No. 11-2141

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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.

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

FEDERAL DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD, VACATE JUDGMENT BELOW, AND REMAND PURSUANT TO CIRCUIT RULE 27.2(A)(1)

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Pursuant to Fed. R. App. P. 27(a)(3) and 10th Cir. Local R. 27.2(A)(4), the United States Department of Energy (DOE) and the National Nuclear Security Administration (collectively NNSA) file this Response in Opposition to the Motion filed by the Los Alamos Study Group (Study Group).

SUMMARY

This Court should deny the Study Group's motion for summary disposition, or in the alternative, for a remand for additional proceedings (hereinafter "Remand Motion"). The Remand Motion does not meet the substantive or procedural standards of Local Rule 27.2(A), nor would it fulfill the purposes of such a motion. In addition, the Remand Motion finds no support in the law.

In its Complaint in this case, the Study Group alleged that NNSA must prepare a new environmental analysis under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, for the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility (CMRR-NF). The district court found that NNSA's then-ongoing preparation of a Supplemental Environmental Impact Statement (SEIS) mooted that suit, and that any challenges to the SEIS process would not be ripe until NNSA took a final agency action by issuing a decision. The court dismissed the case for lack of jurisdiction, and the Study Group appealed. During the appeal, NNSA issued its Final SEIS and its Amended Record of Decision (Amended ROD), selecting the Modified CMRR-NF

Alternative. The Study Group then filed a *new lawsuit* challenging the Amended ROD and Final SEIS, and that suit is currently pending in the District Court of New Mexico (D.N.M. No. 1:11-cv-00946).

Now the Study Group has filed this Remand Motion. The Study Group attached a portion of the President's Budget for Fiscal Year 2013 which "proposes deferring CMRR construction for at least five years." The Study Group argues that, in light of this budget proposal, this Court should not only summarily reverse the district court's dismissal for lack of jurisdiction *but also* grant the Study Group summary judgment on the merits of newly alleged NEPA claims. This argument is without merit. The budget proposal does not revoke or invalidate the SEIS or Amended ROD. Congress may or may not adopt the budget proposal, and even if the budget proposal is adopted, it would only *postpone* implementation of the selected alternative. That has nothing to do with what is at issue in this appeal—it does not render the original suit any less moot, nor does it provide a discrete, final agency action that would retroactively give the Study Group a cause of action in this suit under the Administrative Procedure Act (APA), 5 U.S.C. § 704.

The Study Group's Remand Motion is but one more attempt to challenge new events that occurred *after* the Study Group appealed and to argue that each new event is a NEPA violation. But the APA only permits judicial review of a *discrete, final agency action*—the Study Group cannot proceed with constantly

shifting challenges to each and every act that the Executive branch allegedly takes or plans to take, let alone do so in this appeal. A plaintiff's "allegations of legal wrongdoing must be grounded in a concrete and particularized factual context; they are not subject to review as free-floating, ethereal grievances." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111 (10th Cir. 2010). Nor may the Study Group effectively amend its Complaint on appeal by presenting new claims based on new events during the appeal, nor can it introduce new evidence to create a new record on appeal.

This appeal has been fully briefed. This Court should deny the Study Group's Remand Motion, review the briefs in this appeal, and affirm the district court's dismissal of the Study Group's suit for lack of jurisdiction.

FACTUAL BACKGROUND

The facts underlying this case are complicated and are summarized in greater detail in NNSA's Response Brief on pages 6-19. We provide a short summary of the facts relevant to the Remand Motion here:

1. *District court proceedings:* In its Complaint in this case, the Study Group alleged that NNSA must prepare a new environmental analysis under NEPA for the proposed CMRR-NF. Previously, NNSA had prepared an Environmental Impact Statement (EIS) and Record of Decision (ROD) authorizing the construction of the CMRR-NF. 68 Fed. Reg. 64,620 (Nov. 14, 2003); 69 Fed. Reg.

