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,*
-against-

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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# PLAINTIFF-APPELLANT'S RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BECAUSE OF MOOTNESS

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## Introduction

Pursuant to Fed. R. App. P. 27, 10th Cir. Local R. 27.2, and the Court's Order entered on November 2, 2011, Plaintiff-Appellant Los Alamos Study Group ("Plaintiff" or the "Study Group") responds to Defendants-Appellees' ("Defendants") motion to dismiss this appeal as moot, filed on November 1, 2011. The Study Group opposes the motion because this case is not moot and Plaintiff is entitled to substantial relief from this Court and the United States District Court for the District of New Mexico.

## Nature of this Case

This case was filed because Defendants were and are engaged in final design and construction of a massive unitary project, the Chemistry Metallurgy Research Replacement ("CMRR") project, at Los Alamos National Laboratory ("LANL") without prior preparation of an applicable environmental impact statement ("EIS") complying with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). When suit was brought, Defendants had constructed and were outfitting the CMRR Radiological Laboratory, Utility and Office Building ("CMRR-RLUOB"), which is a support facility that constitutes the first part of the CMRR project. (App. 929-37, 1565-74, 1650-67, 1673-78). They then had and currently have 283 persons working at preparing the detailed design of the next part of the project—the much larger and more impactful CMRR Nuclear Facility

("CMRR-NF") (Defendant-Appellees' Ex. E at 11, 13-14), and they have directed their contractor, Los Alamos National Security, LLC ("LANS"), to proceed with construction contracts for CMRR-NF. (App. 1669-79). In 2010, Plaintiff first learned that Defendants had dramatically increased the scale and impacts of the CMRR-NF beyond anything described in a 2003 EIS or the 2004 Record of Decision ("ROD") for the CMRR project. (App. 594-98). Despite the lack of a predecisional EIS analyzing the environmental impacts of the 2010-11 CMRR-NF and all reasonable alternatives, as NEPA requires (40 CFR § 1502.14(a)), Defendants have forged forward with their ambitious plans to design and build the CMRR project.

Plaintiff's Complaint, filed on August 16, 2010 (App. 11-44), seeks a declaratory judgment and an injunction requiring Defendants to comply with NEPA by preparing an Environmental Impact Statement ("EIS") that would analyze the impacts of the proposed 2010-11 CMRR-NF, including alternatives that have become reasonable in light of the tenfold increase in expected cost, additional decade of delay, and material changes in the purpose and need of the proposal. Plaintiff alleged:

> 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. (App. 12).

Further, Plaintiff alleged:

> 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. (*id.*).

The Complaint alleges:

1. The current CMRR project has expanded dramatically from the design examined in the 2003 EIS, and that 2003 EIS has now become obsolete and irrelevant. (App. 16-20, ¶¶ 15-28).

2. Construction cost projections for the CMRR have increased from $350-500 million to about $4 billion. (App. 16, 18, ¶¶ 16, 24).

3. The main function of the CMRR is to assist in manufacturing plutonium pits, which are the core of a nuclear weapon. Recent studies have determined that plutonium pits have a lifetime decades longer than was known in 2003, requiring a thorough rethinking of the NEPA "purpose and need" for the CMRR. (App. 21-22, 24, ¶¶ 35, 42).

4. The only warhead manufacturing program that would have required output from the CMRR has been cancelled—again calling for rethinking of the "purpose and need." (App. 23, ¶ 39).

5. Defendants' changes in the CMRR design are so fundamental that the 2003 EIS is now entirely irrelevant, a Supplemental EIS ("SEIS") would be inadequate, and a new EIS is required. (App. 26-29, ¶¶ 50-51).

The Complaint seeks injunctive relief to require Defendants to cease their ongoing implementation of the CMRR project until a new EIS is issued. Relief was sought:

> 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 . . . (App. 42).

