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**VIA ELECTRONIC MAIL**

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**Re: NNSA Must Issue a Record of Decision Regarding its Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement**

We are writing on behalf of the public interest organizations the Natural Resources Defense Council, Inc., Nuclear Watch New Mexico, Savannah River Site Watch, and Tri-Valley Communities Against a Radioactive Environment to advise the Department of Energy (“DOE”) and the National Nuclear Security Administration (“NNSA”) of their duties under the National Environmental Policy Act (“NEPA”). In particular, this letter reiterates the need for the agencies to prepare a new or supplemental Programmatic Environmental Impact Statement (“PEIS”) regarding their decision to produce plutonium pits for nuclear weapons at multiple sites. At a minimum, the agencies must issue a Record of Decision (“ROD”) based on their Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement, DOE/EIS-0236-S4-SA-02 (“Final Programmatic SA”) before undertaking any further implementation of the actions proposed in the Final Programmatic SA.

**INTRODUCTION**

This is the third letter I have sent on behalf of my clients to DOE and NNSA advising the agencies of their clear legal duty under NEPA to prepare a new or supplemental PEIS for their decision to produce plutonium pits for nuclear weapons at multiple sites. This letter attaches and incorporates by reference letters that we sent to the agencies on May 17, 2019 and on September 17, 2019. Our earlier letters contain detailed descriptions of the factual background for this letter; for the sake of brevity, this letter recites only the most crucial facts.

On May 17, 2019, we first advised DOE and NNSA that the agencies’ decision to produce plutonium pits for nuclear weapons requires analysis in a new or supplemental PEIS. A year before, on May 10, 2018, DOE and NNSA had announced their intention to produce

plutonium pits at both the Los Alamos National Laboratory (“LANL”) and the Savannah River Site (“SRS”), but in the intervening time had not announced any plan for complying with NEPA—and instead had ignored previous calls from my clients to inform the public about what environmental analysis would undergird the agencies’ new decision. However, in apparent response to our letter, on May 31, 2019, DOE and NNSA announced their intention to prepare a programmatic Supplement Analysis (“SA”), as well as a site-specific EIS for pit production at SRS and a site-specific SA for expanded pit production at LANL.

After DOE and NNSA issued a draft Programmatic SA, on September 17, 2019, we sent the agencies another letter to explain that, although our clients had submitted, and would continue to submit, comments on the agencies’ decision-making process at every available opportunity, the agencies’ chosen course for purported compliance with NEPA actually falls far short of what the statute requires. That letter explained that DOE’s refusal to conduct any new or supplemental programmatic NEPA analysis is inconsistent with fundamental statutory principles and amounts to impermissibly segmenting analysis of proposed activities at LANL and SRS into separate, site-specific environmental reviews, when in fact a programmatic review is necessary for this plainly programmatic action. For example, as that letter, and our clients’ comments, explained, the result of the agency’s chosen approach is that the agency has unlawfully failed to consider *any* programmatic alternatives to its decision to produce pits at two particular sites.<sup>1</sup>

NNSA issued its Final Programmatic SA in early December 2019. The Final Programmatic SA reflects the refusal of DOE and NNSA to prepare any new or supplemental PEIS in association with the agencies’ decision to produce plutonium pits at both LANL and SRS. In particular, the Final SA “determined that no further NEPA documentation is required at a programmatic level, and NNSA may amend the existing Complex Transformation SPEIS ROD.” However, although DOE and NNSA issued their Final SA in early December 2019—roughly six months ago—the agencies have not issued any Amended ROD.

