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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

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

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

Defendants.

**PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL**

Plaintiff Los Alamos Study Group ("LASG") moves the Court pursuant to Rule 62(c), Fed. R. Civ. P., for an injunction pending appeal to preserve the status quo while the merits of this case are considered by the Court of Appeals.

On May 23, 2011, this Court entered its order, dismissing this National Environmental Policy Act ("NEPA") case on grounds of prudential mootness and ripeness. That decision is now on appeal to the Court of Appeals for the Tenth Circuit. By this motion LASG respectfully requests the Court to consider the likelihood of irreparable injury, should the defendants proceed

as they have indicated they will do, and should the Court's decision be remanded by the Court of Appeals. LASG respectfully submits that the law supports its position on appeal and that the decision of the Court of Appeals is likely to so hold. Unless enjoined, defendants are likely to undertake interim actions that will preclude NEPA compliance. This Court should therefore enter its order requiring defendants, pending appeal, to cease all activities which are calculated to preordain the ultimate decision, after proper NEPA analysis, whether to construct the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") and unreasonably narrow the range of alternatives considered with respect to the CMRR-NF project.

**Factual background**

The evidence in the record illustrates the following facts about the ongoing CMRR-NF project, which is the subject of this litigation:

1. There is no effective Environmental Impact Statement nor any valid Record of Decision with respect to the 2010-11 version of the CMRR-NF that NNSA intends to construct. All alternatives discussed in the 2003 EIS have been abandoned, and the defendants have made clear that the decision announced in the 2004 ROD (69 Fed. Reg. 6967-02)(Feb. 12, 2004) will not be followed. (See 2011 Draft Supplemental Environmental Impact Statement, DOE/EIS-0350-S1 ("DSEIS"), Summary, S-8, S-9.

2. Defendants' actions show that they have taken the CMRR-NF project beyond the point of commitment:

a. Defendants directed their Management and Operating Contractor, Los Alamos National Security, LLC ("LANS") to plan for CMRR-NF completion by 2020 with

operations in 2022. (CMRR Project Update, June 10, 2010, at 4 (Tab 43[1]). Defendants made a contract with LANS, under which LANS is to issue and execute construction contracts for the CMRR-NF Infrastructure Package in FY2011 as well as perform certain design efforts. (DOE/NNSA FY 2011 Performance Evaluation Plan, at 101-02)(Tab 45).

b. DOE and NNSA are components of the existing Administration. Senior Administration figures have issued letters and press statements declaring their unequivocal support for the CMRR-NF. (Mello Aff. 1 ¶ 59 (Tab 58); Mello Aff. 3 ¶ 95, ref. 79 (Tab 59)). They have made an agreement with certain Senate Republicans, under which the Senators agree to vote to ratify the New START arms control treaty and the Administration agrees to construct the CMRR-NF. (*See, e.g.,* Tab 58; letter from Sen. Kyl to Vice President Biden, Aug. 19, 2010 (Mello Aff. 2 ¶ 4(e), ref.)).

c. Senior NNSA officials remain committed to construction of the CMRR-NF. Donald Cook, Deputy Administrator for Defense programs of NNSA, has sworn to the "importance of the CMRR Project to our national defense" (Cook Aff. ¶ 2). Defendant Thomas Paul D'Agostino, NNSA Administrator, has stated that "it is critical that we complete the design and construction of key facilities" including CMRR-NF. (Mello Aff. 2, ¶ 4a, ref.) The draft SEIS states that NNSA decided in 2004 to build the CMRR-NF, and "the SEIS is not intended to revisit that decision." (DSEIS, Summary at v.)

d. NNSA has invested hundreds of millions of dollars in CMRR-NF design. (Mello Aff. 1 ¶ 54, ref. (Tab 41)).

---

[1] References to items by Tab number refer to the volume of exhibits used in connection with Mr. Mello's testimony on April 27, 2010.

