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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. 1:11-CV-0946-RHS-WDS

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

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' "UNOPPOSED" MOTION TO TRANSFER RELATED CASE

Plaintiff The Los Alamos Study Group responds to the Federal Defendant's "Unopposed" Motion to Transfer Related Case ("Motion") (Docket "Dkt." No. 5) (Nov. 10, 2011). While plaintiff consented to the proposed transfer of this case to the Honorable Judith C. Herrera, plaintiff now is constrained to oppose the erroneous characterizations and misstatements of law contained defendants' Motion.

INTRODUCTION

This action arises under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*. Plaintiff challenges the defendants' *post hoc* use of a 2011 Final Supplementary Environmental Impact Statement ("FEIS") and Amended Record of Decision ("Amended ROD") as a putative and after-the-fact justification for defendants' continuing and unabated implementation of the Chemistry and Metallurgy Research Replacement ("CMRR") project,

including the 2010-11 CMRR Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL").

Plaintiff responds in opposition to defendants' present motion because the motion severely misstates: (1) the terms on which plaintiff consented to the relief requested by defendants' proposed motion to transfer the present case (hereinafter "LASG II"); and (2) the factual and legal bases supporting the complaint in LASG II and the significant legal differences under NEPA supporting the present appeal of the prior case, No. 1:10-CV-0760-JH-ACT (hereinafter "LASG I"), which challenged the defendants' implementation of a major federal action, *i.e.*, the 2010-11 CMRR-NF, without first conducting the analysis of alternatives required under NEPA.

ARGUMENT

A. Plaintiff Did Not Consent to the Motion Filed by Defendants.

On November 8, 2011, defendants' counsel e-mailed plaintiff's counsel inquiring about plaintiff's position on defendants' "inten[tion] to file a motion to transfer Case 1:11-CV-0946-RHS-WDS to the Court of Judge Herrera who considered the earlier related action, Case 1:10-CV00760-JH-ACT." E-mail from John Tustin to Thomas M. Hnasko dated November 8, 2011 ("Exhibit A"). By return e-mail, plaintiff's counsel agreed to the requested relief, *i.e.*, the transfer of pending LASG II to the Court of the judge who had considered and ruled upon the claims in LASG I, albeit adversely to plaintiff.

However, rather than circulating a simple, proposed motion, defendants availed themselves of the opportunity to submit a memorandum resembling a motion to dismiss containing their theories as to why the implementation of the CMRR-NF project without prior

analysis of reasonable alternatives required under NEPA (as claimed in LASG I), has somehow been exonerated by either: (a) the May 23, 2011 dismissal of LASG I; or (b) the FEIS, the defendants' new NEPA paperwork that was issued long after defendants' decision to construct the 2010-11 version of the CMRR-NF in an attempt to justify the decision to build that major federal project after the fact. As defendants are well aware, plaintiff has appealed Judge Herrera's decision in LASG I, contending that final agency action under NEPA does not occur only at the time the agency issues NEPA paperwork, as determined by Judge Herrera, but also occurs when the agency irretrievably commits itself and begins implementing a major federal project without first conducting the required NEPA analysis. Had defendants' counsel attached any draft of their proposed motion or otherwise informed plaintiff of the representations defendants intended to make, plaintiff would have opposed the motion because it misstates both the fact and law with respect to LASG I and LASG II.

Additionally, defendants' counsel has resorted to the improper strategy of filing a motion to transfer in each of the two cases, *i.e.*, LASG I and LASG II. It is self-evident that there is no basis to seek a transfer order in LASG I because Judge Herrera was already assigned to LASG I, she has issued a Final Judgment in LASG I (Dkt. Nos. 55-56), and plaintiff has never consented to any motion to transfer concerning that case which plaintiff is presently challenging on appeal. The defendants blatantly misrepresent the nature of LASG II and the different challenges previously presented in LASG I.

B. Defendants' Motion Contains Numerous Misstatements of Law and Fact.

The defendants misrepresent the nature of LASG II and the different challenges previously presented, dismissed, and appealed in LASG I:

1. Defendants allege that LASG I challenged defendants' "analysis of potential environmental impacts" of the CMRR-NF. Motion at 1, 3. Defendants persist in representing the claim in LASG I as one limited to a challenge to the "analysis of environmental impacts" of CMRR-NF. It is not clear what "analysis" is referred to, since defendants had not announced the SEIS, and clearly had issued no SEIS when LASG I was filed. Further, NEPA requires that agencies, prior to committing themselves to a major federal action, analyze *alternatives* so that they can evaluate how environmental consequences may be minimized – something defendants have failed to do. In LASG I plaintiffs did not question defendants' 2003 analysis of alternatives and environmental impacts; rather, LASG I focused on defendants' implementation of a major federal action without any EIS and NEPA record of decision to support it, including defendants' failure to analyze any reasonable alternatives to the now greatly expanded CMRR-NF project, as required by NEPA. *See, e.g.*, Complaint, LASG I, Dkt. No. 1 (Aug. 16, 2010) at 19-32.