In response to the Complaint, Defendants on October 1, 2010 published a Notice of Intent to prepare a Supplemental EIS (75 Fed. Reg. 60745) and promptly moved to dismiss on grounds of mootness and lack of ripeness. (App. 45). That motion, and Plaintiff's Motion for Preliminary Injunction (App. 128), were heard on April 27 and May 2, 2011. App. 337-559. By then Defendants had issued a Draft SEIS (App. 1008-1531), which stated that Defendants had no intention of considering alternatives to the planned CMRR-NF at Technical Area 55 at LANL.[1]

On May 23, 2011, the District Court dismissed this case on grounds of prudential mootness and lack of ripeness. (App. 314-35). Plaintiff has appealed.

[1] Defendants argue that Plaintiff cannot "challenge" the draft or final SEIS in this case. (D. Br. 13-14). Defendants injected the SEIS into this case, claiming in the court below that their preparation of a supplemental EIS made the case moot. (App. 74-76). Plaintiffs have pointed out that Defendants' position in the SEIS—that they will not consider any reasonable alternatives—by itself refutes any claim that their NEPA violations should be regarded as moot, since the violations continue. See Plaintiff-Appellant's Opening Brief at 27, 39-41 (Aug. 31, 2011).

In its opening brief, filed on August 31, 2011, Plaintiff emphasized that Defendants are in the course of constructing, outfitting and designing various elements of the CMRR project and that such continuing activities violate 40 CFR § 1506.1(a) because they would "limit the choice of reasonable alternatives." Such activities prevent Defendants from making an unbiased NEPA analysis and an objective selection of an alternative.

On September 2, 2011, EPA published notice of the availability of the Final SEIS (76 Fed. Reg. 54768).[2] The Final SEIS stated, as had the Draft SEIS, that Defendants would not reconsider whether to build the CMRR-NF, citing as support the 2003 EIS and 2004 ROD, which concern a wholly different project and are entirely obsolete:

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

The Final SEIS analyzes three so-called alternatives: (1) the construction of the CMRR-NF pursuant to the 2004 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, Defendants eliminated the 2004 design from consideration:

[2] As Defendants note (D.Br. 2 note 1), the Final SEIS is available on line at http://energy.gov/nepa/downloads/eis-0350-s1-final-supplemental-impact-statement.

> 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. (*id*. at S-8).

Defendants also stated that continued use of the CMR without upgrades would not meet their needs, thereby eliminating that supposed alternative also:

> 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. (*id*. at S-23).

Since Defendants had eliminated alternatives (1) and (3), they left only alternative (2), to construct the 2010-11 CMRR-NF. They listed a few other potential alternatives (*id*. at S-23 through S-26), but they did not analyze them.

The discussion of alternatives is a critical part of an EIS, since the purpose of an EIS is to inform decision-makers of the impacts and available alternatives. (40 C.F.R. §1502.1). An EIS must explore "all reasonable alternatives" (40 C.F.R. § 1502.14), but the SEIS has no discussion or analysis of reasonable alternatives to the 2010-11 CMRR-NF. Moreover, 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 discussion of alternatives. Regulations (40 C.F.R. § 1502.16) also call for discussion of the environmental consequences of all the alternatives considered, including 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 Defendants have not listed any alternatives, the SEIS does not meet this NEPA requirement.

On September 16, 2011, Defendants obtained a 30 day extension of their time to respond to Plaintiff's opening brief. They then issued the Amended ROD, recording their determination to construct the 2010-11 CMRR-NF. (76 Fed. Reg. 54344)(Oct. 18, 2011). On November 2, 2011 Defendants filed the Motion for Summary Disposition.

## Argument

### a. This case is not moot, because the violation is continuing, and the relief sought by Plaintiff has not been afforded.

A case is not moot if the court can grant effective relief. "[T]he crucial question is whether granting a present determination of the issues offered will have some effect in the real world." *McKeen v. U.S. Forest Service,* 615 F.3d 1244, 1255 (10th Cir. 2010), *quoting Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1311 (10th Cir 2010). *See also Utah Environmental Congress v. Russell,* 518 F.3d 817, 824 (10th Cir. 2008); *Wyoming v U.S. Department of Agriculture,* 414 F.3d 1207, 1212 (10th Cir. 2005). The burden of proof is on the party alleging mootness.

*Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The burden of demonstrating mootness is a heavy one. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953).

Whether a case is moot depends upon the nature of the pending claims, determined from the pleadings and the briefs. *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008). Plaintiff brought this case to obtain relief in the form of a NEPA-compliant EIS and other relief appropriate to remedy a NEPA violation (App. 42-44), including discontinuance of Defendants' implementation of their decision to build the 2010-11 CMRR-NF until they have issued that EIS and a valid ROD. It is critically important that, until Defendants can make a valid decision as to which project, if any, to build, they cease their continuing investment in the design and construction of the 2010-11 CMRR-NF and its ancillary and support facilities, so that Defendants can take a clear-eyed "hard look" at the true alternatives to that massive project, with understanding of the actual "purpose and need," as NEPA demands.

But Defendants have now issued only a strikingly abbreviated SEIS, which analyzes no reasonable alternatives, fails to enable a choice among alternatives, and purports to update an EIS that long ago lapsed into irrelevancy and cannot be "supplemented." Defendants claim that they have now made an informed

"amended" decision to proceed—with the 2010-11 CMRR-NF project that they chose internally in the late 2000's and have never compared to any actual alternatives. Based on that narrowly limited SEIS, and a supposed "decision" that, in fact, merely restates the decision made years before and confirmed by their irreversible commitments of resources, Defendants argue that the courts can do nothing more and that this case is over. If their position is accepted, Defendants can then continue to design, build, and contract for their chosen alternative, without ever complying with NEPA requirements for an EIS, in violation of NEPA regulations, while Plaintiff is denied a forum and must start from scratch to prove, in another case, that the latter-day SEIS did not cure the NEPA violations and that the project must ultimately be paused for the objective review that NEPA requires.

This case is not moot, because the NEPA violation continues, and Plaintiff clearly has not obtained the relief that it sued for. Defendants rely upon cases in which a federal agency admitted NEPA liability, issued an EIS or an Environmental Assessment ("EA"), and completed the NEPA process, whereupon mootness was found. (D.Br. 10-11). Here, Defendants have not admitted their obligation to issue an EIS as prayed, but have only written an inadequate SEIS, with no consideration of alternatives, in violation of NEPA's clear requirements. Meanwhile, Defendants continue with their project. They have not ceased their unlawful conduct, and relief is not only possible but required.

A NEPA lawsuit does not become moot merely because a Defendant unilaterally claims that, in its opinion, it has done all the law demands. In *Southwest Williamson County Community Association, Inc. v. Slater*, 243 F.3d 270 (6th Cir. 2001), the Secretary of Transportation asserted that he had completed NEPA compliance by issuing two EAs and two Findings of No Significant Impact ("FONSIs") about parts of the project and that the case was moot. The Court of Appeals rejected the argument:

> This case is not rendered moot merely because the federal defendants assert that, under their own interpretation of the statute, they are not required to act. (*id*. at 277).

Here, Defendants assert that this case has become moot because "this Court cannot grant any meaningful relief on the Study Group's original complaint seeking to compel a new NEPA analysis." (D.Br. 2). But the Court certainly has the authority to reverse the erroneous dismissal below, which rests upon misconceptions of the doctrines of prudential mootness and ripeness and disputed statements by Defendants, and to remand with directions to proceed to consider the NEPA claims. The District Court would then consider the state of Defendants' NEPA compliance, but no court is required to assume that the SEIS satisfies NEPA, as the Complaint demands, and it plainly does not do so.

None of the cases cited by Defendants supports dismissal here. In *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115 (10th Cir. 2009) (D.Br. 10-11),

EAs were completed by the Forest Service after briefing was closed on appeal. Notably, the petitioners *did not assert* that the EAs failed to provide the relief sought in their pleadings. Rather, they argued that the case was not moot under the "voluntary cessation" exception (572 F.3d at 1121), but where there was no reason to expect the challenged conduct to recur, this Court found mootness. (*id.*). Reliance on *Neighbors for Rational Development v. Norton*, 379 F.3d 956 (10th Cir. 2004)(D.Br. 12), is likewise misplaced, for there an EA was completed, and the plaintiff "never argue[d] the completed environmental assessment does not adequately consider the environmental impact and alternatives to development of the property." (at 966). Clearly, that is not so here.