6967 (Feb. 12, 2004). The Study Group alleged that NNSA had since violated NEPA by failing to adequately analyze new seismic information, proposed design changes to the CMRR-NF, and other factors. Subsequently, NNSA announced the preparation of an SEIS, *i.e.*, a supplemental analysis of the potential environmental effects of the proposed CMRR-NF pursuant to NEPA. In the course of the district court proceedings, the Study Group tried to shift its challenge to pursue premature arguments requesting that the district court find the new SEIS inadequate before NNSA completed it and made a final decision.

The district court dismissed the case as *prudentially* moot because NNSA and DOE "are proceeding with an SEIS, and are not moving forward with final design or construction pending completion of that process." *Los Alamos Study Group v. DOE*, 794 F. Supp. 2d 1216, 1222-26 (D.N.M. 2011). "The final form and conclusion of the SEIS cannot currently be known." *Id.* at 1226. 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." *Id.* Further, the court 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)]." *Id.* at 1226-30. The court held that any alleged NEPA violations should be considered "at the completion of the process, as opposed to while it is ongoing."

Id. at 1229.

2. *Events during the appeal:* After the Study Group appealed, NNSA completed the SEIS process, issued its Final SEIS, and issued an Amended ROD on October 12, 2011. *See* 76 Fed. Reg. 54,768 (Sept. 2, 2011) (announcing availability of Final SEIS);[1] 76 Fed. Reg. 64,344 (Oct. 18, 2011) (Amended ROD). In the Amended ROD, NNSA selected the Modified CMRR-NF Alternative. 76 Fed. Reg. 64,344.

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 for the CMRR-NF, and specifically the adequacy of the Final SEIS and Amended ROD. That case has been docketed as No. 1:11-cv-00946.

3. *NNSA's appellate filings:* In the case on appeal, on November 1, 2011, NNSA filed a Motion for Summary Disposition Because of Mootness. NNSA explained that NNSA's completion of the Final SEIS and issuance of the Amended ROD, as well as the Study Group's new lawsuit challenging those documents, rendered this case *constitutionally* moot. The Clerk referred that motion to the merits panel, and the parties then fully briefed the appeal.

In its Response Brief, NNSA requested that this Court affirm the district

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

court's dismissal of the Study Group's claims for lack of jurisdiction. First, NNSA's Final SEIS and Amended ROD mooted all of the claims in the Study Group's original Complaint. Response Br. at 22-38. Second, in the case on appeal, the Study Group did not challenge discrete, final agency action under the APA because NNSA did not take the operative final agency action (the Amended ROD) until after the Study Group appealed. Response Br. 38-50. Similarly, any challenge was not ripe for review. Response Br. at 50-54.

NNSA also explained that, to the extent that the Study Group attempted to challenge NNSA's analysis in the SEIS and Amended ROD in its appellate filings, the Study Group had to pursue those arguments in its *new lawsuit*. Response Br. at 36-38, 41-43. This appeal does not present those merits issues because neither the Final SEIS nor the Amended ROD even existed when the Study Group filed its Complaint or commenced this appeal.

4. *Budget Proposal and the Study Group's Remand Motion*: On March 6, 2012, the Study Group filed its Remand Motion. The Study Group attached a portion of the President's Budget for Fiscal Year 2013. In the budget proposal section on cuts, the proposal states that "NNSA proposes deferring CMRR construction for at least five years." The budget proposal does not rescind or revoke the SEIS or Amended ROD.

The Study Group contends that the budget proposal amounts to a

"supervening event." Remand Mot. at 2. The Study Group requests summary disposition from this Court ordering the district court "to require preparation [sic] a new EIS encompassing all reasonable alternatives." *Id.* at 12. In the alternative, the Study Group requests a remand with an order that the district court "determine whether a new EIS must precede a major federal project that will not be implemented until at least 2018." *Id.* Thus, the Study Group requests not only summary disposition on the jurisdictional issues on appeal—mootness, finality, and ripeness—but a summary resolution of the *merits* of yet another new NEPA claim that the Study Group seeks to allege for the first time on appeal, on which the district court never ruled.

