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

APPELLANT'S OPENING BRIEF

Respectfully submitted,

THOMAS M. HNASKO
DULCINEA Z. HANUSCHAK
Hinkle, Hensley, Shanor, and Martin, LLP
Post Office Box 2068
Santa Fe, NM 87504
(505) 982-4554

LINDSAY A. LOVEJOY, JR.
Law Office of Lindsay A. Lovejoy, Jr.
3600 Cerrillos Rd., #1001A
Santa Fe, NM 87507
(505) 983-1800

Oral Argument is requested
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

August 31, 2011

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None.

STATEMENT OF JURISDICTION

This case is brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq*. and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. ("NEPA") and challenges defendants-appellees the U.S. Department of Energy ("DOE"), Energy Secretary Steven Chu, National Nuclear Security Administration ("NNSA"), and NNSA Administrator Thomas Paul D'Agostino's (collectively "DOE") pursuit of the Chemistry and Metallurgy Research Replacement ("CMRR") Nuclear Facility ("NF") project without an applicable Environmental Impact Statement ("EIS").

Jurisdiction in the court below is based upon 28 U.S.C. § 1331. Final judgment was entered on May 23, 2011. A notice of appeal was filed on July 1, 2011, within 60 days of the entry of judgment, pursuant to Rule 4(a)(1)(B), Fed. R. App. P. Jurisdiction in this Court is based upon 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the court below abuse its discretion in dismissing the NEPA complaint on grounds of prudential mootness, stating that DOE has "changed its policy" by promising new NEPA analyses, where: (a) DOE's promised NEPA review rejects consideration of any alternatives; (b) DOE has nearly completed Phase I of the CMRR project and continues to perform final design of CMRR-NF,

which is Phase II; (c) DOE has made a contract to begin construction of CMRR-NF; and (d) the Administration is publicly committed to construct CMRR-NF?

2. Relying on DOE's plan to issue a supplemental NEPA analysis, did the court below err in dismissing the complaint on grounds of ripeness where: (a) DOE's planned NEPA review rejects consideration of any alternatives to CMRR-NF; (b) DOE has nearly completed Phase I of the CMRR project and continues to perform final design of CMRR-NF, which is Phase II; (c) DOE has made a contract to begin construction of CMRR-NF; and (e) the Administration is publicly committed to construct CMRR-NF?

3. Did the lower court err in granting a Rule 12(b)(1) motion to dismiss this NEPA case, where: (a) the material facts cited by that court in support of its decision were disputed; (b) plaintiff-appellant The Los Alamos Study Group ("LASG") had submitted evidence in conflict with the court's findings of fact; and (c) LASG was denied the opportunity to conduct discovery?

STATEMENT OF THE CASE

On August 16, 2010 LASG filed its Complaint against DOE. Appellant's Appendix ("App.") 11-44. On October 4, 2010 DOE moved to dismiss pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of subject matter jurisdiction. App. 45-82. LASG responded, and DOE replied. App. 83-127. On November 12, 2010 LASG moved for a preliminary injunction. App. 128-161. DOE responded, and LASG

replied. App. 162-94; 206-29. The District Judge on November 17, 2010 referred the Motion to Dismiss to the Magistrate Judge. On January 6, 2011, the Magistrate Judge filed proposed findings and a recommended disposition, recommending dismissal. App. 195-205. DOE and LASG filed objections to the Magistrate Judge's recommendations. App. 230-50. LASG moved for a discovery conference and a scheduling order; the Magistrate Judge denied this motion on April 8, 2011. App. 311-13. The District Court heard the parties' objections to the Magistrate Judge's recommendations and LASG's Motion for Preliminary Injunction on April 27, 2011 and May 2, 2011. On May 23, 2011 the District Judge issued a Memorandum granting DOE's Motion to Dismiss and entered judgment of dismissal. App. 314-35. This appeal followed.

STATEMENT OF THE FACTS

a. *CMRR EIS and ROD*

NNSA prepared the CMRR EIS[1] in 2003 to analyze certain alternatives to perform plutonium-related analytical chemistry ("AC") and materials characterization ("MC") and associated research and development activities at a new Los Alamos National Laboratory ("LANL") facility, which would have a 50-year operating period. The EIS analyzed (a) construction of a CMRR Facility at

[1] LASG does not believe that the 2003 CMRR EIS was adequate for purposes of NEPA analysis when it was issued but does not raise that issue on this appeal.

LANL TA-55 as the Preferred Alternative[2], (b) a "Greenfield" site alternative at LANL TA-6, (c) two "hybrid" alternatives, and (d) the no action alternative. App. 700-01; 1547. The Record of Decision ("ROD") described Alternative 1 as a single project to construct two or three buildings:

> Alternative 1 is to construct a new CMRR facility consisting of two or three new buildings within TA-55 at LANL to house AC and MC capabilities and their attendant support capabilities that currently reside primarily in the existing CMR building, at the operational level identified by the expanded operations alternative for LANL operations in the 1999 LANL SWEIS.

App. 1547.

This preferred alternative was described as "a single consolidated special nuclear material (SNM) capable, Hazard Category 2 laboratory with a separate administrative offices and support functions building . . ." App. 1548.

DOE/NNSA issued a ROD on February 12, 2004, selecting Alternative 1. The ROD outlined the construction impacts of Alternative 1, which were termed "minimal":

> The construction of a new SNM-capable Hazard Category 2 laboratory, an administrative offices and support functions building, SNM vaults and other utility and security structures, and a parking lot at TA-55 would affect 26.75 acres (10.8 hectares) of mostly disturbed land, but would not change the area's current land use designation. The existing infrastructure resources (natural gas, water, electricity) would adequately support construction activities. Construction activities would result in temporary increases in air quality impacts,

[2] This alternative also involves construction of parking areas, tunnels, vault areas, and other infrastructure support needs. App. 1547.

> but resulting criteria pollutant concentrations would be below ambient air quality standards. Construction activities would not impact water, visual resources, geology and soils, or cultural and paleontological resources. Minor indirect effects on potential Mexican spotted owl habitat could result from the removal of a small amount of habitat area, increased site activities, and night-time lighting near the remaining Mexican spotted owl habitat areas. The socioeconomic impacts associated with construction would not cause any major changes to employment, housing, or public finance in the region of influence. Waste generated during construction would be adequately managed by the existing LANL management and disposal capabilities.

App. 1548.

Concerning operational impacts, the ROD stated similarly:

> Relocating CMR operations to a new CMRR facility located at either TA-55 or TA-6 within LANL would require similar facilities, infrastructure support procedures, resources, and numbers of workers during operations. . . . There would not be any perceivable differences in impact between the action alternatives for land use and visual resources, air and water quality, biotic resources, (including threatened and endangered species), geology and soils, cultural and paleontological resources, power usage, and socioeconomics.

App. 1549.

The CMRR EIS projected completion by 2009. App. 1545. DOE/NNSA concluded that a new facility would be less expensive than upgrading the existing CMR. App. 1551.

b. *DOE's Critical Decision 1*

In May 2005 DOE approved Critical Decision 1 ("CD-1") for CMRR-NF and CMRR Radiological Laboratory, Utility, and Office Building ("CMRR-

RLUOB") Special Facility Equipment. App. 1552. Under DOE Order 413.3, approval of CD-1 means that the agency has selected one particular alternative and cost range to meet its need. App. 612-14. The project then moves to the execution phase. In May 2005 DOE approved Critical Decision 2/3 for the CMRR-RLUOB, meaning that the cost baseline was approved and construction would begin. App. 612-14; 1552.

c. ***Subsequent Modifications to the CMRR-NF Design***

By February 2009 the projected cost of the CMRR had risen from about $600 million for both buildings in 2003 to more than $2 billion for the CMRR-NF alone. App. 938; 1541-43; 1552. The Defense Nuclear Facilities Safety Board ("DNFSB"), acting pursuant to Pub. L. No. 110-417, § 3112, issued a Certification Review in September 2009, explaining that DOE/NNSA had proposed a design with deeper excavation, to 75 feet, and would need to strengthen or replace a 50 to 60 foot layer of unconsolidated volcanic ash and to install a confinement ventilation system. App. 1554-57.

In 2010 DOE/NNSA first made public certain design changes in the CMRR-NF. At a meeting on March 3, 2010, it stated that soil and seismic conditions required excavation to 125 feet, with the bottom 50 feet of the hole to be filled with concrete for stability. App. 1558-59.

The 2003 EIS stated that 3,194 cubic yards of concrete would be needed for the CMRR-NF. App. 1560. By August 2010, DOE/NNSA estimated that 371,000 cubic yards of concrete would be needed. App. 1561. Producing this concrete would generate more than 100,000 tons of carbon dioxide. App. 1562-63. Instead of one concrete plant, DOE/NNSA said it would need at least two. App. 1037. The 2003 EIS had estimated that 267 tons of steel would be needed. App. 1560. Plans now call for 18,500 tons of steel. App. 1564. The area of the CMRR-NF had been projected to be 200,000 square feet. App. 1543-44. Current plans call for a building of 406,000 sq. ft. App. 1565-74.

