CASE 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; 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-Appellees.	)

On Appeal from the United States District Court
For the District of New Mexico
The Honorable Judge Judith Herrera
D.C. No. 1:10-CV-760-JCH-ACT

PLAINTIFF-APPELLANT'S MOTION TO SUPPLEMENT THE RECORD, TO VACATE THE JUDGMENT BELOW, AND TO REMAND PURSUANT TO TENTH CIRCUIT RULE 27.2(A)(1)

PRELIMINARY STATEMENT

Plaintiff-Appellant, Los Alamos Study Group ("LASG"), respectfully moves the Court to enter an order supplementing the record with uncontested documentation demonstrating that unfounded assumptions underlie Defendants-Appellees the United States Department of Energy et al.'s (collectively "DOE/NNSA") Supplemental Environmental Impact Statement ("SEIS"), which purportedly ratified their decision to construct the 2011-12 Chemistry, Metallurgy Research Replacement-Nuclear Facility ("CMRR-NF") at Los Alamos, New Mexico. On February 13, 2012, Defendants-Appellees advised Congress that the alternative selected in the SEIS would be deferred for at least five (5) years and that plutonium requirements would be met through various alternatives *not analyzed or mentioned in the SEIS* (but advocated by LASG), *i.e.*, by using alternative facilities within the existing nuclear facilities complex.

The SEIS, which formed the basis of the lower court's findings of prudential mootness and lack of ripeness, clearly does not describe DOE/NNSA's choice of alternatives. Based on this disclosure, amounting to a supervening event, there is no present basis for this Court's continued analysis of prudential mootness or ripeness principles as they relate to a NEPA document which DOE/NNSA have ignored in making decisions on weapons policy. Accordingly, in order to conserve judicial resources, LASG respectfully requests the Court to enter an order

supplementing the record with the undisputed materials from the February 13, 2012 budget request attached to this motion and, pursuant to 10th Cir. R. 27.2(A)(1)(b), vacate the lower court's judgment based on a supervening change of position by DOE/NNSA, and remand to the lower court with directions that DOE/NNSA prepare a new EIS. Alternatively, pursuant to 10th Cir. R. 27.2(A)(1)(c), LASG respectfully requests the Court to vacate the judgment below and remand for additional proceedings to determine whether, in light of the several newly-acknowledged alternatives, a new EIS must be prepared to ensure compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* In this determination, the Court must bear in mind that, with the latest delays, the foundational EIS, issued in 2003, will be at least fifteen (15) years old at the time the CMRR-NF is constructed in 2018. DOE/NNSA oppose the relief requested in this motion.

ARGUMENT

When LASG lodged this appeal, the purpose was to challenge the lower court's rulings that the doctrine of prudential mootness and principles of ripeness barred LASG's Complaint contesting DOE/NNSA's irreversible commitments to, and continued implementation of, the 2011 version of the CMRR-NF without first preparing a current environmental impact statement ("EIS") under the NEPA,

which would have analyzed and compared reasonable alternatives to the current iteration of CMRR-NF.

Despite the fact that the only EIS relied on by DOE/NNSA to construct the 2011 CMRR-NF was an antiquated 2003 EIS that did not – and could not – consider the drastically changed attributes of the 2011 CMRR-NF, including cost increases from approximately $300 million in 2003 to approximately $6 billion in 2011, the court below reasoned that any NEPA violation could be cured, and prudentially mooted, by DOE/NNSA's promise to issue a SEIS in 2011, rectifying any NEPA deficiencies resulting from the stale 2003 EIS. That court ruled alternatively that the NEPA violations were not ripe unless and until an amended record of decision ("AROD") authorized the 2011 version of CMRR-NF, or some other alternative that DOE/NNSA may have considered in the forthcoming SEIS. It reached these decisions over LASG's objection that any 2011 SEIS, issued eight (8) years after the antiquated 2003 EIS, would merely rubber-stamp a massively changed project, to which DOE/NNSA were and remained irreversibly committed without taking a hard look at currently available alternatives.

As LASG predicted, DOE/NNSA issued a SEIS that considered no reasonable alternatives to the multi-billion dollar 2011 version of CMRR-NF. To underscore this manifest predetermination, DOE/NNSA presented two perfunctory alternatives in the SEIS, both of which were straw men designated to be stricken in

favor of the 2011 CMRR-NF, with virtually no analysis whatsoever. Inexplicably, one of the alternatives was actually to construct the 2003 version of the CMRR-NF as analyzed in the 2003 EIS and approved in the 2004 ROD, yet DOE/NNSA acknowledged in the 2011 SEIS that the 2003 CMRR-NF could no longer be built. Thus, by default, DOE/NNSA simply chose the 2011 CMRR-NF as their preferred alternative, without analysis of any other alternatives, claiming that this after-the-fact ratification somehow satisfied NEPA.

