon the Court through the use of the Tenth Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service is consistent with the Service Method Report:

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November 1, 2011

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