ARGUMENT

The district court dismissed the Study Group's suit for lack of jurisdiction because NNSA's then-ongoing SEIS process mooted the Study Group's original Complaint. *See Study Group*, 794 F. Supp. 2d at 1226. The district court explained that "[i]f, upon completion of the SEIS and issuance of the ROD, [the Study Group] believes that its perspectives were not adequately considered, it will have the opportunity to file a new complaint." *Id.* During the appeal, NNSA completed its SEIS and issued its Amended ROD, and the Study Group filed its new complaint challenging the Final SEIS and Amended ROD (D.N.M. No. 1:11-cv-00946). The only question presented in *this* appeal is whether this Court should

affirm the district court's dismissal for lack of jurisdiction. The answer remains "yes." The budget proposal has no effect on or relevance to that answer.

I. The Study Group's Remand Motion does not meet the substantive or procedural requirements of Rule 27.2.

The Study Group's Remand Motion does not meet the procedural or substantive standards of Rule 27.2. Substantively, the Remand Motion attempts to: (1) supplement the record on appeal with the budget proposal; (2) effectively amend the Complaint by alleging new claims challenging recent events (and hypothetical future events); (3) present further arguments that the district court's decision should be reversed; and (4) move for summary judgment on the *merits* of the newly alleged NEPA claims (despite the fact that the district court never ruled on the merits). Neither the Federal Rules of Appellate Procedure nor 10th Cir. Local Rule 27.2 allows a party to achieve these goals through a motion during an appeal.[2]

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[2] The Remand Motion's procedural violation is a product of the Study Group's impermissible use of Rule 27.2. Procedurally, the Remand Motion is untimely. The Study Group filed its notice of appeal on July 1, 2011, so a Rule 27.2(A)(1) motion should have been filed no later than July 15, 2011. 10th Cir. Local R. 27.2(A)(3)(a). The Study Group filed this Remand Motion more than seven months later, and the Study Group has not shown "good cause" as required under the Rule. *Id.* "Good cause" might exist if the budget proposal changed the law or mooted this case, but it does neither. *See* 10th Cir. Local R. 27.2(A)(1)(b).

This procedural violation is not merely technical but highlights that this Remand Motion is contrary to the substantive standards and purpose of Rule 27.2. First, Rule 27.2 imposes a fourteen day deadline, and among other things, that deadline forecloses a party from using Rule 27.2 as the Study Group attempts to do

First, "[t]his court will not consider material outside the record before the district court." *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000). The Federal Rules "do[] not grant a license to build a new record" on appeal. *See Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981) (collecting cases). A court may consider new factual events occurring after appeal, but only to the extent that they render the case moot. Here, the Study Group introduces the budget proposal in an attempt to support various NEPA merits arguments, not to establish mootness. For example, the Remand Motion cites three district court cases, but only to support its *merits* argument that "significant delay since the original NEPA studies . . . underscores the need for new NEPA analyses." Remand Mot. at 9-10. In contrast, the Study Group's Remand Motion does not cite a single authority regarding mootness.

Second, the Remand Motion seeks to effectively amend the Complaint on appeal by adding entirely new claims challenging actions and events that did not

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here. The deadline makes it impossible to use Rule 27.2 to supplement the record on appeal with events that occur during the appeal (except to establish mootness), to amend the Complaint by alleging claims arising from events during the appeal, or to present new arguments to supplement briefs that have already been filed.

Second, "Rule 27.2 is a convenience to parties who have motions that, if meritorious, moot issues that would otherwise need to be briefed." *United States v. Clayton*, 416 F.3d 1236, 1238 (10th Cir. 2005). This case has been fully briefed, has been calendared for argument on May 9, 2012, and is prepared for resolution on the jurisdictional issues presented. Thus, the Study Group's Remand Motion can hardly be justified as a convenience to the parties or as allowing the parties to avoid briefing.

exist before the appeal began—here, among other things, the President's budget proposal, NNSA's potential future conduct, and the hypothetical commencement of construction in 2018. As explained at length in NNSA's Response Brief (pp. 36-38, 41-43), if the Study Group wishes to challenge NNSA's conduct during the course of this appeal, the Study Group must file a new APA suit challenging a new final agency action. Rule 27.2 does not allow a party to amend its Complaint by adding new factual allegations during the appeal.