On February 13, 2012, DOE/NNSA's budget request for fiscal year 2013 contradicted the SEIS altogether, selecting one of the alternatives advocated by LASG, but not considered in the SEIS: the satisfaction of plutonium requirements by using existing facilities within the nuclear complex. DOE/NNSA's budget request states that, although the CMRR-NF is not abandoned, it will be deferred "for at least five years," and that "studies are ongoing to determine long-term requirements." Thus, when DOE/NNSA finally constructs the CMRR-NF, it will be based on a foundational EIS at least fifteen (15) years old, and a SEIS and AROD at least seven (7) years old.

The attached page from the Administration's February 13, 2012 budget request for Fiscal Year 2013 bears directly upon the Court's consideration of the case, and should be accepted in the record to dispose of any claims of prudential mootness and ripeness. It states as follows:

CUTS: CMRR FACILITY

Department of Energy

The Administration proposes deferring the construction of the Chemistry and Metallurgy Research Replacement (CMRR) facility and meeting plutonium requirements by using existing facilities in the nuclear complex.

* * *

The National Nuclear Security Administration (NNSA) has designed CMRR for the following stockpile missions: plutonium chemistry; plutonium physics; and storage of special nuclear materials. Construction has not begun on the nuclear facility. NNSA has determined in consultation with the national laboratories that existing infrastructure in the nuclear complex has the inherent capacity to provide adequate support for these missions. Therefore, NNSA proposes deferring CMRR construction for at least five years. Studies are ongoing to determine long-term requirements. Instead of CMRR, NNSA will modify existing facilities, and relocate some nuclear materials. Estimated cost avoidance from 2013 to 2017 totals approximately $1.8 billion.

In place of CMRR for plutonium chemistry, NNSA will maximize use of the recently constructed Radiological Laboratory and Utility Office Building ["RLUOB'] that will be fully equipped in April 2012, approximately one year ahead of schedule. In place of CMRR for plutonium physics, NNSA has options to share workload between other existing plutonium-capable facilities at Los Alamos and Lawrence Livermore national laboratories.

In place of CMRR for the storage of special nuclear materials, the Budget includes $35 million to accelerate actions that process, package, and dispose of excess nuclear material and reduce material at risk in the plutonium facility at Los Alamos. If additional storage is needed, NNSA can stage plutonium for future program use in the Device Assembly Facility in Nevada. The Office of Secure Transportation Asset will execute shipments as needed.

The budget document makes the following main points:

1. The Administration seeks no funding for constructing the CMRR-NF project in Fiscal Years 2013 through 2017. The Administration also seeks no funding for continuing the design of CMRR-NF in the current or any subsequent fiscal year.

2. Construction of the CMRR-NF project is to be deferred for at least five years.

3. DOE/NNSA have now determined that their existing infrastructure has the inherent capacity to provide for the missions formerly assigned to the proposed CMRR-NF. These alternatives, which DOE/NNSA now intend to implement, were not considered in the 2003 EIS, the 2011 SEIS, or authorized by the 2011 AROD.

4. DOE/NNSA are studying the long-term mission requirements that justified the CMRR-NF project. The long-term purpose of and need for CMRR-NF are now under fresh review.

5. DOE/NNSA have now selected a project alternative, not previously mentioned or described, that does not involve constructing CMRR-NF for at least five (5) years. "Instead of CMRR, NNSA will modify existing facilities, and relocate some nuclear materials." *See* DOE/NNSA Budget Cut Statement. No such alternative was analyzed or even mentioned in the 2003 EIS or

2011 SEIS, both of which clearly no longer form any basis for the presently-proposed federal action.

These statements conflict with DOE/NNSA's positions advanced in the lower court and in this Court. The Court has been told that the CMRR-NF is essential to national security (DOE/NNSA's Response Brief (Dec. 22, 2011) ("DOE/NNSA Br.") 9, 12; App. 732), but now other facilities are viewed as sufficient for national security purposes. DOE/NNSA stated that timely completion of CMRR-NF was critical (App. 732, 733), but now the Administration proposes a delay of at least five (5) years.

In the SEIS that has been urged upon the Court (DOE/NNSA Br. 27 n. 5) to support prudential mootness, DOE/NNSA stated that there are no possible alternatives to the current CMRR-NF (SEIS[1] at 2-28 through 2-32), but now they plan to use several existing alternatives that LASG had vigorously advocated for consideration. LASG Opening Brief (Aug. 31, 2011) 43-44. DOE/NNSA also said that the purpose and need for NNSA action had not changed since 2003 (SEIS at 1-11) and that they would not revisit their 2004 decision to construct the CMRR-NF at Los Alamos National Laboratory. SEIS at 1-15. Now, DOE/NNSA have chosen to defer and revisit that decision and they acknowledge that further studies are necessary to determine long-term requirements.