The 2003 EIS states that 27 acres would be committed to construction. App. 1576. The 2010 CMRR will incorporate parts of LANL Technical Areas 55, 46, 48, 50, 52, 63, 64, 66, and 54 or 36. App. 779-80. Approximately 114 acres are involved. App. 1579. In the 2003 plan an additional 100,000 cubic yards or so would need excavation, while in the current plan from 400,000 to 500,000 additional cubic yards would be excavated, beyond 90,000 cubic yards already excavated. App. 1582; 1679-80.

The 2003 plan would employ about 300 construction workers, at peak. App. 1560. In June 2010 NNSA estimated a peak construction work force of 822; in September 2010 it estimated 900, not including support personnel, engineering and design, and administration, which add hundreds more. App. 1583-96.

The 2010-11 plan includes a craft worker facility, an electrical substation, a truck inspection facility, an additional office building, and a warehouse. Pajarito Road is expected to be closed for two years. Temporary facilities, possibly even housing, would be required. App. 595-98. The completion date is now 2020, with operations beginning in 2023. App. 1597-98.

In November 2010, the White House estimated the budget for the CMRR-NF at "$3.7 to $5.8 billion." App. 1737. A more reliable "baseline" cost estimate will be available in 2015. App. 1600-02.

The cost increases are importantly related to seismic and other safety concerns. In 2007 LANL issued a new Probabilistic Seismic Hazard Analysis (App. 1603-09) with a "significantly" increased estimate of the seismic hazard, in frequency and maximum acceleration of large earthquakes, over the 1995 analysis. App. 1607. The soft material beneath the building amplifies these accelerations and may allow the building to slide laterally. App. 1554-57; 1603-09. Neither issue was appreciated in 2003. App. 941-42. Further, DOE had changed the "design basis threat" for nuclear facilities, disfavoring above-ground facilities. App. 1612-14. Also, DOE added a confinement ventilation system, meant to operate after an earthquake, to reduce risks to workers and nearby communities. App. 1554-57. Further, DOE/NNSA planners developed a "hotel concept" to

accommodate unspecified future uses. This change led to "major seismic design challenges," because of the wide spans required. App. 1610-11.

Annual operations of the 2003 CMRR-RLUOB and NF were expected to consume about 10.4 million gallons of water and 19,300 megawatt hours of electricity. The CMRR-RLUOB and NF are now estimated to require about 16 million gallons of water, 161,000 megawatt hours of electricity, and 58 million cubic feet of natural gas. App. 1044. Addition of a third transmission line and re-conductoring two existing transmission lines to Los Alamos County are being studied. *Id.*

Moreover, the purpose and need of the CMRR have become uncertain. Its primary mission is to increase LANL's plutonium pit[3] production rate, but with the end of the Reliable Replacement Warhead program, there is no large-scale pit production mission. App. 1615-16. DOE's JASON science advisory group reviewed research on pit life and concluded that most U.S. pits would last a century or more. Thus, new pits are not needed for the weapons stockpile. App. 1617-42. In May 2010 NNSA stated that 60 pits per year could be produced at LANL's Plutonium Facility by 2021. App. 1643. In 2008 Los Alamos National Security, LLC ("LANS"), the Management and Operating contractor, met a contract requirement for pit capacity of 80 pits per year. App. 1644-45. The April

[3] The pit is the core of a nuclear weapon.

2010 Nuclear Posture Review states that DOE/NNSA should manage the weapons stockpile without pit manufacturing, which would recommence only after approval by the President and Congress. App. 1646.

d. ***NNSA's Contractual Commitments***

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

> Measure 18.3 Delivery of CMRR and NMSSUP II
>
> Expectation Statement:
> LANS will accelerate and/or complete key Nuclear Materials Safety and Security Upgrades (NMSSUP) Phase II and CMRR milestones as well as integration and planning of the Pajarito Road corridor:
>
> Completion Target:
> This measure has been achieved when the Contractor has by September 30, 2011:
> . . .
>
> B. CMRR
>
> Actions necessary to issue and execute construction contracts for Infrastructure Packages in FY 2011 are achieved on schedule.
>
> Nuclear Facility basemat and structural design achieve planned maturity and schedule goals.
>
> Demonstrate acceleration of the RLUOB REI scheduled completion from FY 2013 to FY 2012.

App. 1669-79.

NNSA has directed LANS to complete CMRR-NF construction by 2020 and to begin operation by 2022. App. 1650-67. The FY 2010 agreement calls upon LANS to develop integrated planning to support Pajarito Corridor construction:

> Instituted a process to manage the institutional interfaces and resolve issues for TA-50-55 related projects (CMRR, TA-55 Reinvestment, RLWTF, New TRU, and NMSSUP2) that enhance overall site project performance and minimize operational impacts for the next decade.

App. 1668.

LANS is to produce planning tools for:

1. laydown, staging and warehousing;
2. concrete batch plant strategy;
3. parking and workforce transportation;
4. security strategy;
5. scope or schedule conflicts;
6. master integrated schedule;
7. multi-year staffing plan; and
8. FY 2011 and FY 2012 budgets.

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

e. *Construction of the CMRR Project*

In the CMRR project, the CMRR-RLUOB is the "First Replacement Component." App. 1571. Several elements of the CMRR-RLUOB serve the CMRR-NF. It has:

1. a radiological lab section;
2. a central utility building of 20,998 sq. ft., serving both CMRR buildings;
3. offices in RLUOB accommodating 350 people in both CMRR buildings;
4. a personnel entrance control facility serving both buildings;
5. a training center with laboratories serving all of TA-55;
6. a parking lot for both CMRR buildings;
7. fuel oil storage and backup electrical generation for both buildings;
8. a facility incident command center for CMRR-NF and other nearby plutonium facilities; and
9. an operations center.

App. 929-37; 1673-78.

NNSA has partially excavated the site of the CMRR-NF, removing approximately 90,000 cubic yards. App. 1679-80. Construction of a parking lot for CMRR-NF staff appears complete. App. 1578. Large portions of the Nuclear Materials Safety and Security Upgrades ("NMSSUP") project, currently under construction, serve CMRR-NF. App. 1681-83.

f. ***NNSA's Continuing Final Design***

DOE/NNSA presentations state that NNSA is doing detailed final design of CMRR-NF to produce all of the plans necessary for construction. App. 1585-96; 1665; 1684; 1699; 1732. Thus: "Design deliverables include all products

necessary to construct." App. 1593. Steve Fong, CMRR Project Manager, has stated that the infrastructure package is ready for design-build contracting. App. 1698-1700. The project is divided into five phases or "chunks," so early chunks can get started before later ones have completed design. App. 1731-32. NNSA's appropriations and obligations for *final design* of the CMRR-NF were $39.4 million in FY 2008, $92.2 million in FY 2009, and $57 million in FY 2010. Further, $166 million was requested for FY 2011—for Final Design only. App. 1684.

g. *Administration Commitment to Build CMRR-NF*

The Vice President, in a letter dated September 15, 2010 to the Senate Foreign Relations Committee, declared the Administration's "unequivocal support" for the CMRR-NF. He spoke of the President's "commitment to an immediate start to his modernization initiatives," including the CMRR-NF: "I write to assure the Committee of the Administration's strong support for this program." App. 1735-36. Further:

> [T]he designs of key facilities such as the . . . Chemistry and Metallurgy Replacement Facility have progressed. Based on information learned since the submission of the President's FY 2011 budget and the report under section 1251 of the National Defense authorization Act for FY 2010, we expect that funding requirements will increase in future budget years.
>
> . . . .
>
> This Administration has expressed its unequivocal commitment to recapitalizing and modernizing the nuclear enterprise, and seeks to

> work with Congress on building a bipartisan consensus in support of this vital project. I look forward to continued work with Congress to ensure that we accomplish our shared objective to maintain and strengthen U.S. nuclear security.

App. 1535-36.

At the date of this letter the Administration was seeking ratification of the New START weapons treaty. There was an agreement that, if certain Senators voted for the treaty, the Administration would build the CMRR-NF. App. 693-96.

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

> Increase funding by $4.1 billion . . . over the next five years relative to the plan provided to Congress in May—including an additional $340 million for the Uranium Processing Facility (Tennessee) and the Chemistry and Metallurgy Research Replacement (CMRR) facility (New Mexico);
>
> and:
>
> The Administration is committed to requesting the funds necessary to ensuring completion of these facilities.

App. 1737.

NNSA management has said that "The proposed CMRR-NF is a unique facility, central to LANL's mission and critical to the national security of the United States." App. 1738. Deputy Administrator Cook swears to the "importance of the CMRR Project to our national defense." App. 1739. Administrator

D'Agostino said on October 28, 2010 that "it is critical that we complete the design and construction of key facilities," including CMRR-NF. App. 1740-42.

h. *This Litigation*

On July 1, 2010 LASG wrote to the Energy Secretary and the NNSA Administrator, advising of LASG's concern about proceeding with CMRR-NF without an applicable NEPA analysis. App. 637-45.