Third, the Study Group uses the budget proposal primarily to introduce new arguments in favor of reversal of the district court's judgment and the merits of its various NEPA arguments, including its newly alleged NEPA claims. Such non-jurisdictional arguments relating to the merits of an appeal are not proper grounds for summary disposition. *See, e.g.*, *Joseph A. ex rel. Wolfe v. N.M. Dep't of Human Servs.*, 28 F.3d 1056, 1059 (10th Cir. 1994); *Braley v. Campbell*, 832 F.2d 1504, 1509 (10th Cir. 1987). Rule 27.2 does not exist to give a party an opportunity to supplement its Opening and Reply Briefs with new arguments.

Fourth, the Study Group requests that the Court "vacate the judgment below and remand: (a) with a direction to require preparation of a new EIS." Remand Mot. at 12. In essence, the Study Group requests that this Court resolve the merits of its newly alleged NEPA claims and grant it the requested remedy. The Study Group seeks this ruling on the merits even though (1) the district court never

reached the merits; (2) as a result, NNSA did not brief the merits in its Response Brief; and (3) this Court does not have the administrative record for the Final SEIS and Amended ROD before it. Despite the district court's dismissal of the Study Group's case for lack of jurisdiction under Rule 12(b)(1), the Study Group is requesting a summary disposition that would amount to a grant of summary judgment under Rule 56. Rule 27.2 does not support such a motion. In fact, when this Court reverses a district court's dismissal for lack of jurisdiction, the Court generally remands for further proceedings and does not reach the merits. *See, e.g.*, *Wyoming v. United States*, 279 F.3d 1214, 1241 (10th Cir. 2002).

Rule 27.2 does not authorize any of the relief sought by the Study Group. Under Rule 27.2, "[a] party may file *only* the following dispositive motions . . . (b) a motion for summary disposition because of a supervening change of law or mootness [or] (c) a motion to remand for additional trial court or administrative proceedings." 10th Cir. Local R. 27.2(A)(1)(b), (c) (emphasis added).[3] However, the Study Group does not point to any "supervening change in law"—a budget proposal is not a change in law. Similarly, the Study Group does not concede that this case is moot; quite the opposite—the Study Group opposed NNSA's Motion for Summary Disposition Because of Mootness. Thus, the Study Group does not

[3] The Study Group is not seeking to dismiss its case under 27.2(A)(1)(a), nor is it seeking to enforce an appeal waiver under 27.2(A)(1)(d).

meet the requirements for disposition under Rule 27(A)(1)(b). In an attempt to fit within Rule 27(A)(1)(c), the Study Group frames its motion as, in the alternative, a request for a remand for the district court to consider the *merits* of the newly alleged NEPA claims that it presents on appeal. But the district court dismissed this case for a *lack of jurisdiction*, and the Study Group does not point to jurisdictional facts that need to be resolved. Thus, this request for a "remand" is still a request for summary disposition of the issues on appeal. Rule 27(A)(1)(c) does not countenance such a motion. Indeed, the Study Group does not cite to a single case in which this Court granted a Rule 27.2 motion *at all*, much less in circumstances similar to this appeal.

Thus, the Study Group seeks relief that is unavailable under the Federal Rules of Appellate Procedure and the Local Rules. Indeed, Rule 27.2 limits permissible dispositive motions to a narrow set of categories, and the Remand Motion falls into none of them. The Remand Motion should be denied on this basis alone, and this Court need go no further to decide it.