Nevertheless, despite the absence of any ROD providing legal authorization to implement the action described in the Final Programmatic SA, DOE and NNSA are in fact implementing that action. As the Final SA states, “to implement the proposed action” in the Final Programmatic SA, “NNSA will prepare site-specific documents,” including a site-specific EIS for operations at SRS and a site-specific SA for operations at LANL. In April 2020, DOE and NNSA issued a draft EIS for operations at SRS, and in March 2020, the agencies issued a draft SA for operations at LANL. Accordingly, the agencies have left no room to doubt that they are, in fact, implementing the action proposed in the Final Programmatic SA by preparing site-specific environmental analyses—but are doing so without any lawful authorization in the form of any Amended ROD at the programmatic level.<sup>2</sup>

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<sup>1</sup> Our previous letters were included as attachments to our clients’ comments on the draft SA at LANL and the draft EIS at SRS. As such, we expect that the agencies will include these letters in the administrative record for any decisions it makes at the conclusion of those processes and will provide a reasoned response to the points raised in those letters.

<sup>2</sup> As our clients’ comments on the draft SA at LANL and the draft EIS at SRS, those documents were deficient for a variety of reasons. For the sake of brevity, we will not reiterate all those reasons here, but will note that among the critical defects of both documents is that they fail to

In the absence of any Amended ROD at the programmatic level, DOE and NNSA's continued implementation of the action proposed in the Final Programmatic SA is not lawful. *See* 40 C.F.R. § 1506.1(a) (“Until an agency issues a record of decision as provided in § 1505.2 . . . *no action concerning the proposal shall be taken*” (emphasis added)); *id.* § 1505.2 (“*At the time of its decision . . . each agency shall prepare a concise public record of decision*” (emphasis added)). DOE and NNSA have plainly already made a decision at the programmatic level, but are withholding a ROD without any legitimate reason. Instead, DOE and NNSA appear to be deliberately slow-walking the issuance of a formal Record of Decision in an apparent effort to prevent the federal courts from reviewing the agencies' failure to comply with NEPA.

DOE and NNSA must immediately come into compliance with NEPA. As previous letters have explained, and as my clients have explained in comments at every available opportunity, the agencies were incorrect to conclude that no further programmatic environmental review is needed. As such, to come into compliance with NEPA, the agencies must withdraw the Final Programmatic SA and commit to preparation of a new or supplemental PEIS regarding their intention to produce plutonium pits at multiple sites. At a bare minimum, if DOE and NNSA are committed to the analysis in the Final Programmatic SA and believe that it satisfies their duties under NEPA regarding programmatic environmental review, then the agencies must immediately issue a ROD based on that Final Programmatic SA, and must do so before they undertake any further implementation of the action proposed in the Final Programmatic SA.

## **DISCUSSION**

### **I. Programmatic Environmental Analysis Remains Necessary**

As an initial matter, we reiterate that DOE and NNSA's refusal to prepare a new or supplemental PEIS is a violation of NEPA, and remind the agencies that the current request for the issuance of an Amended ROD on the agencies' final SA should not be construed in any way as agreement with the agencies' conclusion in the Final SA. To the contrary, we continue to dispute the adequacy of the Final SA for all the reasons raised in our previous letters, which we incorporate by reference here. Indeed, the Final SA is riddled with profound legal and logical errors.

For example, the Final SA concedes that the production of plutonium pits at LANL and SRS are “connected” actions within the meaning of NEPA, yet refuses to consider those in a single NEPA document. Because “connected” actions are defined as actions that “are closely related and therefore should be discussed in the same impact statement,” 40 C.F.R. § 1508.25(a)(1), the agencies' conclusion is plainly unlawful. The agencies maintain that they discharged any duty to analyze these activities together in the 2008 Complex Transformation PEIS, in particular claiming that the 2008 PEIS sufficiently analyzed the use of the Mixed-Oxide Fuel Fabrication Facility (“MOX Facility”) to produce plutonium pits. However, this notion is belied by the fact that the 2008 PEIS was completed before the MOX Facility construction

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remedy the agencies' failure to provide any programmatic analysis that comports with the requirements of NEPA.

process ran significantly over-time and over-budget, encountered significant construction fraud leading to a lawsuit against the contractor responsible for construction, and was eventually cancelled altogether—leaving only a partially completed building of questionable construction. Likewise, the notion that the 2008 PEIS contains any sufficient analysis of the impacts of utilizing the MOX Facility for the production of plutonium pits is belied by the fact that DOE and NNSA are currently preparing a new EIS for the activities at SRS. Because the agencies have conceded both that a new EIS is necessary for the activities at SRS, and that these activities are “connected” to the activities at LANL within the meaning of NEPA’s implementing regulations, the agencies are plainly required to consider these activities together in a new or supplemental PEIS.