This suit was filed on August 16, 2010. App. 11-44. The Complaint seeks declaratory and injunctive relief requiring compliance with NEPA, including issuance of an EIS concerning the CMRR-NF and all reasonable alternatives. LASG alleges that the impacts of the current CMRR-NF far exceed those of all designs examined in the 2003 EIS, including the design selected in the 2004 ROD. Neither that design nor the reasonable alternatives have been analyzed in an EIS. The 2003 CMRR project was fundamentally smaller-scale and did not involve challenging seismic risks or other mission elements that the current project deals with. App. 17-18. Moreover, the Complaint alleges, the estimated cost of the 2003 CMRR was $600 million for two buildings, while the current CMRR-NF building will cost $4 billion or more. App. 18. The 2003-04 CMRR-NF was expected to be completed by 2009; the current version will not be built until 2023. The size of the building has approximately doubled, and it would be built to a depth of 125 feet, as opposed to the original 75 feet, causing many large impacts.

App. 19-20. The Complaint reviewed the factors that gave rise to the design changes—*e.g.*, updated seismic risk analysis, increased design basis threat—and outlined the numerous ways in which the original plan had dramatically changed:

- increased acreage requirements;
- technical areas affected;
- concrete and soil grout requirements increased;
- increased greenhouse gas emissions;
- increased mining impacts;
- increased steel requirements;
- increased peak employment;
- increased construction period;
- increased excavation depth and volume;
- use of spoils to cap disposal sites;
- increased operation of CMR;
- added craft worker facility;
- electrical substation;
- closure of Pajarito Road;
- truck inspection facility;
- added warehouse;
- displacement of 4,400 LANL workers;

- larger decontamination and decommissioning tasks; and
- larger trucking impacts.

LASG requested preparation of an EIS for the current CMRR-NF project and all reasonable alternatives, and an ROD, before any decision to build it. App. 29-42.

i. *DOE's Actions Taken After Litigation Began*

After litigation began, NNSA prevailed upon LANS to modify the Management and Operations contract to require LANS to assist in developing the Draft Supplemental EIS ("SEIS") and to delete the requirement to obtain execution of construction contracts. The requirement that design achieve planned maturity and schedule goals remained. App. 1671-72.

Also, DOE/NNSA announced that construction of the CMRR-NF would not proceed until they completed a SEIS and a ROD. App. 573-75. However, NNSA specifically requested that it be permitted to continue design activities, so that no time would be lost in constructing the CMRR-NF. App. 575. NNSA said that final design contracts have been deferred, but certain undefined design efforts continue. App. 727; 1684.

i. *Notice of Intent to Prepare SEIS*

On October 1, 2010, DOE/NNSA published a Notice of Intent to prepare a SEIS, supposedly to address changes in the CMRR-NF project occurring after the 2003 EIS. App. 579-82.

j. *Motion to Dismiss*

Three days later, on October 4, 2010, DOE moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. App. 45-82. DOE argued that LASG's NEPA demands implicated the forthcoming SEIS, so that such demands were unripe, because until the SEIS was issued, there was no final agency action (5 U.S.C. § 704), and were also moot, in light of defendants' promise to issue a SEIS. DOE urged both constitutional mootness and prudential mootness, under which a court may dismiss a case where DOE has changed its policies so that repetition of the actions in issue is highly unlikely. *United States v. W.T. Grant & Co.*, 345 U.S. 629, 633 (1953).

DOE filed a declaration by Deputy Administrator Cook, who stated that 283 personnel are employed on the CMRR-NF project, no construction will occur while the SEIS is being prepared, but compliance with LASG's request to "halt any and all design activities, make no further contractual obligations, and seek no further funding" would involve firing most of the 283 employees. App. 572-74.

LASG responded, describing the project's post-2003 transformation into the current multi-billion-dollar venture. App. 83-106; 587-94; 598-601. It pointed out that previous NEPA analyses in the 2003 CMRR EIS, the 2008 LANL SWEIS[4],

[4] Final Site-Wide Environmental Impact Statement for the Continued Operation of the Los Alamos National Laboratory, DOE/EIS-0380 (2008).

and the 2008 Complex Transformation SPEIS[5] simply presented the 2003 version of the project, which was now inapplicable. App. 588.

LASG showed that DOE/NNSA documents indicated that construction was going forward. The project is now going forward, full steam ahead. Approximately 100 craft employees were at work on the CMRR-NF during Fiscal Year 2010, just ended, and in FY 2011 the number will rise to an estimated 125. App. 1583-84. Support services are at 150 to 200 people. App. 1585-96. Design projects now ongoing are the Infrastructure Package, the Pajarito Road Relocation, and the Basemat Package. App. 92; 1731-32.

LASG showed that the Administration had publicly committed to the CMRR-NF, in exchange for senatorial votes for the New START treaty. App. 92-93. LASG showed that DOE/NNSA planned to finish final design for each of the five CMRR-NF "phases" in mid-FY 2011 through FY 2014. App. 1731-32. LASG also showed that the changes in CMRR-NF were undisclosed until public meetings in March and June 2010. App. 601-05. The District Judge referred the motion to Magistrate Judge Torgerson. Order referring Defendants' Motion to Dismiss to Magistrate Judge Alan C. Torgerson, January 17, 2010.

On November 12, 2010 LASG moved for a preliminary injunction, with supporting affidavits and exhibits. App. 128-61.

[5] Complex Transformation Supplemental Programmatic Environmental Impact Statement, DOE/EIS-0236-S4 (2008).

k. *The Magistrate Judge's Findings and Recommendation*

On January 6, 2011 the Magistrate Judge issued proposed findings and recommended disposition, calling for dismissal on grounds of prudential mootness. App. 195-205. He found that "NNSA is still evaluating the aspect of relative sizing and layout of the proposed CMRR-NF" and that "No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared." App. 200. He stated that DOE/NNSA is in the process of preparing a SEIS, "which would supersede the 2003 EIS and 2004 ROD" and had not yet determined "how best to proceed":

> After the SEIS is completed, NNSA will decide, based on that study, how best to proceed with the proposed CMRR-NF. Thus, 'circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief.

App. 203.

He stated that DOE/NNSA is changing its policy and that construction would not begin until after the SEIS and a new ROD are issued. He added that dismissal is correct, even if construction of the CMRR-NF infrastructure was imminent, as LASG claimed. App. 204 n. 2.

LASG filed objections to the Magistrate Judge's report pursuant to 28 U.S.C. § 636(b)(1)(c). App. 234-50. LASG pointed out that prudential mootness does not support dismissal based upon an agency's announcement that it will conduct further NEPA studies, that DOE/NNSA remain fully committed to the CMRR-NF

project, that DOE/NNSA had constructed the CMRR-RLUOB, that the dispute is ripe, and that the proposed SEIS was impossibly limited and could not cure the NEPA violations, since it failed to consider all reasonable alternatives and was biased by being prepared after DOE/NNSA's commitment to the project.

l. ***The Draft SEIS***

On April 22, 2011 DOE/NNSA issued a Draft SEIS. It states that NNSA will not reconsider its commitment to the CMRR-NF:

> Because NNSA decided in the 2004 ROD to build CMRR . . . the SEIS is not intended to revisit that decision. Instead the SEIS is limited to supplementing the prior analysis by examining the potential environmental impacts related to the proposed change in CMRR design.

App. 1743-44.

The Draft SEIS lists the following "alternatives":

1. A modified CMRR-NF in accordance with 2010-11 designs.

2. The CMRR-NF announced in the 2004 CMRR ROD.

3. Continued use of the existing CMR with minor upgrades and repairs.

However, the Draft SEIS effectively eliminates both alternatives (2 and 3) to the current CMRR-NF project. It states that the 2004 CMRR-NF would not meet DOE seismic performance standards: "Therefore, the 2004 CMRR-NF would not be constructed." App. 1027; 1035-36. It says that use of the existing CMR building "would result in very limited AC and MC capabilities over the extended

period," and "[t]his alternative does not completely satisfy NNSA's stated purpose and need to carry out AC and MC." App. 1038.

The Draft SEIS identifies two construction "options" within the Modified CMRR-NF: the Deep Excavation Option and the Shallow Excavation Option, but it does not term them NEPA "alternatives." App. 1037. Having made Critical Decision 1 to build the CMRR-NF, under DOE Order 413.3 DOE/NNSA was in no position to consider alternatives.

m. ***The Decision Below***

The court below heard objections to the Magistrate Judge's report and LASG's Motion for Preliminary Injunction on April 27 and May 2, 2011. The court stated that there is sufficient overlap that she would not separate the issues. App. 340. LASG presented argument and evidence on the preliminary injunction. App. 342.[6]

On May 23, 2011, the court issued a decision granting DOE's Motion to Dismiss and, therefore, did not rule on LASG's Motion for Preliminary Injunction. The court found, first, that the current project clearly departs from the 2003 EIS analysis:

[6] Counsel for defendants objected to testimony by Mr. Mello, Executive Director of LASG, stating that "Mr. Mello has no direct information for this Court. All of his information, as you saw on his declaration, is based on documents that the Court can certainly look at." App. 371-72. This was not disputed, but the court agreed to take the evidence, cautioning counsel to be efficient. App. 372.