II. The budget proposal does not change any of the relevant facts.

Even if the Remand Motion were properly brought under Rule 27.2(A)(1), the budget proposal on which the motion is based does not change any of the facts relevant to the district court's dismissal for lack of jurisdiction. NNSA has not revoked or rescinded the Amended ROD. 76 Fed. Reg. 64,344. In the Amended

ROD, NNSA selected the Modified CMRR-NF Alternative. *Id.* NNSA has not revisited that selection. The budget proposal did not change that selection; it "proposes deferring CMRR construction for at least five years." Thus, even if Congress might adopt the budget proposal, it would only postpone construction. NNSA has also not changed or invalidated the Final SEIS, nor has it disavowed the environmental analysis in the Final SEIS. *If* there is any merit to the Study Group's challenges to both the Final SEIS and the Amended ROD, the Study Group may still present those arguments in its new lawsuit pending in district court. The case on appeal remains moot, and the budget proposal does not change any of the facts establishing that the case is moot.

Notably, the Study Group cites only to the President's budget *proposal*. Congress may still decide to provide funds for the construction of the Modified CMRR-NF. "In exercising the broad discretion granted by the Constitution, Congress can approve funding levels contained in the President's budget request, *increase* or decrease those levels, eliminate proposals, or *add programs not requested* by the administration." III U.S. Gov't Accountability Office, GAO-04-261SP, *Principles of Federal Appropriations Law*, 1-26 (3d ed. 2008) (emphases added); *see Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citing earlier edition of source approvingly). Thus, the budget proposal may or may not result in the deferral of construction of the Modified CMRR-NF.

III. The budget proposal does not render the Study Group's original suit any less moot, nor does it identify any discrete, final agency action that the Study Group could have challenged in its original suit.

A. NNSA's Final SEIS mooted the Study Group's Complaint that NNSA needed to prepare a new NEPA analysis.

Under this Court's precedent, when an agency prepares an additional environmental analysis of its proposed actions—as NNSA has prepared an SEIS for the CMRR-NF here—any previous challenges focused on an alleged absence of an analysis no longer present a live controversy. *See, e.g.*, *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1121 (10th Cir. 2009) (holding that agency's issuance of environmental analyses for projects mooted case seeking to compel NEPA analyses). Similarly, when an agency supplements its environmental analysis and issues a new ROD, any challenges suggesting that the prior analysis was lacking do not present a live controversy. *See, e.g.*, *Silvery Minnow*, 601 F.3d at 1110-15; *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211-12 (10th Cir. 2005). When an agency takes a new final agency action which is supported by an additional NEPA document, analysis, and process, then earlier procedural challenges pursuant to the APA and NEPA are moot. *See Wyoming v. DOI*, --- F.3d ----, 2012 WL 642126, at *8 (10th Cir. Feb. 29, 2012). The NEPA challenges are moot even *if* the new final agency action, unlike the Amended ROD here, is in substance a "mirror image" of the prior action. *See id.* at *7.

The Study Group's Remand Motion further highlights how moot this case

has become. Throughout its Remand Motion, the Study Group challenges, among other things, the adequacy of the Final SEIS, the Amended ROD, the President's budget proposal, potential future conduct, and the hypothetical commencement of construction in 2018—none of which existed when the Study Group filed its Complaint or when the district court dismissed this case for lack of jurisdiction. The Study Group cannot resuscitate its moot case by presenting new allegations on appeal challenging events that did not exist when it filed its Complaint. *See, e.g.*, *Silvery Minnow*, 601 F.3d at 1111 (analyzing mootness based on those agency actions that had been issued when the plaintiff filed its complaint). Events have overtaken the case on appeal, and the Study Group's case is moot, even *if* the Study Group wishes that NNSA had prepared an entirely new, full EIS and reached a different decision in its Amended ROD. *See, e.g.*, *Wyoming v. DOI*, 587 F.3d 1245, 1250-54 (10th Cir. 2009) (holding that new temporary rule mooted challenge even if plaintiff preferred a permanent rule).

In the Remand Motion, the Study Group argues at length that the budget proposal's description of actions that NNSA may take reveals flaws in NNSA's analysis of alternatives in the SEIS. Remand Mot. 9-11. Those questions, however, are not part of this lawsuit and appeal. Instead, those issues are currently before the district court in the *new lawsuit*. Response Br. at 36-38. In *this* case that is now on appeal, the Study Group challenged NNSA's NEPA compliance

prior to the preparation of the SEIS and Amended ROD.