Likewise, a new or supplemental PEIS is plainly necessary to enable DOE and NNSA to consider programmatic alternatives to the selection of these two particular sites for plutonium pit production. Even presuming that there is any merit to the agencies’ preference of producing pits at multiple sites—which my clients dispute—the agencies have never prepared any programmatic NEPA document to analyze any programmatic alternatives to consider *which* sites are suitable. This failing has thwarted Congress’s intent to provide the public the opportunity to understand and participate in the agencies’ decision-making process, particularly the process for selecting LANL and SRS as the sites for pit production. More fundamentally, the agencies’ failure to consider programmatic alternatives has also blinded them to the existence of other programmatic alternatives, such as the reuse of existing pits.

Dr. Frank von Hippel, a prominent nuclear physicist and a former assistant director for national security in the White House Office of Science and Technology, recently submitted comments on the Draft EIS for the SRS pit production facility, stressing that the agencies’ approach to NEPA has wrongly led to the exclusion of programmatic alternatives such as the alternative of pit reuse. These comments are attached. As Dr. von Hippel stated, these issues require “a Programmatic EIS on the proposal for pit production, inspection, lifetime estimation, refurbishment and reuse in NNSA’s larger complex, including the Kansas City Plant and LLNL as well as LANL, Pantex and SRS.”

## **II. DOE and NNSA Must Immediately Issue a ROD**

Although DOE and NNSA are wrong to conclude in the Final Programmatic SA that no further NEPA analysis is required at a programmatic level, the agencies are nonetheless obligated to issue a Record of Decision for that conclusion.<sup>3</sup>

NEPA’s implementing regulations, which are “binding on all federal agencies,” 40 C.F.R. § 1500.3, plainly state that “[a]t the time of its decision . . . each agency shall prepare a concise public record of decision.” *Id.* § 1505.2. Here, DOE and NNSA’s Final Programmatic SA reached a “conclusion and determination” that “no further NEPA documentation is required at a programmatic level.” Because “conclusion and determination” are synonyms for “decision,” it is beyond dispute that the Final Programmatic SA has reached a “decision” within the meaning of NEPA’s implementing regulations. Thus, the agencies are required to issue a ROD now.

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<sup>3</sup> A Record of Decision must be published in the Federal Register. 10 C.F.R § 1021.315(c).

Likewise, NEPA’s implementing regulations—and DOE’s own regulations—make clear that the agency’s chosen course of implementing the proposal in the Final Programmatic SA *before* issuing a ROD is unlawful. *See* 40 C.F.R. § 1506.1(a) (“Until an agency issues a record of decision as provided in § 1505.2 . . . *no action concerning the proposal shall be taken . . .*” (emphasis added)); *see also* 10 C.F.R. § 1021.315(d) (“No action shall be taken until the decision has been made public” through publication in the Federal Register or by other means).<sup>4</sup>

Moreover, NEPA’s implementing regulations only allow an interim action to be undertaken if it will not “[l]imit the choice of reasonable alternatives,” 40 C.F.R. § 1506.1(a), and “[w]ill not prejudice the ultimate decision on the program,” *id.* § 1506.1(c). “Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.” *Id.* Here, DOE’s implementing actions—including its development of an SA for activities at LANL and an EIS for activities at SRS—flout these requirements because these implementing activities do limit the choice of reasonable programmatic alternatives, such as the selection of *different sites* for pit production or pit reuse as a credible alternative in whole or part to new pit production. Accordingly, DOE and NNSA find no support in NEPA’s regulations allowing for truly interim actions. *See* 10 C.F.R. § 1021.211 (“DOE shall take no action concerning the proposal . . . before issuing a ROD, except as provided at 40 CFR 1506.1.”).<sup>5</sup>