> Unquestionably, the CMRR-NF as currently envisioned will require an expenditure of resources and create a potential environmental impact greater than the project as envisioned in the 2003 EIS and 2004 ROD, prior to discovery of the seismic issues.

App. 320.

However, the court made certain key findings in directing dismissal:

1. "No CMRR-NF construction is underway, and none will occur until after the SEIS is finalized." App. 320; 324; 327; 331; 334.

2. "[N]o construction or other irrevocable actions appear to be ongoing while [DOE is] engaging in the SEIS process." App. 320.

3. "[DOE is] not moving forward with final design or construction." App. 324.

4. "[DOE is] currently preparing a supplement to the initial EIS in response to changed circumstances, exactly as the NEPA regulations contemplate." App. 325.

5. "[DOE is] not currently out of compliance with NEPA." *Id*.

The court stated that, for prudential mootness, the central inquiry is whether circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief, *e.g.*, where a defendant "has already changed or is in the process of changing its policies or where it appears that any repeat of the actions in question is otherwise highly unlikely," citing *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F. 3d 1096, 1122 (10th Cir. 2010).

The court said: "[LASG] seeks injunctive relief to ensure that [DOE's] design and planning of the CMRR-NF are made pursuant to an EIS." App. 322. It stated that LASG made two erroneous assumptions:

> [F]irst, that NEPA requires [DOE] to prepare a new EIS from scratch before moving forward with the project. Second, that [DOE is] currently moving forward with final design and construction in violation of NEPA.

App. 323.

Case law holds that a defendant's promise to prepare an EIS does not support dismissal of a NEPA suit. *Blue Ocean Pres. Soc'y v. Watkins*, 767 F. Supp. 1518 (D. Haw. 1991). The court distinguished the case, noting that it concerned constitutional mootness and that in *Blue Ocean* DOE had not formally announced its plan to issue a new EIS.

The court held that "[DOE's] undertaking of an SEIS means that circumstances have changed since the beginning of the litigation that forestall any occasion for meaningful relief." App. 327-28. It stated:

> The Court agrees that 'sound discretion withholds the remedy where it appears that a challenged "continuing practice" [of an administrative agency] is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted.

App. 328.

Thus, the court found that DOE/NNSA's decision to build the CMRR-NF based on an inapplicable EIS is "undergoing significant modification," based upon

the Draft SEIS. Where "the final form and conclusion of the SEIS cannot currently be known," LASG can participate in the SEIS process, the "SEIS process may address many, if not all, of [LASG's] concerns about the environmental effects of the proposed CMRR-NF project," and a new lawsuit may be filed after the SEIS process, the court held dismissal appropriate. *Id*. The court characterized the alternative as an order "to halt all work, including design analysis, and to issue . . . an advisory opinion." *Id*.

> The court also dismissed the case on grounds of ripeness. It stated that:
>
> While the SEIS process is ongoing, there is no ripe 'final agency action' for the Court to review pursuant to the Administrative Procedure Act.

App. 329.

LASG had argued that DOE violated NEPA when it made an irretrievable commitment of resources to the CMRR project. The court rejected this argument, reasoning that "[DOE has] presented evidence that NNSA is still evaluating aspects of the sizing and layout of the proposed CMRR-NF project" which is "still in some state of flux." App. 330-31. Moreover, the court stated that Congress has never appropriated funds for NF construction, and construction is not underway, none will occur while the SEIS process is ongoing, and design work is not "final agency action." App. 331.

LASG also claimed that the facts established NEPA predetermination, but the court stated that predetermination generally refers to an agency "entering into a binding agreement with an outside group committing it to a particular action prior to conducting an environmental analysis." App. 332. The court did not explain what was meant by "outside group." It said that "[LASG] has come forward with no evidence of any such agreement in this case." *Id*. Rather, the court said, here DOE was still completing an SEIS, and "the continuation of design activities as part of the SEIS process is hardly a showing of predetermination." *Id.*

SUMMARY OF THE ARGUMENTS

The lower court abused its discretion in dismissing based on prudential mootness. It erroneously determined that DOE had committed no NEPA violation. There is no EIS for the CMRR project of 2010-11. DOE has violated NEPA by making irretrievable commitments of resources to the CMRR project by constructing the CMRR-RLUOB, which is Phase I of the CMRR project, and other facilities that would function with the CMRR-NF, contrary to *Davis v. Mineta,* 302 F.3d 1004 (10th Cir. 2002). They have violated NEPA in carrying out final design of the CMRR-NF, contrary to DOE regulations. They have violated NEPA in contracting with LANS to begin construction of the CMRR-NF, contrary to *Metcalf v. Daley,* 214 F.3d 1135 (9th Cir. 2000).

Further, the lower court abused its discretion in determining that the violation in issue—constructing CMRR-NF without a NEPA analysis of its impacts and all reasonable alternatives—was not likely to recur. DOE's Draft SEIS expressly states that no alternatives will be considered. Statements by officials of NNSA and from the highest levels of the Administration make clear that DOE is committed to construction of the CMRR-NF project of 2010-11. Numerous alternatives exist which should be considered, especially in light of the order of magnitude cost increase. The initiation of a new SEIS process is no basis to dismiss a pending NEPA case, but here DOE does not even propose a valid SEIS, because no alternatives will be considered.

The lower court also erred in dismissing the case on grounds of ripeness, holding that there is no final agency action, 5 U.S.C. § 704, until a SEIS is prepared and a ROD is issued. Such holding conflicts with the established rule that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

The lower court erroneously decided the Motion to Dismiss based upon fact findings on material matters on which the evidence was in conflict. Such practice

violates the requirements of Rule 56, Fed. R. Civ. P. *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992).

ARGUMENT

Point I

The District Court Erred in Finding Prudential Mootness

The lower court's application of the principle of prudential mootness is reviewed for abuse of discretion. *W.T. Grant & Co.*, 345 U.S. at 633; *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997); *Bldg. & Const. Dept. v. Rockwell int'l Corp.*, 7 F.3d 1487 (10th Cir. 1993); *Penthouse Int'l v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991). A court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings. *Davis*, 302 F.3 at 1111.

The court below, in invoking prudential mootness, found that there had been no violation of NEPA. App. 325; 327. This determination was in error and calls for reversal. The undisputed evidence establishes several NEPA violations.

There is no applicable EIS or any valid ROD with respect to the 2010-11 CMRR-NF. The lower court acknowledged this. App. 320. All alternatives discussed in the 2003 EIS have been abandoned, and DOE has stated that the 2004 ROD will not be followed. *See* App. 1027-28.

However, DOE has irretrievably committed resources to the CMRR-NF project. DOE is building and outfitting the CMRR-RLUOB, whose purpose is to

support, and function in tandem with, the CMRR-NF. App. 929-37; 1565-74; 1650-67; 1673-78. The CMRR-RLUOB is the "First Replacement Component" of the "Multi-phased, two-building project" App. 1565-74. The CMRR-RLUOB was planned and analyzed along with the CMRR-NF as part of the unitary CMRR project in the 2003 EIS, and it was selected for construction simultaneously with the CMRR-NF, which is the "Second Replacement Component." *Id*. Thus, the CMRR-RLUOB is "phase one of the planned Chemistry and Metallurgy Research Replacement (CMRR) at Technical Area 55." App. 840. Other documents call it "Phase A". App. 839.

NNSA broke ground for the CMRR-RLUOB in January 2006 and proceeded with construction. In May 2007 LANL's new seismic analysis made clear that seismic challenges would require redesign of the CMRR-NF. App. 1603-09. Work continued on the CMRR-RLUOB without interruption. Final design of equipment was authorized in 2007. App. 613-14. The 2010 Congressional Budget Request stated that DOE/NNSA would proceed with final design and installation of special facility equipment for the CMRR-RLUOB. App. 634. Capital appropriations for the CMRR-RLUOB would continue through FY 2013. App. 635-36. Approximately $319 million has been appropriated for construction of the CMRR-RLUOB. App. 939-40. In October 2010 about three years of equipment manufacture and installation remained, for which an additional $108 million will

be sought. *Id*. The CMRR-RLUOB is expected to be operational in 2013. App. 1655; 1660.

Thus, NNSA has proceeded to build and equip CMRR-RLUOB, despite knowing from 2007, at the latest, that seismic and other challenges meant that the CMRR-NF would not be built as stated in the 2004 ROD, and that the 2003 EIS did not describe the environmental impacts of the evolving CMRR-NF. App. 1603-09. But by constructing CMRR-RLUOB, at a cost to date of $319 million, NNSA invested deeply in construction of the CMRR project, making it far more likely that NNSA would construct the CMRR-NF.

DOE is also constructing the NMSSUP, a security structure, segments of which are designed to serve the CMRR-NF. App. 1681-83. Such construction likewise makes it more likely that DOE will continue and construct the CMRR-NF.

