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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. 1:10-CV-0760-JH-ACT

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 ADMINSTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants.

PLAINTIFF'S REPLY
TO FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION
TO MOTION TO EXCEED PAGE LIMITATIONS

Plaintiff The Los Alamos Study Group ("plaintiff") responds herein to Federal Defendants' Response in Opposition to Plaintiff's January 14, 2011 Motion to Exceed Page Limitations (Dkt. No. 28), filed on January 18, 2011 (Dkt. No. 31).

Argument

1. The need to file a 23-page reply arose in part because the defendants raised several meritless or irrelevant arguments in their response that required an answer of similar length. These include:

a. The assertion that the proposed scope of operations, building location and footprint of the CMRR-NF have not changed (Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction ("D.Br.") at 1, 10 (Dkt. No. 23)), requiring discussion of the project elements that *have* changed extensively (Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction ("P. Reply") at 6-7 (Dkt. No. 30));

b. The assertion that construction of the CMRR-NF is not occurring (D.Br. at 1, 3, 15, 16), requiring description of the CMRR-NF construction already completed, underway, and forthcoming (P. Reply at 7-8, 11);

c. The argument that issuance of an EIS in 2003 followed by a proposed SEIS in 2011 constitutes full NEPA compliance (D.Br. at 2, 19, 23), requiring explanation that in fact defendants are in violation and that no SEIS process undertaken under the present circumstances could ever be objective, include all reasonable alternatives, or otherwise comply with the requirements of the National Environmental Policy Act ("NEPA") (P. Reply at 22-23);

d. The argument that continued planning and design will aid the alleged "SEIS decision-making process" (D.Br. at 2, 13, 20), requiring plaintiff to explain that continued implementation of a single alternative during this alleged "decision-making process" will merely cement defendants' prior decision (P. Reply at 15-16);

e. The argument that "predetermination" under NEPA concerns predetermining the environmental impact, not "the need and urgency," of an action (D.Br. at 2), requiring plaintiff to explain that predetermination concerns neither the environmental impacts nor the need for some federal action, but rather a decision to implement a specific federal action

prior to NEPA analysis of reasonable alternatives in response to that need, as has occurred here (P. Reply at 22);

f. The argument that a NEPA plaintiff must show "certain, great, actual, and not theoretical" injury (D.Br. at 2, 14, 15), requiring plaintiff to explain the different NEPA requirement (P. Reply at 14-15);

g. The argument that future construction impacts constitute "speculative" injuries (D.Br. 3, 17), requiring plaintiff to explain that likely impacts are fully cognizable under NEPA (P. Reply at 14) and that NEPA places the burden of detailed environmental analysis on agencies, not plaintiffs;

h. The argument that the CMRR-NF is "critical" to the nation's nuclear weapons infrastructure modernization (D.Br. at 3), requiring plaintiff to explain that this has not been determined (P. Reply at 16-19) and would not in any case absolve defendants from their NEPA obligations;

i. The argument that CMRR-NF "implicates international policy concerns" (D.Br. at 3), requiring plaintiff to explain that the statement is unfounded and immaterial to the legal requirement that defendants must abide by NEPA (P. Reply at 18);

j. The argument that the "challenged decision [to continue constructing CMRR-NF in the absence of applicable analysis under NEPA] implicates substantial agency expertise" (D.Br. at 6), requiring plaintiff to explain that this position is unsupported (P. Reply at 18-19);

k. The argument that a supplemental EIS is authorized here by the regulations (D.Br. at 6-9), requiring plaintiff to state why a supplemental EIS could never satisfy the requirements of NEPA under these circumstances (P. Reply at 21-23);

l. The argument that no decision has been made to build the CMRR-NF (D.Br. at 8), requiring plaintiff to explain that a decision has clearly been made and is being implemented (P. Reply at 9-12);

m. The argument that to say that the CMRR-NF is proceeding without a valid EIS is "spurious" (D.Br. at 9), requiring plaintiff to show that no valid EIS exists (P. Reply at 6, 11-12);

n. The argument that the interrelated projects in the Pajarito Corridor have independent utility and are not "connected actions" (D.Br. at 10-11), requiring plaintiff to explain how the projects are connected in function and how the CMRR-NF affects the proposed scale and scope of these connected actions (P. Reply at 12-13);