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

DOE/NNSA's budget document states clearly that alternatives not previously considered—within the "existing infrastructure of the nuclear complex" such as use of the CMRR-RLUOB for plutonium chemistry, "options to share workload between other existing plutonium-capable facilities at Los Alamos and Lawrence Livermore national laboratories," and actions to "reduce material at risk in the plutonium facility at Los Alamos," including staging plutonium at the Device Assembly Facility in Nevada—are now viewed as "reasonable alternatives" under 40 C.F.R. § 1502.14(a), appropriate use in lieu of constructing CMRR-NF.

Moreover, if construction is commenced in 2018—now the earliest possible date—the foundational 2003 EIS will then be fifteen (15) years old and the perfunctory SEIS will be at least seven (7) years old. In these situations, courts have held that a significant delay since the original NEPA studies, especially where new alternatives have been recognized, underscores the need for new NEPA analyses:

> We start with the premise that a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. *Warm Springs Dam*, 621 F.2d at 1023. This continuing duty is especially relevant where the original EIS covers a series of actions continuing over a decade. See Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Policy Act Regulation, 46 Fed. Reg. 18026, 18036 (1981). In general, an EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed. *Id.*

S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983). In *Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 229 F.Supp.2d 1140, 1148-49 (D. Or. 2002), where "relevant new information has been developed and made readily available in the 14 years since the 1988 FEIS was prepared," the court held that "defendants' decision that a new EIS was unnecessary is nevertheless arbitrary and capricious in light of the extent of the new information at issue." *See Or. Natural Res. Council Action v. U.S. Forest Serv.*, 445 F.Supp.2d 1211, 1232 (D. Or. 2006)("the agency must also carefully reexamine whether the passage of time warrants preparation of new EAs or EISs . . . and explain whatever decision it makes.").

In the present case, it is not only the passage of time itself and the unknown circumstances in 2018 which require the preparation of a new EIS. Unlike the cases cited above, DOE/NNSA are now committed to pursuing alternatives never before considered in any NEPA document, alternatives that were previously advocated by LASG but never analyzed by DOE/NNSA. Further, DOE/NNSA is presently undertaking a fresh review of the purpose and need underlying the project and all NEPA analyses to date. Consequently, it is not simply "new information" that requires a new EIS to supplant the old one, but DOE/NNSA's proposed course of conduct and selection of alternatives which are not guided by any NEPA study whatsoever.

Thus, as the budget announcement from DOE/NNSA demonstrates, the SEIS and AROD are now indefensible, because DOE/NNSA are ignoring them in their decision-making. The SEIS cannot sustain a claim of mootness or a condition of ripeness, as it has now been demoted to irrelevancy. By 2018 – the earliest date for the construction of CMRR-NF, a lapse of fifteen (15) years or more will have occurred since the issuance of the foundational EIS in 2003, and it is implausible to suggest that agency choices made in 2003 can apply to the circumstances existing in 2018 or thereafter, especially when DOE/NNSA is presently departing from the decisions analyzed in the 2003 EIS and 2011 SEIS and chosen in the 2004 ROD and 2011 AROD. These NEPA analyses, however, formed the entire bases for the lower court's decision, as urged by DOE/NNSA's inaccurate representations that the functions of CMRR-NF were vital for national security and could not be replicated elsewhere within the nuclear weapons complex.

Since it cannot be disputed that (a) DOE/NNSA are now developing an updated conception of the purpose and need for plutonium facilities, (b) a range of "reasonable alternatives" to meet such needs will be analyzed from numerous standpoints—particularly including environmental impacts—to enable an up-to-date decision among alternatives, and (c) sufficient time is certainly available for the necessary studies and decisions based upon, *inter alia*, the full NEPA process, LASG submits that judicial efficiency should prompt the Court to vacate the

decision below and remand with a direction to require preparation a new EIS encompassing all reasonable alternatives. Alternatively, since the factual claims on which the decision below was based are now admitted to be erroneous, and since the SEIS process has contributed nothing and will not guide DOE/NNSA's current decision, the Court should vacate the judgment below and remand the case with the directions that the district court conduct such proceedings as are necessary to determine whether a new EIS must precede a major federal project that will not be implemented until at least 2018.

Conclusion

The Court should allow the Record to be supplemented by the addition of the attached extract from the Administrations FY 2013 budget request, and in light of the new position taken therein by the Federal Government, the Court should vacate the judgment below and remand:

(a) with directions to require preparation of a new EIS, or, alternatively,

(b) with directions to proceed to further consideration of issues of NEPA compliance.

Respectfully submitted,

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March 6, 2012

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing *Plaintiff-Appellant's Motion to Supplement the Record, to Vacate the Judgment Below, and to Remand Pursuant to Tenth Circuit Rule 27.2(A)(1)*, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the AVG Anti-Virus Business Edition 2011, AVG Version 10.0.1424, Virus DB: March 6, 2012 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ Dulcinea Z. Hanuschak
Dulcinea Z. Hanuschak

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiff-Appellant's Motion to Supplement the Record, to Vacate the Judgment Below, and to Remand Pursuant to Tenth Circuit Rule 27.2(A)(1)* was furnished through (ECF) electronic service to the following on this 6th day of March, 2012:

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