DOE is also proceeding with final design of the CMRR-NF. DOE/NNSA presentations show final design being carried out at this time of the Infrastructure Package, Pajarito Road Relocation, and Basemat Package. The presentations show that construction will immediately follow design. *E.g.*, App. 1665; 1699; 1732. Further: "Design deliverables include all products necessary to construct." App. 1593. DOE has requested $166 million for "Final Design" in FY 2011. App. 1684. By the end of FY 2011, DOE will have been appropriated $458 million for the CMRR-NF. App. 1647.

In addition, NNSA has made contractual commitments to go forward with the construction of CMRR-NF. NNSA's contract with LANS required LANS to issue and execute construction contracts for the CMRR-NF Infrastructure Package in FY2011 as well as perform design efforts. LANS undertook as to "Delivery of CMRR" to meet this target:

> Actions necessary to issue and execute construction contracts for Infrastructure Package(s) in FY 2011 are achieved on schedule.

App. 1669-70.

NNSA thus contractually undertook to construct the CMRR-NF.[7] NNSA directed LANS to plan for CMRR-NF completion by 2020, with operations in 2022. App. 1653.

Moreover, DOE/NNSA has been directed to build CMRR-NF. These agencies are components of the Administration. Senior Administration figures have issued letters and press statements declaring their "unequivocal support" for the CMRR-NF. App. 1735-37.

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[7] The contract states that CMRR schedules assume appropriate NEPA documentation is completed prior to March 30, 2011. Thus, only the schedule for performance, and not construction itself, assumed NEPA documentation. Further, at the time of the contract (August 24, 2010), a Supplement Analysis had been prepared, and no NEPA process was ongoing. (*See* App. 571; 678-82; 690-91 showing Aug. 17, 2010 date of Supplement Analysis). When a NEPA process was begun, on October 1, 2010, it was clearly inadequate, incorporating no analysis of alternatives; thus, the contract was not conditioned upon lawful NEPA compliance. App. 1012. In any case, the Administration directive to construct CMRR-NF was in no way conditioned upon NEPA compliance.

Further, senior Administration figures have made an agreement under which certain Senators agreed to vote for the New START arms treaty and the Administration agreed to construct the CMRR-NF. *See, e.g.*, App. 693-99; 1735-36. That treaty has now been ratified; thus, the agreement has been performed in part, and it awaits performance by the Administration. The Administration has in no way retreated from its public undertaking to build the "Chemistry and Metallurgy Replacement (CMRR) facility (New Mexico)" App. 1737. This Administration commitment clearly binds DOE and NNSA, as agencies of the Administration.

These facts demonstrate several violations: An agency's NEPA obligations mature when it makes irreversible and irretrievable commitments of resources to an action that may affect the environment. A federal agency must assess the environmental impacts of an agency action before it reaches the "point of commitment." 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, 718-19 (10th Cir. 2009). *See Center for Biological Diversity v. U.S. Dep't of the Interior*, 563 F. 3d 466, 480 (D.C. Cir. 2009); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F. 3d 43, 49 (D.C. Cir. 1999); *Conner v. Burford*, 848 F.2d 1441, 1449-50 (9th Cir. 1988); *Mobil Oil Corp. v. FTC*, 562 F.2d 170, 173 (2d Cir. 1977).

NEPA regulations state that, "[u]ntil an agency issues a record of decision . . . no action concerning the proposal shall be taken which would: [1] have an adverse environmental impact; or [2] limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a); see also 40 C.F.R. § 1502.2(f)("Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.").

Thus, without NEPA review, it is a violation of NEPA to undertake actions that would influence the choice of alternatives. *See, e.g., Davis,* 302 F.3d at 1115 n. 7 (construction of first phase would skew decision to build phase two); *Burkholder v. Peters,* 58 Fed. Appx. 94, 2003 WL 103071 (6th Cir. 2003)(pursuant to 40 C.F.R. § 1506.1(a)(2), Federal Highway Administration regulations specifically prohibit "final design activities" prior to issuance of a Finding of No Significant Impact); *Maryland Conservation Council, Inc. v. Gilchrist,* 808 F.2d 1039, 1042 (4th Cir. 1986)(construction of state-regulated highway segments violates NEPA, where they would "stand like gun barrels pointing into the heartland of the park," which was subject to NEPA); *Arlington Coal. on Transp. v. Volpe,* 458 F.2d 1323, 1333 (4th Cir. 1972). In *Arlington,* the court emphasized that construction of a project before NEPA compliance was unlawful:

> If investment in the proposed route 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.

Therefore the court enjoined construction pending appeal and directed the district court to enjoin construction. *Id*. at 1327.

Further, DOE regulations state that, while DOE is preparing a required EIS,

> DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1.

10 C.F.R. § 1021.211. 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 <u>detailed</u> 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.

App. 1691.

In addition, when an agency predetermines that it will pursue a project without completing NEPA analysis, and it proceeds, the agency violates NEPA. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712, 714 (10th Cir. 2010); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780-81 (10th

Cir. 2006); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1240 (10th Cir. 2004); *Davis v. Mineta*, 302 F.3d at 1112; *see also Metcalf v. Daley*, 214 F.3d at 1143; *Int'l Snowmobile Mfrs.' Ass'n v. Norton*, 340 F.Supp.2d 1249, 1260 (D. Wyo. 2004).

Clearly, DOE is committed to build CMRR-NF, even though no applicable EIS exists. *See e.g.*, App. 1012; 1735-37. DOE/NNSA has not withdrawn its Critical Decision 1, which selects CMRR-NF. App. 1552. When and if NEPA review is ever completed, the project may have gone so far that it is effectively unstoppable, *see Highway J Citizens Group v. U.S. Dep't of Trans.*, 656 F.Supp.2d 868, 878 (E.D. Wis. 2009), reducing NEPA to a meaningless formality. Consequently, NNSA's action in proceeding with the CMRR "predetermines the future" (Mandelker, D.R., NEPA Law and Litigation § 4.28, at 4-113 (West Pub. 2010)) by limiting the choices available. *See Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1091 (9th Cir. 2003).

Under these principles, issuance of a road easement, to enable mining, is a violation if no NEPA analysis took place, because it increases the risk that an environmentally damaging project may go forward. *Sierra Club v. U.S. DOE*, 287 F.3d 1256 (10th Cir. 2002):

> To establish injury-in-fact from failure to perform a NEPA analysis, a litigant must show: 1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened or imminent environmental harm; and 2) that this increased risk if environmental harm injures its concrete interest.

> *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996).

Similarly, in *Davis v. Mineta*, 302 F.3d at 1115 n. 7, construction of Phase I of a highway project is a NEPA violation and must be enjoined, because it increases the risk of environmental harm from the project:

> 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 Sierra Club v. Marsh*, 872 F.2d 497, 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.)

Here, DOE/NNSA has pushed forward the CMRR project by building the CMRR-RLUOB, outfitting the CMRR-RLUOB, and constructing the NMSSUP and a large parking lot for the CMRR-NF. As in *Sierra Club* and *Davis*, construction of the first phase is an irreversible commitment that makes it much more likely that NNSA will build the CMRR-NF. Such actions, continuing to this date, are NEPA violations, because they influence the DOE/NNSA decision in favor of building the CMRR-NF and create the risk of environmental harm. Likewise, the continued detailed design of CMRR-NF plainly violates DOE's own regulation, 10 C.F.R. § 1021.210(b), as well as 40 C.F.R. § 1506.1(a) and constitutes a NEPA violation, because it creates yet another investment in construction of the CMRR-NF.

In addition, DOE/NNSA has committed resources through its contractual commitments. Predetermination violates NEPA when the agency makes an irreversible commitment, *e.g.*, by a contract, under which the agency becomes committed to a particular course. *Forest Guardians*, 611 F.3d at 712. *Forest Guardians* cites *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718-19 (9th Cir. 1988), where an irreversible commitment was found in construction contracts, awarded before NEPA compliance. *Forest Guardians*, 611 F.3d at 715. *Forest Guardians* also cites *Davis v. Mineta*, 302 F.3d at 1112-13, where defendants made an irreversible commitment of resources by contract. *Forest Guardians*, 611 F.3d at 713. It also cites *Metcalf v. Daley*, 214 F.3d at 1143, 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.'

Forest Guardians, 611 F.3d at 715.

The material facts cannot be disputed. Construction of the CMRR-RLUOB, the NNSA-LANS contract, and the Administration's undertaking to build the CMRR-NF are all public information. Remarkably, in discussing potential NEPA violations, the lower court's opinion *says nothing* about the impact of the CMRR-RLUOB's construction. That court's decision *makes no reference* to the Administration's public undertaking to build CMRR-NF. The court *makes no reference* to the NNSA-LANS agreement, which bound NNSA to commence

construction. Inexplicably, that decision states that there is "no evidence" of a contractual commitment toward construction of the CMRR-NF. App. 332. To state that there has been no NEPA violation disregards the undisputed evidence. App. 330. A decision based upon such an error is an abuse of discretion. *Davis v. Mineta*, 302 F.3d at 1111.