o. The argument that defendants have given public notice of NEPA activities in connection with CMRR-NF in their air permit meetings (D.Br. at 11-12), requiring plaintiff to explain that these meetings are not related to NEPA (P. Reply at 13);

p. The argument that defendants have not predetermined that the CMRR-NF should be built (D.Br. at 12-14), requiring plaintiff to show that they have so predetermined (P. Reply at 22-23);

q. The argument that plaintiff cannot show irreparable injury (D.Br. at 14), requiring plaintiff to show that such injury has occurred and that further injury is likely (P. Reply at 13-15);

r. The argument that construction is irrelevant because it would only occur after a SEIS and a new ROD (D.Br. at 16, 20), requiring plaintiff to show that an injunction is still required, because design, construction, and equipment installation work during this period continues the implementation of the CMRR-NF (P. Reply at 13-14) and NEPA does not recognize or credit any SEIS written under such circumstances;

s. The argument that various publications say CMRR-NF is critical to national security (D.Br. at 17-18), requiring plaintiff to demonstrate that they do not so show (P. Reply at 17);

t. The argument that construction of CMRR-NF is critical to the nuclear Non Proliferation Treaty and the Comprehensive Test Ban Treaty (D.Br. at 19), requiring plaintiff to show that it is not (P. Reply at 18);

u. The argument that the alleged costs of delay would not be self-inflicted (D.Br. at 20-21), requiring plaintiff to show that defendants incur such alleged costs, if there are any, with their eyes open (P. Reply at 19-20);

v. The argument that Bob Peurifoy's conclusions are in conflict with persons of similar expertise who are defendant's experts (D.Br. at 22), requiring plaintiff to show that there is no conflict and defendants' witnesses are not experts (P. Reply at 18-19);

w. The argument that plaintiff's interest in nuclear disarmament is somehow relevant here (D.Br. at 23), requiring a response (P. Reply at 1-2);

x. The argument that plaintiff is required to post a substantial injunction bond if it prevails (D.Br. at 23-24), requiring plaintiff to show that this is incorrect (P. Reply at 20).

2. Plaintiff limited its opening brief to matters directly relevant to issuance of a preliminary injunction. Thus, most of the enumerated matters were not discussed. Defendants brought these issues into the case. Plaintiff regrets the need to devote pages to such issues, but the defendants have made it necessary. Plaintiff therefore is required to request sufficient pages to address such issues.

3. Since defendants have ignored their NEPA responsibilities during this period and continue to do so, there is no EIS and no administrative record concerning their decisions to expand this proposed project. Moreover, defendants have submitted very little evidentiary material to support their position. It has fallen to plaintiff to inform the Court, through evidence and briefing, about the material facts concerning this very large project – among the largest in the history of New Mexico – to which defendants have made numerous significant changes over the past seven years. These include the huge differences between the facility analyzed in 2003-04 NEPA documents and the CMRR-NF of 2010, the nature of the decisions the defendants have made, and the opportunities that now exist to choose differently. This effort has required some pages, which plaintiff hopes were well spent. In light of these circumstances, plaintiff requests that the court exercise its discretion to accept plaintiff's provisionally-filed reply as written. D.N.M.LR-Civ. 1.7 (stating that the "[local] rules may be waived by a Judge to avoid injustice"); *Lane v. Page*, 250 F.R.D. 634, 642 (D.N.M. 2007) (indicating that district court judges have discretion to interpret, apply, and waive local court rules) (citing D.N.M.LR-Civ. 1.7; *Hernandez v. George*, 793 F.2d 264, 266-67 (10th Cir. 1986)).

Conclusion

WHEREFORE, plaintiff requests that the Court enter its order accepting plaintiff's provisionally-filed reply to defendants' response to plaintiff's motion for preliminary injunction.

Respectfully submitted,
[*Electronically Filed*]

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Certificate of Service

I hereby certify that on this 26th day of January, 2011, I filed the foregoing PLAINTIFF'S REPLY TO FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION TO EXCEED PAGE LIMITATIONS electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

John P. Tustin

Andrew A. Smith

/s/ Thomas M. Hnasko
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