Here, in contrast, Defendants have not conducted the full NEPA process prayed for in the Complaint, but only a patently inadequate "supplement" to an obsolete eight-year-old EIS, wholly omitting the critical analysis of alternatives. This is not NEPA compliance. Defendants' assertion that "the SEIS considered the very issues that the Study Group alleged required a new NEPA analysis" (D.Br. 11) is simply false. And it is plainly possible for "NNSA to return to its allegedly illegal conduct" (*id.*), because it has never stopped. Jurisdiction has in no way

"lapsed" (D.Br. 13); Defendants are continuing with the conduct complained of, and this Court can grant effective relief.[3]

[3] The other cases relied upon by Defendants have little to do with this situation under NEPA. *Aluminum Co. v. Bonneville Power Administration,* 56 F.3d 1075 (9th Cir. 1995), involves attempted review of a Record of Decision that had expired by its own terms; moreover, the underlying Biological Opinion had been superseded, *i.e.,* the questioned activities had ceased. (at 1078). Here, Defendants are pressing forward with the project in issue. In a later decision, *Aluminum Co. v. Bonneville Power Administration,* 175 F.3d 1156 (9th Cir. 1999), petitioners asserted that the EIS that allegedly mooted the case was, in fact, still defective. The petition was dismissed not because the case was moot but because the petitioners had not advanced this valid argument in their opening brief, as rules require. (at 1163). *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724 (10th Cir. 1997)(D.Br. 8, 11), an Endangered Species Act case, is inapposite, because there the only relief sought had been obtained, and there was no continuing injury. (at 728-29). In *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096 (10th Cir. 2010), congressional action displaced earlier biological opinions under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*., and brought about mootness. (at 1108; Pub. L. No. 108-137, § 208 (2003); Pub. L. No. 108-447, § 205 (2004)). Congress has not acted to alter Defendants' NEPA duties here. *Forest Guardians v. U.S. Forest Service,* 329 F.3d 1089 (9th Cir. 2003), involves the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and, specifically, an attempted challenge to a biological opinion that had been expressly superseded. (at 1096). *Ramsey v. Kantor,* 96 F.3d 434 (9th Cir. 1996), concerns a challenge to a fishery management plan which had been withdrawn; the challenge was moot. *Wyoming v. U.S. Department of Agriculture,* 414 F.3d 1207 (10th Cir. 2005), concerned a forest management regulation that had been withdrawn and replaced. (at 1211-13). *McKeen v. U.S. Forest Service,* 615 F.3d 1244 (10th Cir. 2010), involves terms of a grazing permit which had been cancelled and superseded, leaving no relief for the Court to give. (at 1251, 1255). *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 (10th Cir. 2006), concerns an attack on Bureau of Land Management regulations that had expressly been withdrawn and superseded. (at 1135). The applicability of *State Farm Mutual Automobile Insurance Co. v. Narvaez,* 149 F.3d 1269 (10th Cir. 1998), is obscure, because there the trial court had never had jurisdiction, unlike this case, where jurisdiction is plain.

**b. Where predetermination is in issue, issuance of NEPA documents does not render the case moot.**

Here, Plaintiff claims that the SEIS is massively deficient and predicated upon internal decisions that excluded any alternatives. Thus, Plaintiff claims that Defendants are committed to construct the CMRR-NF and have acted to do so, regardless of the NEPA analyses ultimately done, making NEPA analyses alone a futility, without halting the project, rescinding commitments to proceed, and reconsidering the project and its alternatives. *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) is pertinent here. There, the defendant agency argued that the case was moot, because it had prepared an EA and a FONSI, and said that the court could grant no further relief. The court rejected the assertion in words that apply here:

> [A]ppellants do not concede that the EA that ultimately was prepared is adequate. To the contrary, appellants contend that the EA is demonstrably suspect because the process under which the EA was prepared was fatally defective-*i.e.*, the Federal Defendants were predisposed to finding that the Makah whaling proposal would not significantly affect the environment. We agree. Moreover, appellants vigorously maintain that the EA is deficient with respect to its content and conclusions. (*id.* at 1146)

Predetermination raises the need for judicial supervision of remedies to ensure objective reconsideration, even after new NEPA analyses have been prepared—which has not occurred here. In *Upper Pecos Association v. Stans*, 500 F.2d 17 (10th Cir. 1974), this Court sustained dismissal of a NEPA suit as moot when a

new EIS was issued, but only after carefully determining that there was no need for relief to ensure that NEPA compliance would not be a "hollow gesture:"

> The question therefore confronting us is whether the Elk Mountain Road project is presently in such a stage of flexibility that consideration of environmental factors will be merely a hollow gesture. We do not think so. To date EDA has disbursed no funds on the grant, nor does it intend to disburse any finds until such time as the grant is reconsidered at every level of EDA in light of the final environmental impact statement. Although unquestionably appellees should have drafted their environmental impact statement prior to making the grant offer, we do not believe the Elk Mountain Project is so far along that appellees are precluded from objectively reconsidering the project. Appellant offers no evidence suggesting that EDA is irretrievably committed to the project and we find no evidence in the record to substantiate such a conclusion. Under the circumstances of this case we believe EDA has complied with the mandates of NEPA. (*id*. at 19).

Here, the opposite is true. Defendants have shown no "flexibility" about construction of the CMRR-NF, and consideration of environmental factors—should they ever be analyzed in an EIS—standing alone, would be a "hollow gesture." Thus, additional relief is required, and the case is not moot.

**c. Plaintiff's claims for relief from Defendants' irrevocable commitments of resources are not moot.**

Moreover, despite their noncompliance, Defendants are continuing with irrevocable commitments that will harden their resolve to construct the 2010-11 CMRR-NF. Defendants have built the CMRR-RLUOB, which is a $363 million support facility for the CMRR-NF; they are in the process of outfitting the CMRR-RLUOB; they are engaged in the Nuclear Materials Safety and Security Upgrades

("NMSSUP") project, which in part serves the CMRR project; they have put LANS under contract to complete construction subcontracts to build CMRR-NF; and they and their contractor employ some 283 persons and an unknown number of design subcontractors to complete final design of the CMRR-NF at a cost of hundreds of millions. As the Sixth Circuit stated in *Southwest Williamson County*, rejecting mootness arguments: "If we conclude that the [project] constitutes a 'major federal action,' then we have the authority to instruct the district court to enjoin the state from further construction on the [project]." (243 F.3d at 277).

Contrary to Defendants' assertions (D.Br. 13), the federal courts have authority to restrain design efforts, where they will limit the agency's choice of alternatives. An agency should be enjoined from investing in a project:

> [i]f investment in the proposed [project] were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and at some point his consideration would become a meaningless formality. *National Audubon Society v. Department of the Navy*, 422 F.3d 174, 201 (4th Cir. 2005).

Under 40 C.F.R. § 1506.1(a), actions should be enjoined that would "limit the choice of reasonable alternatives." The "question of whether particular activities will in fact '[l]imit the choice of reasonable alternatives' . . . is context-specific." *National Audubon*, 422 F.3d at 202:

> The proper inquiry in a NEPA case is therefore not whether an agency has focused on its preferred alternative, but instead whether

> it has gone too far in doing so, reaching the point where it actually has '[l]imit[ed] the choice of reasonable alternatives.' (*id.* at 206).

In this case, the line is drawn by Defendants' regulations. While the Department of Energy ("DOE") is preparing an 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.

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 added*).

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. U.S. DOE Guidance Regarding Actions that May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions. (June 17, 2003, at 4) (App. 1691).

There are good grounds for injunctive relief, suspending detailed, final design during NEPA review. At the very least, Plaintiff's efforts to obtain such interim relief are not moot.