The Study Group does not (and cannot) point to *any* relief that it could obtain in this suit that it cannot obtain in its new lawsuit. The Study Group may not simultaneously pursue the exact same claims in two different courts (as it is attempting to do here). The Remand Motion confuses merits and jurisdictional arguments, and as a result the Remand Motion requests a judgment on the merits of NEPA claims which are not properly before this Court.

B. The district court lacked jurisdiction because the Study Group did not challenge discrete, final agency action, and the budget proposal does not change this fact.

As explained in NNSA's Response Brief, the Study Group did not identify a discrete, final agency action as required to sustain jurisdiction under the APA. *See* Response Br. at 38-50. The Amended ROD is the operative final agency action, but the Study Group did not (and could not) challenge the 2011 Amended ROD in *this* case because NNSA issued it during the course of this appeal. For the same reason, the budget proposal does not (and cannot) fix this fundamental jurisdictional defect, because it also cannot establish that the Study Group challenged a discrete, final agency action before the district court.

IV. A budget proposal does not create any new NEPA obligation and is not judicially reviewable.

In any event, even if this Court were to consider the Study Group's new claims based on the budget proposal, that budget proposal cannot justify summary

disposition because NEPA does not apply to budget proposals, and the budget proposal is not reviewable under the APA. The Supreme Court has held "that appropriation requests constitute neither 'proposals for legislation' nor 'proposals for . . . major Federal actions,' and that therefore the procedural requirements of [NEPA] have no application to such requests." *Andrus v. Sierra Club*, 442 U.S. 347, 364-65 (1979). The Court explained that NEPA applies to major federal actions and that review of budget proposals regarding how actions should be funded would be redundant. *See id.* at 362. Even if the final budget does change an agency's actions, NEPA applies to the resulting, new major federal actions, not at the budget proposal stage. *See id.*; *cf. Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103-04 (9th Cir. 2007) (finding that appropriations are unreviewable and that plaintiffs must challenge agency's final agency action); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006).

Additionally, the Study Group cannot challenge the President's budget proposal because the President is not an "agency" within the meaning of the APA and is not subject to judicial review under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Indeed, even an agency's budget proposal or request "is not 'agency action' within the meaning of § 702, much less 'final agency action' within the meaning of § 704." *Fund for Animals, Inc. v. BLM*, 460 F.3d 13, 19 (D.C. Cir. 2006).

> Judicial review of such budget initiatives would wreak havoc with the normal operations of agencies and the executive branch. Agencies propose all kinds of programs in the budget process, and they are not the only actors in that process. The President decides which agency budget requests to forward to Congress. . . . It is impossible to believe that the APA opened this process to judicial scrutiny as a reviewable "agency action."

Id. at 20 (citation omitted). As the D.C. Circuit explained, the APA permits judicial review of the agency's discrete, final agency actions, but not of the budget proposal to fund (or not fund) those actions. *See id.* at 19-22; *cf. Lincoln*, 508 U.S. at 193-94 (finding agency's allocation of funds from lump-sum appropriation unreviewable under the APA).

Thus, to the extent the Study Group appears to be challenging the budget proposal or NNSA's hypothetical future conduct (*e.g.*, Mot. at 2, 10), the Study Group must wait to identify a final agency action and establish that it is a "major Federal action" to which NEPA applies. *See, e.g.*, *Karst Envtl. Educ. & Prod., Inc. v. EPA*, 475 F.3d 1291, 1297-98 (D.C. Cir. 2007); *Kleppe v. Sierra Club*, 427 U.S. 390, 400-07 & n.15 (1976). Here, the Study Group requests (Remand Mot. at 12) "a new EIS encompassing all reasonable alternatives," but without identifying a final agency action, it is unclear what the court is supposed to review, what proposal an EIS would analyze, or what the reasonable alternatives would be.

CONCLUSION

For all of these reasons, NNSA respectfully requests that the Court deny the Study Group's Remand Motion.

Respectfully submitted,

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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 1.121.1810.0 program (last updated March 18, 2012) 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, March 19, 2012, 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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