2. Defendants blatantly misrepresent the nature of LASG II by suggesting that plaintiff's challenge to defendants' *post hoc* FSEIS in LASG II "includes the same NEPA claims that Judge Herrera dismissed in [LASG I]". Motion at 2. Nothing could be farther from the truth. First, the SEIS was not even announced when LASG I was filed, the FSEIS was not issued during the pendency of LASG I, and defendants nonetheless continued unabated with their implementation of the 2010-11 CMRR-NF representing to Judge Herrera all the while that they somehow were not "committed" to the project throughout the preparation of the SEIS. *See* Complaint, LASG I Dkt. No. 1 (Aug. 16, 2010); *see also* Oct. 1, 2010 Notice of Intent to Prepare a SEIS (Oct. 4, 2010) LASG Dkt. No. 9-2; *see also* Motion at 5. Thus, it is flatly untrue that "the

new claims raised in LASG II have already been briefed and considered at the District Court level" (Motion at 8), because the district court's consideration and decision in LASG I (a) predated the FSEIS, (b) did not reach the merits of any of the claims raised in plaintiff's Motion for Preliminary Injunction, and (c) did not even address the adequacy of the Draft SEIS. In contrast, plaintiff in LASG II now claims that the FSEIS itself is deficient because it contains no analysis of reasonable alternatives and cannot possibly justify a project retroactively which defendants continued to execute and implement during the pendency of both LASG I and LASG II. According to defendants' misguided theory, LASG I was properly dismissed because of defendants' promise to prepare NEPA paperwork long after deciding to proceed with the major federal action, and LASG II, which now challenges the timing, adequacy, and validity of that recently issued post-decisional paperwork, is really the "same case" as LASG I and, by implication, should be dismissed as well. To the contrary, it is the anticipated *differences* between LASG I and LASG II that underscored Judge Herrera's suggestion that plaintiff wait and file LASG II after the SEIS was completed. LASG II is an entirely different case from LASG I.

To be sure, LASG II must include consideration of the defendants' previous actions and decisions challenged in LASG I because, according to defendants themselves, the SEIS only supplements the original 2003 CMRR-NF and the 2004 ROD, explicitly refuses to revisit the decision in 2003 to implement the 2003 CMRR-NF, but yet inconsistently concludes that the 2003 CMRR-NF can no longer be built. *See e.g.* Defendants' Reply in Support of Motion to Dismiss, LASG I, Dkt. No. 11 (Nov. 8, 2010) at 11; *see also* Notice of Intent to Prepare SEIS, Fed. Reg. Vol. 75, No. 190 (Oct. 1, 2010). Under defendants' theories, there is no proper time

for any review of the federal action because, as the Court ruled in LASG I, defendants are allowed to proceed with the implementation of the 2010-11 CMRR-NF without answering any challenge to their actions before their paperwork is completed. Now that the SEIS paperwork is completed, albeit after-the-fact, defendants contend that the second challenge must be dismissed on the same basis as the first. These misconceptions are belied by the very different postures of the two cases: LASG I was dismissed not on the merits but because the SEIS process was ongoing and incomplete. LASG II concerns the defendants' continuing NEPA noncompliance, now that the SEIS has become final.

3. Defendants also contend that, in LASG I, plaintiff "sought – and continues to seek – [in LASG II] judicial review of DOE's decision-making process while the DOE was in the midst of preparing a Supplemental Environmental Impact Statement ("SEIS") for the CMRR-NF." Motion at 1. But when plaintiffs filed LASG I, no SEIS existed or was even announced whose "process" could be challenged. *See* Complaint, LASG I Dkt. No. 1 (Aug. 16, 2010); Oct. 1, 2010 Notice of Intent to Prepare a SEIS (Oct. 4, 2010) LASG Dkt. No. 9-2. In LASG I, the final agency action challenged by plaintiff was defendants' implementation of a major federal project without an applicable EIS or ROD. *See, e.g.*, Plaintiff's Response to Federal Defendants' Motion to Dismiss, LASG I, Dkt. No. 10 (October 21, 2010). Now, in LASG II, plaintiff seeks judicial review of the FSEIS.

4. Defendants also make the revealing misrepresentation that judicial review in LASG II and in the appeal of LASG I "will be resolved based on . . . a voluminous, largely (if not completely) overlapping administrative record that would include the documents relevant to NNSA's NEPA decision-making process for CMRR-NF." Motion at 3. The administrative

record in LASG I did not include – and could not possibly have included – the FSEIS and Amended ROD, nor could it have included any factual developments subsequent to the hearings before Judge Herrera on April 27 and May 2, 2011. Defendants' omission of these important documents – clearly available only in LASG II – may be read as a concession that the documents are an empty, *post hoc* rationalization of defendants' previous commitments to build the CMRR-NF facility which plaintiff challenged in LASG I. Moreover, defendants claimed, in their argument before Judge Herrera, to have an open mind regarding the CMRR-NF. The FSEIS and Amended ROD now say the exact opposite: that defendants' made up their mind to build some kind of CMRR in 2004 and, despite massive changes in the project, have never varied from that decision since that time, notwithstanding the absence of any NEPA documentation preceding their decision to build the very different 2010-11 CMRR-NF. Thus, in light of Judge Herrera's prior work in LASG I, it is likely that transfer would promote judicial efficiency because a portion of the administrative history of the CMRR-NF, including the defendants' irrevocable commitments to it before and after the issuance of the SEIS, would be familiar to her. It is on this basis alone that plaintiff's counsel does not object to a neutral, fact-based proposal to request the transfer of LASG II to the Honorable Judith C. Herrera.

CONCLUSION

For the reasons set forth above, plaintiff The Los Alamos Study Group does not oppose the transfer of LASG II to the Honorable Judith C. Herrera, but opposes all other statements and relief requested in the federal defendants' motion.

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 17, 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: November 17, 2011

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