Plaintiff does not seek to "undo" (D.Br. 12) Defendants' preparations for construction of CMRR-NF; rather, the very fact that such preparations cannot be undone requires that they be enjoined.[4] This Court ruled in *Davis v. Mineta,* 302 F.3d 1104, 1115 n. 7 (10th Cir. 2002):

> If 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. *See* *Marsh*, 872 F.2d at 504; *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir.1986). *See generally* 40 C.F.R. § 1506.1 (prohibiting an agency from taking action concerning a proposal that would limit the choice of reasonable alternatives, until the NEPA process is complete).

Under this Court's precedents, this case is not moot.

**d. A NEPA case is not moot where remedial action has not been completed.**

Defendants' issuance of the SEIS during this litigation amounts to an admission that their NEPA compliance was lacking. In such a situation, the court retains jurisdiction to administer NEPA remedies, including a determination whether an agency has actually achieved compliance and orders to protect and insure compliance. For example, in *Natural Resources Defense Council v. U.S. Army Corps of Engineers*, 457 F.Supp.2d 198 (S.D.N.Y. 2006), the court

[4] *Coliseum Square Association v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006)(D. Br. 12), is not to the contrary, for here there has been no "[a]ction by the defendant that simply accords all the relief demanded by the plaintiff."

emphasized the need for close scrutiny of "agency explanations that come after a decision to proceed has been made because of the risk of 'post-hoc rationalization.'" (*id*. at 222). It noted that an agency may be directed "to prepare new NEPA-compliant documentation 'under circumstances that ensure an objective evaluation' free of the pressures that are present when an agency has already undertaken to conduct a project." (*id*. at 225). And it stated that the agency "will have to demonstrate that it has acted objectively and in good faith." (*id*. at 237). Such relief remains to be carried out by the court in this case.

**e. The second lawsuit does not render this case moot.**

Finally, Defendants argue that mootness arises from the fact that Plaintiff has initiated a new lawsuit to challenge the SEIS and the CMRR project. (D.Br. 13). When that second suit was brought, this case had been dismissed as moot and was on appeal. To ensure preservation of its claim, Plaintiff filed a second suit. There is no basis to claim that the existence of the second suit renders this one moot. Mootness depends upon the status of an individual controversy. *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). The viability of the present litigation is not affected by the second suit.

## Conclusion

Defendants' insufficient NEPA documentation does not "eliminat[e] the issues upon which this case is based," *Wyoming*, 414 F.3d at 1212, neither does it

"redress[] any alleged injuries set forth in the Complaint" (D.Br. 11), nor "heal[] the injury" in issue (D.Br. 8), where the Complaint emphatically asserts that Defendants are implementing a massive federal project without conducting NEPA analyses. Continued implementation of the CMRR project is a "concrete ongoing injury," *Silvery Minnow*, 601 F.3d at 1112. Plaintiff has "a good chance of being likewise injured in the future," and the "facts alleged show that there is a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," *Chihuahuan Grasslands Alliance,* 545 F.3d at 891. The statement that this litigation would call for meaningless, repetitive analysis (D.Br. 11-12) simply ignores the fundamental NEPA requirement of objective analysis of all reasonable alternatives, 40 C.F.R. § 1502.14(a), before making a decision and proceeding, which Defendants have never fulfilled. Under governing precedents the case is not moot.

Even if the Court were to conclude that all issues raised on this appeal have become moot, it is plain that the entire case has not become moot. In such circumstances, the appropriate action is not to direct dismissal of the case but to vacate the judgment of the District Court without prejudice to further proceedings in that court. *Crowell v. Mader,* 444 U.S. 505, 506 (1980).

Defendants' Motion for Summary Disposition should be denied.

Respectfully submitted,

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November 23, 2011

**CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS**

I hereby certify that a copy of the foregoing was 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 10.0.1392, Virus DB: November 23, 2011 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 Response to Federal Defendants' Motion for Summary Disposition because of Mootness* was furnished through the Court's CM/ECF electronic service to the following on this 23rd day of November, 2011:

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