Thus, NEPA plainly requires DOE and NNSA to immediately issue a ROD regarding the “conclusion and determination” that the agencies reached in their Final Programmatic SA. Indeed, DOE’s failure to issue a ROD based on the Final Programmatic SA for over six months stands in contrast to the agencies’ own prior action of far more promptly issuing a ROD based on the 2008 Complex Transformation PEIS. In 2008, the agencies issued a ROD only 56 days after issuing the 2008 Complex Transformation PEIS (and only 26 days after the “waiting period” required by 10 C.F.R. § 1021.315(a)). *See* 73 Fed. Reg. 63,460 (Oct. 24, 2008) (issuance of the 2008 Complex Transformation SPEIS); 73 Fed. Reg. 77,644 (Dec. 19, 2008) (issuance of the

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<sup>4</sup> Although DOE’s regulations state that “DOE may revise a ROD at any time,” 10 C.F.R. § 1021.315(e), that language does not provide any basis for the delayed issuance of an Amended ROD here. First, that same provision also requires that “the revised decision” must be “adequately supported by an existing EIS,” *id.*, which is certainly not the case because by recognizing the need to prepare an EIS for activities at SRS, DOE and NNSA have conceded that the decision to produce plutonium pits at multiple sites is not adequately supported by any previous EIS. Likewise, the same provision states that a “revised ROD is subject to the provisions” of NEPA’s implementing regulations, *id.*, including the provision that a ROD must be issued “at the time of its decision.” 40 C.F.R. § 1505.2. Thus, it is clear that the agencies must issue a ROD for the Final Programmatic SA immediately.

<sup>5</sup> Until the agencies issue a ROD on the Final Programmatic SA, any further implementation of the action proposed in that SA—including further action on the draft SA prepared for activities at LANL or the draft EIS for activities at SRS—is unlawful. *See* 10 C.F.R. § 1021.211 (“DOE shall take no action concerning the proposal . . . before issuing a ROD”).

ROD based on the 2008 Complex Transformation SPEIS). Accordingly, the agencies' previous actions in this context confirm that they understand the duty to promptly issue a ROD, and further indicate that the agencies' failure to issue a ROD on the Final Programmatic SA for over six months is unreasonable and unlawful.<sup>6</sup>

### **III. DOE and NNSA Are Unlawfully Attempting to Evade Judicial Review**

DOE and NNSA's current tactic of slow-walking an Amended ROD altering the 2008 Complex Transformation SPEIS ROD appears to be nothing more than an attempt to prevent the federal courts from conducting any effective review of the agencies' decisions.<sup>7</sup>

As the agencies well know, judicial review of agencies' compliance with NEPA is available through the Administrative Procedure Act ("APA"), which provides that judicial review is available for "final agency action." 5 U.S.C. § 704. DOE and NNSA evidently hope that by withholding a ROD, they may be able to forestall litigation over their refusal to prepare any new or supplemental programmatic NEPA analysis by arguing that in the absence of an Amended ROD, the agency has not yet completed any "final agency action." Thus, the agencies appear to be withholding an Amended ROD on the programmatic issues in order to tactically delay litigation until the agencies have concluded the site-specific analyses at LANL and SRS and are ready to commence construction. This is an apparent effort to ensure that any litigation over the NEPA process for the agencies' *programmatic* decision-making on the expansion of plutonium pit production cannot be commenced until the agencies are already building and/or upgrading their desired facilities.<sup>8</sup>

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<sup>6</sup> The only viable alternative to the agencies immediately issuing a ROD for the Final Programmatic SA is for the agencies to abandon its premature effort to convert partially completed facilities at SRS to support pit production, which is not required by any law, terminate the EIS process at SRS, and instead develop a new or supplemental PEIS for the reasons described here and in our previous letters.