3. Looking to the immediate future, defendants' public statements and presentations show that the following actions have been planned for mid-2011 and after:

a. Defendants are carrying out construction and outfitting of buildings and structures whose principal purpose is to support, and function as connected components of the CMRR-NF. Specifically, defendants are completing construction of and installing equipment in the Radiological Laboratory, Utility, and Office Building ("RLUOB"), which is designed to serve as a support facility for the CMRR-NF. (Mello Aff. 3, ¶ 19, ref. 21a, 21b, 21c, 21d)(Tab 47). Further, Defendants are constructing the Nuclear Materials Safeguards and Security Upgrades Project, Phase II (NMSSUP), which is a security structure, segments of which are designed to serve the CMRR-NF. (Mello Aff. 2 ¶ 7, ref.)(Tab 49). Such construction makes it more likely that, after further NEPA analysis, defendants will decide to construct the CMRR-NF.

b. Defendants have clearly planned final design of the Infrastructure Package, Pajarito Road Relocation, and Basemat Package to take place at this time. This is final design, because defendants' presentations show that it is planned to be followed immediately by construction. (CMRR Project Update, June 10, 2010, at 16 (Tab 43); CMRR Public Meeting, March 3, 2010, at 20 (Tab 53); Pajarito Construction Activities, June 16, 2010, at 7 (Tab 56)). Moreover, defendants state: "Design deliverables include all products necessary to construct." (LANL Construction Corridor presentation, Sept. 8, 2010, at 9)(Tab 27). Appropriations and obligations for Final Design of the NF were $39.4 million in FY 2008, $92.2 million in FY 2009, and $57 million in FY 2010. Further, $166 million was requested for FY 2011—for Final Design only. (Mello Aff. 1 ¶ 74 (DOE budget); Mello Aff. 2 ¶ 4(f))

c. Detailed design makes it more likely that the project will be built. DOE's own guidance for interim actions under NEPA so states[2]: DOE states that "an interim action must be one that would not adversely affect the environment nor limit the choice of reasonable alternatives" (at 1). It prohibits interim design work because it tends to exclude other alternatives and to give a schedule advantage to the agency's favorite, here the CMRR-NF:

> 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. (at 4)

d. In late 2010 Defendants stated that all design efforts on the Infrastructure package had been completed (Mello Aff. 1 ¶ 44, ref. 1, 2 )(Tab 53), they planned to issue RFPs for $60 million to construct the Infrastructure package (Mello Aff. 1 ¶ 63, Aff. 3, ¶ 27), and 125 craft workers and 150 to 200 support workers were planned for FY 2011 (Mello Aff. 1 ¶ 30, ref. 2, at 4)(Tab 26); LANL Construction Corridor, Sept. 8, 2010, at 7 (Tab 27)).

**Argument**

In determining whether to grant an injunction pending appeal, the Court must consider the four factors enumerated in Fed. R. Appellate P. 8(a)(1):

> In deciding whether to grant this motion, we must apply the four factors that always guide our discretion to issue a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of

[2] Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions, DOE Memorandum, Office of NEPA Policy and Compliance, June 17, 2003.

> the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 897 F.2d 511, 512 (Fed.Cir.1990)(quoting *Hilton v. Braunskill*, 481 U .S. 770, 776 (1987)).

As the United States Court of Appeals for the Tenth Circuit stated in *McClendon v. City of Albuquerque*, 79 F.3d 1014 (10th Cir.1996):

> 10th Cir. R. 8.1 requires the applicant to address ...: '(a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) any risk of harm to the public interest.

*General Protecht Group, Inc. v. Leviton Manufacturing Co.*, 2010 WL 5477266 (D.N.M. Dec. 7, 2010).

**a. Likelihood of success on appeal.**

Plaintiff is likely to prevail on appeal, because defendants are clearly committed to construct the CMRR-NF, a major federal action significantly affecting the quality of the human environment (42 U.S.C § 4332(2)(C)), without preparing an environmental impact statement, or considering a reasonable range of alternatives to the project, and defendants have carried the CMRR-NF project beyond the "point of commitment" by making irreversible and irretrievable commitments of resources toward its completion.

Construction has gone forward to the extent of building the RLUOB, which is a facility that supports and is connected to the CMRR-NF. NNSA has also built the NMSSUP and a large parking lot to suit the CMRR-NF. Construction of facilities that serve the planned CMRR-NF materially limits the range of reasonable alternatives that will be considered with respect to the project, makes it much more likely that NNSA will choose to build the CMRR-NF, and

constitutes a NEPA violation. *Davis v. Mineta,* 302 F.3d 1104, 1115 n. 7 (10th Cir. 2002)(Both phases of project must be enjoined, because "[i]f construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project."); *Sierra Club v. U.S. DOE,* 287 F.3d 1256, 1265 (10th Cir. 2002)(In issuing a road easement that may lead to construction of a road and mining operation, "the agency created an increased risk of actual, threatened, or imminent environmental harm."). An EIS must be prepared at the earliest practicable point and must occur before an irretrievable commitment of resources is made. *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683, 718 (10th Cir. 2009).

