

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 RESPONSE AND REQUEST FOR  
MODIFICATION OF ORDER GRANTING FEDERAL  
DEFENDANTS' MOTION FOR EXTENSION OF TIME  
WITHIN WHICH TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiff recognizes that the Court has acted within its discretion under Fed. R. Civ. P. (6)(b)(1)(A) by granting defendants' motion for an extension of time within which to respond to Plaintiff's Motion for Preliminary Injunction, without the filing of plaintiff's response. Plaintiff nonetheless respectfully files this response and request so that the Court may consider whether it is appropriate to modify its Order, given that the federal defendants have failed to disclose to the Court in their motion the material circumstances concerning the proposed extension.

Plaintiff did not decline defendants' request for an extension, but rather consented to it with the reasonable condition that defendants maintain the *status quo* – *solely during the period*

*of the requested extension* – and cease committing further resources to the design and implementation of the CMRR-NF, in contravention of the National Environmental Policy Act (“NEPA”). Government counsel, however, rejected the request and did not inform the Court about those circumstances, and the federal defendants are presently proceeding at an accelerated pace, during the two-week extension, to obtain Congressional approvals for the implementation of the very CMRR-NF for which no environmental impact statement (“EIS”) under NEPA exists. Defendants’ stated intentions of moving forward with the CMRR-NF – both during the period of the extension and while the Motion for Preliminary Injunction is on file – are designed to shift the equities and render this massive federal action a *fait accompli*. Accordingly, it is appropriate for the Court, without motion under Fed. R. Civ. P. (6)(b)(1)(A), to impose the reasonable condition that requires the federal defendants to halt all further investment in the CMRR-NF project during the period of the extension.

As detailed below, plaintiff began to question the requested extension when it became apparent that the proffered reasons for the requested extension were pretextual and unrelated to matters of professional courtesy, accommodation of witnesses who needed additional time to prepare declarations, or sensitivity to counsel’s other scheduling matters. In contrast, the federal defendants have created the impression in their motion that plaintiff declined to support the requested extension for reasons that typically are matters of common professional courtesy and accommodation. As the facts reveal, this is not the case.

1. During the week of November 15, 2010, counsel for defendants requested a one week extension to file defendants’ response in opposition to plaintiff’s Motion for Preliminary

Injunction. The undersigned counsel consented to that request, thereby extending the due date for defendants' response to December 6, 2010.

2. On December 2, 2010, counsel for defendants again contacted the undersigned and requested consent to defendants' filing of exhibits in excess of the 50-page limitation under the local rules. Counsel for defendants stated that the response would be supported by "about 30 pages of declarations" and a few hundred pages of supporting exhibits. The undersigned counsel agreed to allow defendants to exceed the page limits for exhibits.

3. The next day, on December 3, 2010, counsel for defendants again contacted the undersigned counsel, requesting plaintiff's consent to an additional two-week extension of time for the submission of defendants' response. Counsel for defendants had not raised the issue of an extension of time less than 24 hours earlier, when he called to request an extension of the page limitation. Counsel for plaintiff therefore asked why defendants had waited to seek an extension of the time to file a response that was due the next business day.

4. Counsel for defendants presented a variety of reasons, including: (i) he had been ill during Thanksgiving week and was unable to attend to the preparation of the response, although the undersigned had phoned defense counsel on the Friday before Thanksgiving and received a voice message stating that counsel would be on vacation that entire week; (ii) defense counsel had not yet received the discs of exhibits and documents submitted in support of the Motion for Preliminary Injunction, although all such documents had been posted on plaintiff's website and the discs were prepared solely for the convenience of the Court; and (iii) declarant Herman LeDoux, the local project officer for CMRR-NF, experienced a personal emergency and was not able to prepare his declaration, although counsel for defendants had said, less than 24

hours earlier, that all of the declarations totaled 30 pages. Undersigned counsel nonetheless stated that plaintiff would certainly agree to providing an open-ended extension for Mr. LeDoux to file his declaration, after he had attended to his personal emergency.

5. Counsel for plaintiff reiterated to defense counsel that the motion for preliminary injunction was time-sensitive, due to defendants' continued planning and implementation of the CMRR-NF without an applicable EIS. Counsel for plaintiff nonetheless consented to the requested extension, provided that defendants would maintain the *status quo* and agree that any further commitments to the CMRR-NF project would be postponed *during the additional two-week extension*.

6. Defense counsel rejected plaintiff's counsel's proposal and stated that defendants will not cease any aspect of planning, designing, and implementing the CMRR-NF during this period. Defendants then filed their motion, failing to disclose that they will not cease to implement CMRR-NF during the period of the extension and in fact will accelerate their efforts to do so.

7. Defendants' refusal to cease implementing the CMRR-NF, if only during a two-week extension, underscores their disregard of NEPA. In that connection, plaintiff's counsel had recently requested defendants to inform the Court that previous testimony submitted, asserting defendants' lack of commitment to the CMRR-NF, conflicted with positions taken by defendants' representatives in Washington and that defendants continued to assert outside of this Court that they are proceeding with the CMRR-NF project despite a lack of NEPA compliance. (letter, T.M. Hnasko to J.P. Tustin and A.A. Smith, attached as Exhibit A). Defendants have not responded to the letter.

8. Defendants' extension will allow them to avoid disclosing the inadequacy of their NEPA analysis at a critical point when Congress debates action on the CMRR-NF in connection with ratification of the New START Treaty. The administration has bargained for Senate ratification of New START by committing to an increased budget for nuclear weapons "modernization," of which the CMRR-NF is a central element.