The lower court believed, however, that DOE/NNSA had had a change of heart and would not violate NEPA in the future. App. 327-28. Thus, after suit was filed, DOE stated that construction of the CMRR-NF would not proceed until it completed a SEIS and a ROD. App. 573-75. (However, DOE made no offer to suspend construction or equipping of the CMRR-RLUOB—a continuing NEPA violation.) Similarly, after suit was brought, DOE stated evasively that final design contracts have been deferred, but "certain design efforts are continuing." App. 727. (However, Mr. Cook's affidavit specifically asked to continue the design process being performed by 283 employees, demonstrating NNSA's determination to push CMRR-NF forward.) App. 575. Again, after this case was brought, NNSA prevailed upon LANS to amend its contract, deleting the reference to construction contracts. App. 1671-72. (LANS retained its design responsibilities.) And after this case was brought, NNSA announced that it would prepare a SEIS (without, however, any discussion of reasonable alternatives) and immediately moved for dismissal. App. 45-82.

All such actions were taken in clear response to this case. The party asserting mootness—constitutional or prudential—has a heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to resume. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000). "The burden is a heavy one." *Committee*, 962 F.2d at 1524. The movant must establish that it has changed its plans and intentions with respect to the matters alleged to be violative, so that there is no reasonable expectation of the wrong's occurrence. *W.T. Grant & Co.*, 345 U.S. at 633; *Committee*, 962 F.2d at 1524; *Bldg. & Const. Dept.*, 7 F. 3d at 1492. The court must determine that a change in circumstances renders it highly unlikely that the actions in question will be repeated. *Fletcher v. United States*, 116 F.3d at 1321. In contrast, voluntary cessation of unlawful conduct does not terminate the Article III "case or controversy," nor does it disable the court's equitable powers to grant injunctive relief. *W.T. Grant & Co.*, 345 U.S. at 632; *Silvery Minnow*, 601 F.3d at 1122. All of DOE's post-suit actions constitute "voluntary cessation" in an effort to avoid the court's jurisdiction.

But, in fact, DOE does not propose to cease their NEPA violations. The violations are clear from the pleadings. The Complaint alleges that DOE has determined to construct the current (2010-11) CMRR-NF and that they have failed to prepare a NEPA analysis of that CMRR-NF *and its alternatives*:

> [DOE has] 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.

Thus, the Complaint asserts a violation of the NEPA requirement that the EIS "rigorously explore and objectively evaluate *all reasonable alternatives*." 40 C.F.R. § 1502.14(a)(*emphasis added*).

DOE's present intentions are stated in the Draft SEIS (April 22, 2011). Therein, NNSA states that it *does not intend to consider any alternatives* to construction of the CMRR-NF at TA-55 at Los Alamos:

> Because NNSA decided in the 2004 ROD to build CMRR—as a necessary step in maintaining critical analytical chemistry and materials characterization capabilities at LANL—the SEIS is not intended to revisit that decision. Instead the SEIS is limited to supplementing the prior analysis by examining the potential environmental impacts related to the proposed change in CMRR design.

App. 1012; *see also* App. 1028.

The only alternatives mentioned in the Draft SEIS are continued use of the CMR, which NNSA says is inadequate, and construction of the 2003-04 CMRR-NF design, which NNSA says does not meet seismic standards and will not be built. App. 1027; 1038. These are obviously not reasonable alternatives in

NNSA's eyes.[8] The Draft SEIS mentions two design variations for the foundation of the CMRR-NF, but it does not call these NEPA alternatives; to the contrary, they are termed "options" within the alternative to build the 2010-11 CMRR-NF. App. 1027.

Notably, none of the Administration's public commitments of its constituent agencies—DOE and NNSA—to construct the CMRR-NF have been amended in any way. Neither does DOE/NNSA propose to discontinue constructing and equipping the CMRR-RLUOB—which constitutes Phase I of the CMRR project,

[8] Previous EISs clearly do not consider the 2010-11 CMRR-NF and its reasonable alternatives. For example, it cannot be contended that the 2008 LANL Site-Wide Environmental Impact Statement ("SWEIS")(DOE/EIS-0380) analyzed the current CMRR project and its reasonable alternatives. It is clear from the Draft SEIS (App. 1030-31) that the 2010-11 plan for the CMRR-NF did not exist in 2008 and was not analyzed in that LANL SWEIS, and that the LANL SWEIS ROD simply selected "construction and operation of the CMRR facility, as described in the No Action Alternative analyzed in the [Draft SEIS]" (App. 1030-31) — *i.e.*, the 2003 design, a project that is in key respects orders of magnitude smaller than the current plan and will not be built. In the LANL SWEIS ROD, "NNSA did not make any decision related to the CMRR-NF. It explained in the SWEIS ROD that it would not make any decisions regarding proposed actions analyzed in the SPEIS prior to completion of the SPEIS." App. 627.

Likewise, the Complex Transformation Supplemental Programmatic EIS ("CTSPEIS") does not analyze the current plan for the CMRR-NF and its reasonable alternatives. The ROD (App. 621-33) states that, based upon "business case studies" (App. 626), NNSA decided to build the CMRR-NF at LANL; however, the CMRR-NF referred to in the ROD is the much smaller and less costly project analyzed in the 2003 EIS (*see* App. 625) and selected in under the 2004 ROD--recently identified in the Draft SEIS as a project that will not be built. App. 1027. In contrast, the current version of the CMRR-NF is estimated to cost about $6 billion--a price that clearly demonstrates the existence of numerous *unexamined* alternatives of equal or lesser cost.

of which CMRR-NF is Phase II, or employing 283 people in design of the CMRR-NF. The Draft SEIS states that NNSA will not consider *any* alternatives to the construction of the CMRR-NF at LANL. Thus, the trial court's statement that "the SEIS process may address many, if not all, of LASG's concerns about the environmental effects of the proposed CMRR-NF project" has no basis, for it disregards DOE's own declarations. App. 328; 1012. The SEIS process, far from suggesting a remedy for NEPA violations, underscores DOE's unwavering commitment to CMRR-NF, which has not been withdrawn in any respect. Clearly, NNSA has no intention to carry out an objective analysis of all reasonable alternatives to the CMRR-NF. DOE's burden of showing mootness has not been satisfied.

Moreover, jurisdiction may abate if (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Cnty. of Los Angeles v. Davis*, 440 U.S. 625 (1979) (*emphasis added*). Thus, any "lingering effects" of the challenged actions would bar mootness. *Silvery Minnow*, 601 F.3d at 1120; *Penthouse Int'l*, 939 F.2d at 1019. Here, such "lingering effects" include the ongoing construction and outfitting of the CMRR-RLUOB, the ongoing CMRR-NF final design effort, and the Administration's "unequivocal" commitment to build CMRR-NF.

An informal promise or assurance by governmental defendants to cease the challenged practice does not create mootness. *Silvery Minnow*, 601 F.3d at 1118; *Burbank v. Twomey*, 520 F.2d 744, 748 (7th Cir. 1975). Concrete steps are required, such as a policy position that supersedes the challenged policy. Here, the trial court put its faith in a meaningless SEIS process that offers only a review of two foundation designs for the *same* multi-billion-dollar facility in the *same* location—with no consideration of *any* alternatives. Courts often deny mootness based on government actors' evident desire to return to the old ways. 13C Wright, Miller & Cooper, Federal Practice & Procedure, § 3533.6, at 311. Here, the "old ways" continue uninterrupted.

Yet numerous alternatives are reasonable and should be analyzed for environmental impact, cost, and efficiencies, especially since the budget has become so large. Alternatives include upgrading parts of the existing CMR; constructing one or more smaller CMRR-NF buildings by eliminating elements such as a large vault, below-ground construction, or construction over a weak substrate; use of the Plutonium Facility, PF-4, for certain operations; postponement of decision pending better assessment of mission need; use of existing facilities at Savannah River Site, Idaho National Laboratory, or Lawrence Livermore National Laboratory; or relocating specific functions within the pit manufacturing process. App. 943-62. DOE's NEPA documents fail to analyze these alternatives, and the

Draft SEIS fails to suggest that the Final SEIS will do so; to the contrary, it states that it will not do so. Failure to analyze all reasonable alternatives is at the core of the NEPA violation alleged by LASG.

Thus, there is no room for a finding of "prudential mootness," where the there is no reason to believe DOE will stop the unlawful practices spotlighted in this case. The trial court's statement that the Final SEIS will "supersede" the 2003 EIS is clearly mistaken; it is baseless to imagine that the SEIS could transform that eight-year-old EIS into an analysis of the 2010-11 CMRR project—and all reasonable alternatives—that satisfies NEPA. App. 322. And the court's complaint that LASG would have DOE prepare an EIS "from scratch" simply laments the legal obligation to analyze "all reasonable alternatives" and the SEIS requirement to address "substantial changes" in the project or "significant new circumstances or information." App. 335; 40 C.F.R. § 1502.9(c); 40 C.F.R. § 1502.14(a). The CMRR project has changed dramatically, and its cost has ballooned, making a large range of alternatives "reasonable," so that a wholesale rewrite of the 2003 EIS is mandated by the NEPA rules. The decision below scoffs at this NEPA requirement.