Defendants have also made commitments by contract. Defendants' contract with LANS required it to take "actions necessary to issue and execute construction contracts for Infrastructure Package(s) in FY 2011" (DOE/NNSA FY 2011 Performance Evaluation Plan at 102-02)(Tab 45). This agreement constitutes a contractual commitment to carry out construction. The Tenth Circuit has made clear that, when an agency predetermines that it will pursue a given project without necessary environmental analyses, there is a NEPA violation. *Forest Guardians v. U.S. Fish & Wildlife Service,* 611 F.3d 692, 714 (10th Cir. 2010). Predetermination can be shown by a contract under which the agency becomes committed to a particular course. (*id.*) *Forest Guardians* also cites (at 715) *Save the Yaak Committee v. Block,* 840 F.2d 714, 718-19 (9th Cir. 1988), where an irreversible commitment was found in construction contracts, awarded before NEPA compliance. It specifically cites (at 713) *Davis v. Mineta,* 302 F.3d 1104, 1112-13 (10th Cir. 2002), as a case where defendants made an

irreversible and irretrievable commitment of resources by contract. It also cites (at 715) *Metcalf v. Daley,* 214 F.3d 1135 (9th Cir. 2000), which says: "The 'point of commitment' in this case came when NOAA signed the contract with the Makah in March 1996 and then worked to effectuate the agreement. It was at this juncture that it made an 'irreversible and irretrievable commitment of resources.'" (214 F.3d at 1143)

Defendants have passed the point of commitment without conducting the analyses required by NEPA. Defendants' construction efforts, their continuing detailed design efforts, and their contracts calling for construction of the CMRR-NF all constitute NEPA violations. *See Forest Guardians; New Mexico v. BLM; Catron County Board of Commissioners v. U.S. Fish & Wildlife Service,* 75 F.3d 1429, 1434 (10th Cir. 1996).

After suit was filed defendants stated that construction of the CMRR-NF would not proceed until defendants completed a SEIS and a Record of Decision ("ROD"). (Cook Aff. ¶¶ 21, 23, 25). Similarly, after this case was brought, defendants submitted an affidavit stating ambiguously that final design contracts have been deferred, but "certain design efforts are continuing." (Snyder Aff. ¶ 14). Again, after this case was brought, defendants and LANS modified their contract so that it does not call for execution of construction contracts. (DOE/NNSA FY 2011 Performance Evaluation Plan, at 101-02, conformed as of 12/09/2010)(Tab 46).

However, all such actions were taken after this case was filed and in clear response to it. Voluntary cessation of unlawful conduct does not make a case moot. *U.S. v. W.T. Grant & Co.,* 345 U.S. 629, 632 (1953); *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1115-16 (10th Cir. 2010); *Chihuahuan Grasslands Alliance v. Kempthorne,* 545 F.3d 884, 892

(10th Cir. 2008). A party may not avoid judicial review by temporarily altering questionable behavior. (*Silvery Minnow* at 1115-16)

The party asserting mootness—constitutional or prudential—has a heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again. *Friends of the Earth v. Laidlaw Env. Services,* 528 U.S. 167, 189 (2000). The challenged conduct here consists of implementation of the CMRR-NF without a lawful NEPA analysis of all reasonable alternatives to that project in its 2010-11 form. Since the Draft SEIS states that no such analysis will be done (DSEIS, Summary at v.), defendants have not satisfied their burden of showing mootness.

Moreover, the evidence submitted by the parties on defendants' Motion to Dismiss was in conflict on key questions, such as the nature of the construction now proceeding, the nature of the current design efforts, and defendants' plans to issue construction contracts. With the evidence in conflict, it is error to determine material facts on the basis of defendants' submissions alone and in disregard of the conflicting evidence submitted by LASG. (*Committee for the First Amendment v. Campbell,* 962 F.2d 1517, 1521 (10th Cir. 1992)).

**b. Whether the applicant will be irreparably injured absent a stay.**

There is every indication that defendants are committed to the CMRR-NF project and intend to proceed to its completion without NEPA analysis of all reasonable alternatives. (*See* DSEIS, Summary at S-9, S-10). Only after Plaintiff sued them did they take minimal steps to suspend their plans, hoping to avoid NEPA liability.

