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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

vs. Case No. 1:11-cv-00946-RHS-WDS

UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE STEPHEN CHU, SECRETARY, DEPARTMENT OF ENERGY; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, ADMINISTRATOR,

Defendants.

PLAINTIFF'S MOTION AND REQUEST FOR A CONFERENCE OF THE PARTIES UNDER RULE 26(F) AND FOR THE ISSUANCE OF A SCHEDULING ORDER UNDER RULE 16

Pursuant to Fed. R. Civ. P. 16, 26(f) and D.N.M.LR-Civ. 16.3, plaintiff The Los Alamos Study Group ("LASG") moves the Court to enter an order setting pre-trial procedures under D.N.M.LR-Civ. 16, including a discovery conference and order under Fed. R. Civ. P. 26(f). As grounds for this motion, LASG states:

1. Plaintiff LASG's complaint alleges that defendants have violated and are continuing to violate the National Environmental Policy Act of 1969, as amended ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* by implementing the 2010-11 version of the CMRR-NF (the "2010-11 Nuclear Facility") at Los Alamos National Laboratory ("LANL") without ever issuing an environmental impact statement ("EIS") analyzing the current iteration of the 2010-11 Nuclear Facility and comparing it to reasonable alternatives, and without first obtaining a record of decision ("ROD") authorizing the facility. In prior litigation challenging the CMRR-NF,

captioned *The Los Alamos Study Group v. United States Department of Energy, et al.*, No. 1:10-CV-0760-JH-ACT ("LASG I"), plaintiff contended that defendants' execution and implementation of the CMRR-NF, without first completing the NEPA process (including an applicable EIS and issuance of a ROD), constituted final agency action resulting in multiple NEPA violations. Based on defendants' promise to issue a supplemental environmental analysis ("SEIS") of the CMRR-NF, the District Court dismissed the case on prudential mootness grounds, reasoning that the SEIS could include the analysis of reasonable alternatives to the 2010-11 CMRR-NF and satisfy LASG's concerns about the proposed $6 billion project. LASG has appealed the District Court's decision to the Tenth Circuit Court of Appeals on the basis that, among other matters, it is a violation of NEPA to continue to implement any major federal project without first preparing an applicable EIS which discusses and analyzes reasonable alternatives, and thereafter issuing a ROD authorizing implementation of the project.

2. Discovery to obtain extra-record evidence is frequently allowed in NEPA cases[1] to achieve the fundamental purpose of NEPA litigation. As the Fourth circuit has observed:

> a NEPA case is inherently a challenge to the adequacy of the administrative record. That is why, in the NEPA context, 'courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary.'

Ohio Valley Environmental Coal Co. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009). The Second Circuit has explained that NEPA litigation often requires the court to conduct an extra-record investigation based on facts addressed through formal discovery:

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[1] "[A] great many of the cases allowing extra-record evidence are NEPA cases." Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise of and Actual Status of Overton Park's Requirement of Judicial Review "On the Record," 10 Admin. L.J. Am. U. 179, 227 (1996).*

> Deviation from this 'record rule' occurs with more frequency in the review of agency NEPA decisions than in the review of other decisions. *See generally* Susannah T. French, Comment, Judicial Review of the Administrative Record in NEPA Litigation, 81 Cal. L. Rev. 929 (1993). This occurs because NEPA imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of its proposed action, and review of whether the agency's analysis has satisfied this duty often requires a court to look at evidence outside the administrative record. To limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA. The omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's aid in calling such omissions to its attention. Thus, we have held that the consideration of extra-record evidence may be appropriate in the NEPA context to enable a reviewing court to determine that the information available to the decisionmaker included a complete discussion of environmental effects and alternatives.

National Audubon Soc'y v. Hoffman, 132 F.3d 7, 14-15 (2d Cir. 1997).

Thus, in a NEPA case, evidence outside the record may be introduced to show that the agency failed to consider reasonable alternatives or other significant issues:

> In NEPA cases, by contrast, a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of the environmental effects and alternatives . . . which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.
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> A suit under NEPA challenges the adequacy of part of the administrative record itself. Glaring sins of omission may be evidence on the fact of the statement, other defects may become apparent when the statement is compared with other parts of the administrative record . . . . Generally, however, allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept 'stubborn problems or serious criticisms . . . under the rug' . . . raise issues sufficiently important to permit the introduction of new evidence by the district court,

> including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary.

County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1384-85 (2d Cir. 1977). The Tenth Circuit noted in *Lee v. United States Air Force,* 354 F.3d 1229, 1242 (10th Cir. 2004) that review of extra-record evidence "may illuminate whether 'an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug.'" *See also* Mandelker at 4-142 and note 31; *accord Hiram Clarke Civic Club, Inc. v. Lynn,* 476 F.2d 421 (5th Cir. 1973); *Fund for Animals v. Williams,* 391 F.Supp. 2d 191, 198-99 (D.D.C. 2005).