The lower court also ignored the fundamental fact that DOE is subordinate to directives from the highest levels of the Administration, which have directed them to construct the CMRR-NF at LANL. These directives have not been

amended in the slightest. To be sure, DOE has a new litigation tactic: preparing a SEIS to divert attention from their ongoing NEPA violations. But the prospect of more paperwork—without any abatement of continuing NEPA violations, and without any follow-up study of reasonable alternatives —is no promise of NEPA compliance. DOE has failed to carry their heavy burden of establishing that litigation over their violations is moot.

Even if DOE promised a complete new EIS—which is far more than it does—that would be no ground to deny NEPA relief. In *Blue Ocean Pres. Soc'y v. Watkins,* 767 F. Supp. at 1523-24, DOE sought to avoid an injunction by promising to issue an EIS. The court rejected the idea that such future NEPA activity could give grounds to deny relief:

> This is not a case in which the government has already prepared an EIS or even commenced such preparation. Plaintiffs cite numerous cases for the proposition that a suit to compel future action is moot only after it has been 'fully and irrevocably carried out.' *E.g., Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981). To the court, this seems axiomatic. Accordingly, a suit to compel an EIS is rendered moot *when the EIS is completed* and filed. *Romero-Barcelo v. Brown*, 643 F.2d 835, 862 (1st Cir. 1981); *City of Newport Beach v. Civil Aeronautics Bd.*, 665 F.2d 1280 (D.C. Cir. 1981); *Upper Pecos Assoc. v. Stans*, 500 F.2d 17 (10th Cir. 1974). Here, of course, the EIS process is not only unfinished, it has not begun.

Blue Ocean, 767 F.Supp. at 1523-24.

Similarly, in *Portland Audubon Soc'y v. Babbitt,* 998 F.2d 705 (9th Cir. 1993), the court issued injunctive relief on NEPA grounds, even though a further

EIS was in preparation, stating that there is "no basis for the BLM to argue that no final action of the BLM has been taken so as to be challenged by plaintiffs or to argue that plaintiffs have not demonstrated standing." *Portland*, 988 F.2d at 708.

The lower court's order of dismissal on grounds of prudential mootness is fundamentally erroneous and should be reversed.

Point II

The Court Below Erred in Finding That the Dispute is Not Yet Ripe.

Decisions on the issue of ripeness are reviewed de novo. *Sierra Club*, 287 F.3d at 1263. Again, in dismissing on grounds of ripeness, the court found no NEPA violation. App. 330. This is erroneous, as shown in Point I, *supra*. Since the determination of lack of ripeness was premised upon an error, it must be reversed for that reason alone.

Moreover, the court below appeared to believe that no NEPA action may proceed until after an agency produces some form of EIS. This is another fundamental error. The right to bring a NEPA action matures when an agency undertakes a major federal action without completing NEPA analyses; suit need not await preparation of an EIS. In holding that there will be no final agency action until DOE issues the forthcoming SEIS and a ROD based upon it, the court erred. App. 329; 333. DOE has clearly proceeded with the 2010-11 CMRR-NF project based upon an agency decision, and have disregarded NEPA-mandated

procedures in doing so. "The result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). A NEPA case is ripe at this stage:

> Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.

Ohio Forestry Ass'n, 523 U.S. at 737.

This Court's decisions confirm that LASG's NEPA claim is ripe. *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1095 (10th Cir. 2004), holds that "a claim that an agency violated NEPA's procedural requirements becomes ripe when the alleged procedural violation occurs, assuming the plaintiff has standing to bring the claim."[9] Again, in *Sierra Club*, 287 F.3d at 1264-65, the case was ripe where DOE, without NEPA analysis, granted a road easement, even though the harm to plaintiff might not occur for many years: "In the context of a NEPA claim, the harm itself need not be immediate, as 'the federal project complained of may not affect the concrete interest for several years,'" at 1265,

[9] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 7 (1992): "There is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law one living adjacent to the site for the proposed construction of a federally licensed dam has standing to challenge the licensing authority's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."

quoting from Comm. to Save Rio Hondo v. Lucero, 102 F.3d 445, 449 n.4 (10th Cir. 1996). This Court has stated:

> In *Sierra Club*, we recognized that the failure to conduct a NEPA analysis, standing alone, may establish a procedural harm adequate to satisfy the ripeness inquiry (so long as the plaintiff also has standing). 287 F.3d at 1264. (citing *Ohio Forestry*, 523 U.S. at 737, 118 S.Ct. 1665). . . . The *Sierra Club* plaintiffs contended that the Department of Energy had taken a specific action—the granting of an easement—without following the proper statutory procedures. *Id*."

Utah v. U.S. Dep't of the Interior, 535 F.3d 1184, 1198 n. 10 (10th Cir. 2008).

Here, DOE has built the CMRR-RLUOB, the first phase of the CMRR project, and entered into contracts and public commitments to build the second phase, CMRR-NF. The parallel is direct. *See also Catron Cnty. Bd. of Comm'rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996) (ripeness found where plaintiff County asserted that agency action would prevent the diversion and impoundment of water by the county, in case of future flooding). *See also Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003). A ripeness inquiry generally addresses three factors:

> 1) whether delayed review would cause hardship to the plaintiffs; 2) whether judicial intervention would inappropriately interfere with further administrative action; and 3) whether the courts would benefit from further factual development of the issues presented.

Utah, 535 F.3d at 1192.

Thus, one consideration is "the hardship to the parties of withholding court consideration," *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Here, the hardship is real. DOE plans to proceed with CMRR-NF construction after it issues a SEIS and ROD. The trial court had no issue with LASG's standing, and it was amply shown that LASG members face an increased risk of harm from the massive CMRR-NF construction project. App. 128-161. *See Friends of Marolt Park*, 382 F.3d at 1095. Members of LASG are exposed to:

A. Immediately forthcoming impacts of the construction effort, including the possible closure of Pajarito Road to all but construction workers; the onset of large-volume truck traffic as massive quantities of concrete and other construction materials are brought to the site; years of dust, noise, fumes, and air pollution attendant upon major construction work; the visual impact of removal and relocation of huge volumes of excavated spoil; and the destruction of large swaths of vegetation, impacting vistas and native wildlife;

B. Short-term risks of the continued operation of the existing CMR Building, which DOE has failed to maintain in condition that meets current standards for seismic risk and for risk of nuclear accident and release of radionuclides;

C. Fifty years of enhanced risks of installation and operation of an enlarged plutonium storage, research, and fabrication facility in Los Alamos,

containing at least twice the plutonium capacity of the current plutonium building, and capable of carrying out and supporting large volume plutonium pit refurbishment and production, operations that entail significant risks of nuclear accident and release of radionuclides; and

D. Risks of releases of radioactivity and hazardous substances in the demolition of the existing CMR Building and the ultimate demolition of the CMRR-NF Building, when its life is concluded. App. 128-161.

Further, ripeness principles protect agencies from "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," lest the Court adjudicate "abstract disagreements over administrative policies," *Abbott Labs.*, 387 U.S. at 148-49. Clearly, this is no abstract dispute. This is a classic NEPA case. The nature of DOE's "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), can readily be shown. The NEPA analysis supposedly supporting DOE's actions is clear: it is the 2003 EIS and 2004 ROD. And the trial court observed that, "Unquestionably, the scope of the CMRR-NF project has changed significantly since the 2003 EIS and 2004 ROD." App. 324. There is no need for further factual development at the administrative level.

Importantly, the ripeness test is different under NEPA:

> NEPA adds an important twist. In a NEPA suit, the issue presented for review typically is whether the agency has complied with the

> statute's particular procedures. Because of the rather special nature of the injury (that is, the failure to follow NEPA), the issue is ripe at the time the agency fails to comply.

Ouachita Watch League v. Jacobs, 463 F.3d 1163, 1174 (11th Cir. 2006).

Under NEPA, "plaintiffs need only establish a sufficient likelihood of harm. . . . Proof that significant effects on the human environment will in fact occur is not essential." *Los Alamos Study Grp. v. O'Leary*, No. 94-1306-M (D.N.M. Jan. 26, 1985)(slip op. at 21)(App. 994)(unpublished). Thus, the "irreparable harm requirement is met if a plaintiff demonstrates a *significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). "The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the [NEPA] was designed to prevent." *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996). Under NEPA, a plaintiff "need only show that the decision could be influenced by environmental considerations that NEPA requires an agency to study." *Laub*, 342 F.3d at 1087.

The court below seems to have thought that a claim becomes unripe when an agency starts further NEPA review. Thus, it held 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." App. 329. It distinguished cases such as *Catron Cnty.*, 75 F.3d 1429, where an agency's action, taken without NEPA

analysis, was found violative of NEPA, stating that "[i]n this case, there has been no showing of a NEPA violation, and no final agency action." App. 330. But that statement is entirely circular, and here there has clearly been a NEPA violation—several, in fact—which constitute final agency action, reviewable under the Administrative Procedure Act. The fact that DOE claims that "NNSA is still evaluating aspects of the sizing and layout of the proposed CMRR-NF project" and it is "still in some state of flux" does not mean that DOE has not violated NEPA, requiring relief. App. 330-31.