Defendants' near-term plans include the completion and outfitting of the RLUOB, completion of the NMSSUP, conducting final design of several "packages" that comprise the

CMRR-NF project, and construction of CMRR-NF, commencing with issuing a contract for the Infrastructure Package. At present, comments have already been received concerning the Draft SEIS (76 Fed. Reg. 28222)(May 16, 2011). DOE/NNSA may issue a final SEIS at any time, with a ROD to follow within 30 days. Even under their unilateral promise not to construct until the SEIS process is complete, defendants will then be free, unless enjoined, to carry out the design, contracting, and construction activities that they had planned before this suit was brought—assuming, in fact, they were ever suspended. Defendants may have this opportunity in a matter of weeks or a few months—well before this case could be heard and decided in the Court of Appeals.[3] From that time design, construction, and contracting could be carried forward to a point where objective NEPA analysis would be entirely frustrated, and any remand for preparation of an EIS analyzing the 2010-11 CMRR-NF project and all reasonable alternatives would be severely prejudiced, because defendants' chosen alternative would be advanced to such a point that it would be nearly impossible to make an objective selection, as the law requires. Moreover, there will be equities in favor of completion of a partially-completed project. *Davis v. Mineta,* 302 F.3d 1104, 1116 (10th Cir. 2002). This would clearly be irreparable injury.

**c. Whether an injunction would injure other interested parties.**

There can be no claim that the national security requires that the CMRR-NF project be constructed while the Tenth Circuit considers the appeal. Plaintiff has shown that the support functions of the CMRR-NF can be furnished during the interim before the CMRR-NF is

[3] The median time between notice of appeal and disposition for all cases is 9.3 months in 2010 according to the Administrative Office. See http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2010Dec.pl (July 14, 2011).

projected to come on line. (See Plaintiff's Motion for Preliminary Injunction at 23-25 (Nov. 12, 2010)). There is no credible argument that national security forbids postponement of the project for long enough to do a proper NEPA analysis. (See Plaintiff's Reply in support of Preliminary Injunction at 16-20 (Jan. 14, 2011)). The testimony of Dr. von Hippel establishes that there is no current need for added pit production capacity in any event. (Tr. 83-85, 87-94, April 27, 2011). The public interest clearly does not require additional pit production capacity in the immediate future, and in any case the proposed CMRR-NF would not provide such capacity until 2022 at the earliest.

**d. Where the public interest lies.**

The public interest clearly does not require that the CMRR-NF be implemented while the Tenth Circuit considers the appeal and in advance of a valid NEPA analysis. The true interest of the public is in enforcing NEPA compliance and is illustrated by the action of the House Appropriations Committee in June 2011, in recommending a $100 million reduction in the appropriation of the CMRR-NF, in order to postpone construction:

> The Committee fully supports the Administration's plan to modernize the infrastructure, but intends to closely review the funding requests for new investments to ensure those plans adhere to good project management practices. The latest funding profile provided to the Committee indicates that over half the funding requested for the Nuclear Facility would be used to start early construction activities. The recommendation will support the full request for design activities, but does not provide the additional funding to support early construction. The NNSA is not prepared to award that project milestone since it must first resolve major seismic issues with its design, complete its work to revalidate which capabilities are needed, and make a decision on its contracting and acquisition strategies. (H.R. Report, FY 2012 Energy and Water Bill, at 131)

In other words, Congress has found that NNSA is in an unseemly rush to construct the CMRR-NF and will not support such action. There is no reason the Court should accept defendants' claims of the need to proceed pending appeal. An injunction should be issued.

**Conclusion**

For the reasons set forth herein, the Court should enter its order, directing the defendants, pending appeal, to cease any activities that have the effect of advancing the CMRR-NF project, and limiting the range of range of alternatives considered with respect to the project, including construction of the CMRR-NF or any projects primarily planned as support facilities for the CMRR-NF (*e.g.,* RLUOB or its outfitting, NMSSUP), detailed or final design of the CMRR-NF, and any contracting for the construction or final design of the CMRR-NF.

Respectfully submitted,
[***Electronically Filed***]

HINKLE, HENSLEY, SHANOR & MARTIN, LLP

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

and

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

**Certificate of Service**

I hereby certify that on this 21st day of July, 2011, I filed the foregoing PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

John P. Tustin

Andrew A. Smith

/s/ Thomas M. Hnasko
Thomas M. Hnasko