9. Congress will debate the New START Treaty and weapons modernization this week or the next. Additionally, the Continuing Resolution that funds the federal government, which includes specific emergency funding for weapons modernization (including CMRR-NF), expires on Saturday, December 18, 2010, and Congress will vote on its extension on or before that date.

10. The administration and the federal defendants have expressed their unqualified commitment to the CMRR-NF—without revealing that the fundamental NEPA analysis has not been done and that further studies are necessary.

11. However, DOE's own guidance demonstrates that the design of the CMRR-NF – which defense counsel acknowledges DOE is presently pursuing and will continue to pursue during the period of the extension – cannot proceed without an applicable EIS under NEPA:

In brief, for a project-specific EIS, an interim action must be one that would not adversely affect the environment nor limit the choice of reasonable alternatives. . . .

Proceeding with detailed design under DOE O 413.3, *Program and Project Management for the Acquisition of Capital Assets*, before the NEPA review process is completed (in contrast to conceptual design noted above) is normally not appropriate because the choice of alternatives might be limited by premature commitment of resources to the proposed project and by the resulting schedule advantage relative to reasonable alternatives." DOE Memorandum: Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions (June 17, 2003), at 1, 4.

12. Based on the foregoing and on defense counsel's failure to inform the Court that plaintiff consented to the proposed extension based on a limited condition that the federal defendants cease implementation of the CMRR-NF during the extension period, plaintiff is informed and believes that the federal defendants seek to advance the implementation of the CMRR-NF project, without regard to NEPA compliance, in an effort to bring about congressional action to shift the equities of the case, so that a *fait accompli* can be created by language supporting and funding the CMRR-NF in a new Continuing Resolution.

CONCLUSION

For the reasons set forth above, plaintiff respectfully requests that the Court modify its order to condition the extension upon the requirement that defendants cease all CMRR-NF activities during the extension period.

Respectfully submitted,

*[Electronically Filed]*

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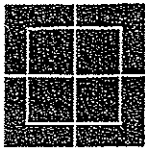
**Certificate of Service**

I hereby certify that on this 8<sup>th</sup> day of December, 2010, I filed the foregoing *Plaintiff's Response and Request for Modification of Order Granting Defendants' Motion for Extension of Time Within Which to Respond to Motion for Preliminary Injunction* 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.

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November 24, 2010

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Re: *Los Alamos Study Group v. United States Department of Energy, et al.*,  
No. 1:10-CV-0760-JH-ACT

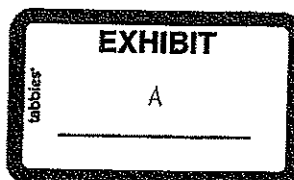
Dear Counsel:

This is written to advise you about erroneous statements submitted to the Court in the captioned litigation and to seek your voluntary cooperation in correcting those statements. In various submittals to the Court, including the Declaration of Donald L. Cook, the Department of Justice has represented that no decision has been made relative to the planning and construction of the proposed CMRR-NF in Los Alamos and that no such decisions will be made "until the SEIS is finished and a new ROD is issued." *See, e.g., Defendant's Motion to Dismiss*, p. 13. According to declarant Donald Cook, there has been no decision to construct the CMRR-NF and such a decision will be made "once the SEIS is completed, *if* NNSA decides to proceed with construction of the proposed CMRR-NF . . . ." (Cook Declaration at ¶ 23 (emphasis added)).

The evidence is overwhelming that defendants are proceeding unabated with the CMRR-NF project. According to the most recent *Nuclear Weapons and Materials Monitor*, DOE dispatched NNSA Principal Deputy Administrator Neile Miller, Deputy under Secretary of Defense for Policy James Miller, and retiring Strategic Command Chief General Kevin Chilton to Arizona to unveil plans and funding for the CMRR-NF to Senator Jon Kyl. The report confirmed that representatives of the federal government had committed an additional \$4.1 billion expenditure for major new construction projects, including the CMRR-NF plan for the Los Alamos National Laboratory.

Moreover, the same publication reported that executive branch officials, in an attempt to shore up votes for passage of the New Strategic Arms Reduction Treaty with Russia, pledged \$84.1 billion over the next ten years for NNSA weapons modernization programs, specifically including the presently-planned CMRR-NF in Los Alamos. According to NNSA, the presently-

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November 24, 2010  
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proposed CMRR-NF is a "linchpin" of NNSA's efforts to modernize the weapons complex and the CMRR-NF is likely to cost in excess of \$5 billion under the present design proposals.

Given the plain evidence demonstrating a commitment to build the CMRR-NF as presently proposed, counsel for the defendants has an obligation to correct the misstatements as soon as possible. Mr. Cook's declaration concerning NNSA's purported indecision to build the CMRR-NF is facially implausible. Likewise, the statements in your briefs, which are consistent with the erroneous statements in Mr. Cook's declaration, appear to deviate significantly from the duty of candor we expect from the Department of Justice.

We recognize that your response to the motion for preliminary injunction is due Friday, December 3, 2010. This would be an ideal time for you to correct the record, acknowledge that your clients are proceeding forthwith with the CMRR-NF, and correct previous statements to the contrary. This also appears to be an appropriate time for defendants to stipulate to the entry of the preliminary injunction and bar any further commitments in any context to the continued design, funding, and construction of the CMRR-NF project until compliance with NEPA has been achieved.

Thank you for your consideration and for your anticipated principled response.

Sincerely,



Thomas M. Hnasko

TMH:js