<sup>7</sup> COVID-19 does not provide any legitimate excuse for the agencies' slow-walking of an Amended ROD. The agencies provided only a 15-day extension on NEPA comment periods in response to requests from members of the public, including my clients, and from members of Congress, for extensions of NEPA comment periods based on the COVID-19 pandemic. In doing so, the agencies stressed that the agencies ostensibly critical national security activities could not tolerate any further delay. As such, the agencies lack any basis for themselves delaying the issuance of a ROD by more than six months.

<sup>8</sup> In fact, that the agencies are already implementing the actions analyzed in the Final Programmatic SA is clear from the fact that upgrades to facilities at LANL for expanded pit production are already occurring, specifically at the Radiological Laboratory Utility and Office Building (RLUOB) and Plutonium Facility-4. More than two years ago, my clients argued for the need for a pit production PEIS in extensive formal comments on a February 2018 draft RLUOB Environmental Assessment. See <https://nukewatch.org/importantdocs/resources/NWNM-Rad-Lab-comments-4-25-18.pdf> and <https://nukewatch.org/importantdocs/resources/NWNM-Addendum-Rad-Lab-comments-4-27-18.pdf> (quoting the Defense Nuclear Facilities Safety

The agencies' approach of slow-walking an Amended Programmatic ROD is a flagrant effort to deprive the federal courts of the power to issue a timely ruling that may have any practical impact on the agencies' chosen course of action. This tactic profoundly undermines NEPA and the role of the federal courts in ensuring that federal agencies comply with the nation's bedrock environmental laws.

### **CONCLUSION**

For all the reasons described above and in our earlier letters, DOE and NNSA are currently in violation of NEPA. To correct their violations of NEPA, the agencies must prepare a new or supplemental PEIS in association with their decision to expand plutonium pit production by producing pits at multiple sites. At a minimum, the agencies must immediately issue an Amended ROD reflecting the decision that the agencies have already made in the Final Programmatic SA, and to ensure that the agencies properly sequence their decision-making as NEPA requires. Moreover, the Amended ROD on the Final Programmatic SA must be issued well before the agencies issue any Critical Decision-1 for either operations at SRS or LANL.

If the agencies refuse to issue an Amended ROD immediately, we hereby request that the agencies provide a "statement of the grounds" on which they refuse to do so. *See* 5 U.S.C. § 555(e) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of a person made in connection with any agency proceedings" and "the notice shall be accompanied by a brief statement of the ground for denial").

We request a response to this letter in no more than 30 days. Thank you for your prompt attention to this matter.

Sincerely,

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Board's observation that "the latter two [RLUOB] subprojects primarily support the increased capacity required for larger pit manufacturing rates").

CC: Sen. Lamar Alexander, Chair, Senate Energy and Water Appropriations Subcommittee  
Sen. Dianne Feinstein, Ranking Member, Senate Energy and Water Appropriations Subcomm.  
Sen. Tom Udall, Senate Energy and Water Appropriations Subcommittee  
Sen. Deb Fischer, Chair, Strategic Forces Subcommittee, Senate Armed Services Committee  
Sen. Martin Heinrich, Ranking Member, Strategic Forces Subcommittee, SASC  
Sen. Lindsay Graham, South Carolina  
Rep. Adam Smith, Chair, House Armed Services Committee  
Rep. Mac Thornberry, Ranking Member, House Armed Services Committee  
Rep. Jim Cooper, Chairman, Strategic Forces Subcommittee, House Armed Services Committee  
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Rep. John Garamendi, House Armed Services Committee  
Rep. Ben Ray Lujan, NM-3  
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