3. The need for discovery in this case and the establishment of an orderly case management procedure is particularly compelling. In LASG I, the Magistrate Judge declined to enter a case management order and reasoned that the case was "prudentially moot" because defendants had presumably committed themselves to prepare a SEIS to analyze alternatives to the present iteration of the CMRR-NF. The District Court accepted the Magistrate Judge's recommendation in LASG I, and reasoned that defendants' promised SEIS might satisfy LASG's concerns about the CMRR-NF project, including an analysis of reasonable alternatives.

4. On September 2, 2011, EPA published notice of the availability of defendants' Final SEIS (76 Fed. Reg. 54768). There is scant record evidence concerning the bases for the Final SEIS, or for the absence of consideration of reasonable alternatives. The Final SEIS stated, as had the Draft SEIS that defendants presented to the District Court in LASG I, that defendants would not reconsider whether to build the CMRR-NF at all, citing as support the now-antiquated 2003 EIS and obsolete 2004 ROD, which concerned a wholly different project:

> Because NNSA decided in the 2004 ROD to build the CMRR . . . this SEIS is not intended to revisit that decision. (Final SEIS at v-v-1).[2]

The record evidence indicates that defendants considered only three so-called alternatives in the Final SEIS: (1) the construction of the CMRR-NF pursuant to the 2004 ROD, termed the "no action alternative," (2) the construction of the current iteration of the 2010-11 CMRR-NF, and (3) continued use of the existing CMRR building, with minor upgrades and repairs. However, defendants eliminated the 2004 CMRR-NF from consideration, which, as stated in the citation quoted above, was their entire basis for their approach of "supplementing" the 2003 EIS in the first place, rather than commissioning a new EIS to analyze the current 2010-11 CMRR-NF and reasonable alternatives to it:

> 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 as well:

> 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 supportive 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).

The lack of safety at CMR, which defendants describe as irremediable, has been a core stated justification for the CMRR project from its inception and for not seriously considering the

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[2] The final SEIS is available on line at http://energy.gov/NEPA/downloads/EIS-0350-SL-Final-Supplemental-Impact-Statement.

alternative of upgrading the CMR.[3] Thus, since defendants had eliminated alternatives (1) and (3) with virtually no analysis, they left only alternative (2), to construct the 2010-11 CMRR-NF. The entire NEPA foundation for the 2010-11 CMRR-NF, according to the SEIS, was the prior authority to construct the 2004 CMRR-NF under the 2004 ROD, which defendants, in the same SEIS, abandoned.

5. The analysis of alternatives is a critical part of NEPA, since the purpose of an EIS is to inform decision-makers of the impacts of available alternatives. (40 C.F.R. § 1502.1). An EIS must explore "all reasonable alternatives" (40 C.F.R. § 1502.14), but the Final SEIS has no discussion or analysis of any reasonable alternative 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 entirely from the Final SEIS, because there is no discussion of alternatives whatsoever.

6. Regulations (40 C.F.R. § 1502.16) also call for a discussion of the environmental consequences of all of 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 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, and the record, as it presently exists, provides no explanation for defendants' actions and omissions in this regard.

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[3] Also, Defendants have variously described the CMR facility as "decrepit" and "in imminent danger of attrition" (Snyder Aff., 26), "failing" (Op. cit., 29), "literally on top of an earthquake fault" and also "done in," (testimony of LANL Director Michael Anastasio before the Senate Subcommittee on Strategic Forces, Senate Armed Services Committee, March 30, 2011. Some of this is prominently cited in 1:10-cv-00760-JCH-ACT Document 66, filed 8/08/11

7. Based on defendants' Final SEIS, many questions concerning defendants' decision-making process are left unanswered, and any information about the process is conspicuously absent from the present record. For example, plaintiff alleges that:

A. Defendants have no applicable EIS to support the 2010-11 CMRR-NF and are not following any applicable ROD. They have committed to the current version of the Nuclear Facility without conducting a NEPA analysis of its impact or those of any alternatives;

B. Defendants have not analyzed the cumulative impacts of connected actions;

C. Defendants have failed to provide any mitigation measures;

D. Defendants have failed to integrate any NEPA analysis into their actual decision-making process; and

E. Based on Congress' recent decision to drastically reduce funding for defendants' 2010-11 CMRR-NF, defendants have not thoroughly analyzed the NEPA requirement of the current "purpose and need" for the CMRR-NF;

F. The main function of the CMRR-NF is to assist in manufacturing plutonium pits, which are the cores of nuclear weapons. Recent studies have determined that plutonium pits have a lifetime decades longer than was known in 2003, also requiring a thorough rethinking of the NEPA "purpose and need" for the CMRR;

G. Defendants' changes in the CMRR-NF design and the ten-fold cost increases are so fundamental that the 2003 EIS is now entirely irrelevant, a SEIS is entirely inadequate, and a new EIS altogether is required.

8. Thus, to determine a lawfulness of the agency actions at issue, the Court may need to pursue inquiries including, but not limited to, the following:

(A) What were the bases for the agency's so-called decision in the Final SEIS not to include any analyses of reasonable alternatives?