Plainly, the prospect of additional NEPA analyses does not defeat ripeness. In *Sierra Club,* additional NEPA analyses would be required in the future, but this Court held the dispute ripe. 287 F.3d at 1264. No precedent supports dismissal of a NEPA case where the defendant agency has violated NEPA—but proposes to continue the unlawful project and issue new NEPA documents in another year. Here not even that promise is made, because DOE's Draft SEIS says that *no analysis of alternatives* will be undertaken; thus, there is no hope of NEPA compliance. But, regardless of the validity of the future SEIS, the present dispute is ripe.

Point III

The District Court Erroneously Resolved Critical Issues of Fact in Favor of DOE, Despite Conflicting Evidence.

A court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion where resolution of the jurisdictional question is intertwined with the merits of the case, *i.e.*, if subject matter jurisdiction depends on the same statute which provides the substantive claim in the case. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Here, NEPA provides the basis for federal question jurisdiction and for the substantive claim.

The Rule 12(b)(1) motion was supported by factual presentations—affidavits and documentary evidence. Thus, it became, in effect, a motion for summary judgment under Rule 56 and subject to that rule's requirement that the "movant [shows] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." On a Rule 56 motion, when the opposing party presents evidence that controverts the facts asserted by the moving party, the court must view the evidence in a light most favorable to the non-moving party. *Committee*, 962 F.2d at 1521.

In the lower court, the evidence was in conflict on key questions, such as the nature of the construction now proceeding, the nature of current design efforts, and DOE's plans to issue construction contracts. The court clearly deemed these

factual issues material to its decision to dismiss. However, that court resolved these issues in accordance with DOE's claims. With the evidence in conflict, it is error to determine material facts on the basis of DOE's submissions alone, as the court did, and to disregard the conflicting evidence submitted by LASG. Fed. R. Civil P., Rule 12(d), 56(a), (c); *Committee*, 962 F.2d at 1521.

The lower court made several determinations of fact, including:

1. No construction is under way. App. 320; 331; 334.
2. No irrevocable actions appear to be ongoing while DOE is engaging in the SEIS process. App. 320; 334.
3. DOE is not currently moving forward with final design and construction in violation of NEPA. App. 323-24; 327.
4. NNSA is still evaluating aspects of the sizing and layout of the proposed CMRR-NF facility, and the overall project design is less than 50% complete. App. 330. The CMRR-NF project is in some state of flux. App. 331.
5. NNSA has spent $210 million on CMRR-NF, and this has been for building design and analysis. *Id.*
6. There is no evidence of a binding agreement with an outside group committing the agency to a particular action before an environmental analysis. App. 332.

7. LASG has not demonstrated the type of irreversible and irretrievable commitment to a particular plan as discussed in the case law. App. 334.

LASG presented evidence of the following facts in opposition to dismissal, and the court below considered this evidence on the Motion to Dismiss. App. 315 n.2.

1. Construction:
    a. DOE planned to have 125 craft workers at work on CMRR-NF and 150 to 200 support workers. App. 1583-96. DOE planned construction from April 2011 onwards. App. 128-161; 675-77.
    b. DOE is poised to issue RFPs for $60 million in CMRR-NF construction. App. 611; 894.
    c. DOE is constructing the CMRR-RLUOB, which is Phase I of the CMRR project and constitutes an irrevocable commitment to the CMRR-NF project. App. 882-83; 929-37; 1565-74; 1650-67; 1673-78.
2. Irrevocable actions:
    a. DOE is continuing construction of the CMRR-RLUOB and installation of its equipment. App. 929-37; 1565-74; 1650-67; 1673-78.

b. DOE is continuing construction of the NMSSUP security system. App. 1577; 1583-96; 1681-83.

3. Final design:

a. DOE planned to carry out final design at this time on the Infrastructure Package, Pajarito Road Relocation, and Basemat Package. This is final design, because it is planned to be followed immediately by construction, as shown by DOE's presentations. *E.g.*, App. 1665; 1699; 1732.

b. DOE states flatly: "Design deliverables include all products necessary to construct." App. 1593.

c. 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. App. 1684.

4. LASG showed that the *only* issue in "flux" involves the CMRR-NF foundation design, discussed in the Draft SEIS. App. 1027.

5. Whether $210 million was all spent on CMRR design:

a. Construction has taken place of facilities that will function as part of the CMRR and whose construction serves to commit DOE/NNSA to the CMRR-NF project. For example, the CMRR-

RLUOB (*see* item 2a, pages 55-56, *supra*; App. 882-84; 890-91; 893-94), the NMSSUP (*see* item 2b, pages 55-56, *supra*; App. 676), the parking lot (App. 675), and the 2006 excavation (App. 611-12; 675; 1679-80). These actions limit the choices available and skew the analysis of alternatives, in violation of NEPA.

6. No evidence of a contract:

   a. NNSA made a contract with LANS, under which LANS, as prime contractor and construction manager, is obligated to cause the issuance and execution of construction contracts and otherwise further the project. App. 1669-70.

   b. NNSA issued a program directive to, *inter alia,* LANS to "plan for CMRR-NF completion by 2020 with operations in 2022." App. 1653.

   c. Contracts for interior fixtures have been let. App. 1650-67. These are custom-made fittings that would fit only the CMRR-NF.

7. No evidence of an irreversible and irretrievable commitment:

   a. The Administration has declared its "unequivocal" commitment by to construction of the CMRR-NF. App. 1735-37.

   b. DOE repeatedly asserts that the CMRR-NF is critical to national security. App. 1738-42.

c. DOE has selected CMRR-NF pursuant to DOE Order 413.3 and have not changed that Critical Decision 1. App. 1552.

d. DOE submitted to Congress a design safety certification report, to obtain authorization of funding. The report described a specific project. App. 607-08.

Further, LASG sought to initiate discovery before the hearing on the Motion to Dismiss. LASG moved the court to require a discovery conference and to issue a scheduling order under Rule 16. App. 278-281. After extensive briefing, which laid out the need for discovery on contested issues, the Magistrate Judge on April 8, 2011 denied leave to take any discovery. App. 278-304; 311-13. Such ruling was an abuse of discretion:

> [D]iscovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986)(citation omitted). . . . [D]iscovery should be granted when, as here, the jurisdictional facts are contested or more facts are needed. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977) (holding that district court abused its discretion in refusing to grant discovery on jurisdictional issue); *see also* Natural Res. Def. Council v. Pena, 147 F.3d 1012, 1024 (D.C.Cir.1998) (remanding to permit "jurisdictional discovery" when allegations indicated its likely utility); *Edmond v. United States Postal Serv. Gen. Counsel*, 949 F.2d 415, 425 (D.C.Cir.1992) (finding abuse of discretion when district court denied jurisdictional discovery in light of allegations suggesting jurisdiction did exist).

Laub, 342 F.3d at 1093.

Dismissal on the basis of prudential mootness cannot be granted if there is a dispute as to a material fact. *W.T. Grant & Co.,* 345 U.S. at 635; *Committee,* 962 F.2d at 1521. Moreover, where prudential mootness is invoked, summary judgment should not be granted where the nonmoving party has not had an opportunity to discover information that is essential to his opposition. *Committee,* 962 F.2d at 1521 and n. 5. Here, LASG sought such discovery but was refused.

In this situation, this Court should regard the evidence in the light most favorable to LASG, the non-moving party, and should determine in accordance with that evidence that DOE has made irretrievable commitments of resources to the CMRR-NF project by constructing the CMRR continuously since before this case was filed, have constructed and equipped the CMRR-RLUOB which is Phase I of the CMRR project, have continued to construct the NMSSUP in support of the CMRR project, have bound themselves to the CMRR-NF by contracting with LANS for the execution of construction contracts, are bound by Administration directive to construct the CMRR-NF, and are carrying out final design of CMRR-NF—all of which actions cement DOE's commitment to construct the CMRR-NF. In accordance with such determinations, the Court should hold that the Motion to Dismiss should have been denied.

CONCLUSION

The Court should vacate the judgment below. The case should be remanded with instructions to vacate the dismissal and to proceed to consideration of the Motion for Preliminary Injunction.

ORAL ARGUMENT

Appellant LASG respectfully submits that the record is sufficiently complex and the issues are so important that the case should not be disposed of without oral argument. The parties take opposing positions as to factual matters, such as the nature of irrevocable commitments made to construct the CMRR project, the extent of DOE's commitment to the CMRR project, and the range of alternatives that defendants must consider under NEPA. These differences should be fully explored at oral argument.

Respectfully submitted,

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

August 31, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appellant's Opening Brief* was furnished through (ECF) electronic service and that a hard copy of *Appellant's Appendix* was sent via U.S. Mail to the following on this 31st day of August, 2011:

Robert P. Stockman
P.O. Box 23795
Washington, D.C. 20026-3795
robert.stockman@usdoj.gov

/s/ Thomas M. Hnasko
Thomas M. Hnasko