(B) What were the bases for agency's decision to abandon the 2004 CMRR-NF, presented in the SEIS as the "no action alternative," and then simultaneously rely in that document on the prior approval of the abandoned 2004 CMRR-NF as the agency's authority to produce a SEIS rather than an entirely new EIS for the 2010-11 CMRR-NF?

(C) What precise purposes and needs did defendants assume the 2010-11 CMRR-NF would meet, and how would these purposes change if the funding for all of NNSA's proposed projects is not available, or if some purposes turn out to entail larger expenses than previously understood, in this action or in connected actions?

(D) When were decisions made to drastically increase the scope of the 2010-11 CMRR-NF; at those times did the agency consider any alternatives and, if so, what were those alternatives?

(E) What irreversible commitments of resources have defendants made toward the construction of the 2010-11 CMRR? How have defendants spent the several hundred million dollars which have been appropriated specifically for this project over the past 10 years? Defendants claim there were no irreversible commitments to the project prior to the Amended ROD (AROD) of October 18, 2011; they say that their partial excavation of the Nuclear Facility site, the construction of the other facilities to serve the Nuclear Facility, and their expenditure

under specific contractual terms of hundreds of millions of dollars in detail design work signify no prejudicial commitment.

(F) How do reasonable alternatives to CMRR-NF, including the "no action" alternative of not building any project, affect the functions, scales, costs, impacts, and timing of other projects, including those within the "Pajarito Construction Corridor?" Which of these projects are connected actions which should be analyzed along with CMRR-NF in a single EIS?

(G) Concerns have been raised by the Army Corps of Engineers, the Governmental Accountability Office (GAO), and the appropriations committees in the House and Senate that that pursuing CMRR-NF at this time could diminish the likelihood of timely and successful completion of defendants' other critical projects.[4] Plaintiffs have asserted [Mello aff. #3, 83d] that delaying CMRR-NF is a reasonable alternative. Given the post-AROD CMRR-NF appropriations cutback for FY2012[5], are defendants assessing delaying this project?

(H) What decisions have been predetermined in disregard of NEPA requirements for analysis of environmental impacts? Plaintiff contends that defendants have decided to construct the 2010-11 CMRR-NF and, by their contractual commitments and other arrangements, have placed their agency on a one-way track to build the Nuclear Facility, despite

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[4] "Work on the CMRR-NF presents another complication, the Corps said. The NNSA is planning to build both facilities concurrently and the Obama Administration has committed billions of extra money to modernize the nation's weapons complex and nuclear arsenal, but the Corps suggested cost growth on either project could trigger problems on the other. 'Significant cost growth of either project may result in a situation where constructing both projects with currently anticipated scopes is not feasible due to NNSA funding constraints,' the Corps wrote. "Army Corps estimate ups cost of UPF to $6.5-7.5 billion," Nuclear Weapons and Materials Monitor, July 1, 2011.

Governmental Accountability Office (GAO), "National Nuclear Security Administration's Future Modernization: Review of the National Nuclear Security Administration's (NNSA) Modernization and Refurbishment of the Nuclear Security Enterprise As Required by Section 3113 of the National Defense Authorization Act for Fiscal Year 2011 (P.1. 111-383), June 2011, pp. 21-22

[5] FY2012 Consolidated Appropriations Act; see House Report 112-331, http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt331/pdf/CRPT-112hrpt331.pdf, pp. 858 and 873.

their claims in *LASG I* that they were keeping an open mind. As plaintiff correctly represented to the District Court in *LASG I*, the Final SEIS had no chance of being an objective document that analyzed reasonable alternatives because defendants have been and remain irretrievably committed to the 2010-11 CMRR-NF.

9. These and other questions clearly require investigation by document production and other discovery methods. In such a situation, courts are not reluctant to receive evidence outside the administrative record to determine NEPA issues. Nor do courts hesitate to call for discovery, either to determine the proper extent of the record or to allow extra-record evidence to be obtained. *See, e.g., American Mining Congress v. Thomas,* 772 F.2d 617, 626 (10th Cir. 1985); *Lee v. U.S. Air Force,* 354 F.3d 1229, 1242 (10th Cir. 2004). Accordingly, based on the scant record evidence purporting to justify defendants' actions in issuing a Final SEIS which had a preordained conclusion, plaintiff respectfully requests that a conference is appropriate under Fed. R. Civ. P. 1-016, together with a scheduling order setting forth a time for initial disclosures, and discovery procedures under Fed. R. Civ. P. 1-026.

10. Defendants oppose the relief requested by this motion.

WHEREFORE, plaintiff the Los Alamos Study Group respectfully requests that the Court enter an order directing the parties to confer in accordance with Fed. R. Civ. P. 1-016, setting a discovery conference under Fed. R. Civ. P. 1-026(F), and issuance of a scheduling order setting pre-trial procedures.

Respectfully submitted by:

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Certificate of Service

I hereby certify that on December 23, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Dated: December 23, 2011

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