UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

SAVANNAH RIVER SITE WATCH, TOM CLEMENTS, THE GULLAH/GEECHEE SEA ISLAND COALITION, NUCLEAR WATCH NEW MEXICO, and TRI-VALLEY COMMUNITIES AGAINST A RADIOACTIVE ENVIRONMENT, Plaintiffs, v. UNITED STATES DEPARTMENT OF ENERGY, JENNIFER GRANHOLM, *in her official capacity as the Secretary*, NATIONAL NUCLEAR SECURITY ADMINISTRATION, and JILL HRUBY, *in her official capacity as Administrator*, Defendants.	)	No. 1:21-cv-01942-MGL

PLAINTIFFS' REPLY BRIEF

Plaintiffs, Savannah River Site Watch, Tom Clements, The Gullah/Geechee Sea Island Coalition, Nuclear Watch New Mexico and Tri-Valley Communities Against a Radioactive Environment ("Plaintiffs") hereby submit their Reply Brief pursuant to the Seventh Amended Scheduling Order. ECF No. 194.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Regulations **Page(s)**

TABLE OF ABBREVIATIONS

ATWIR	Annual Transuranic Waste Inventory Report
CEQ	Council on Environmental Quality
CT SPEIS	Complex Transformation Supplemental Programmatic Environmental Impact Statement
DNFSB	Defense Nuclear Facilities Safety Board
DOE	Department of Energy
EA	Environmental Assessment
EIS	Environmental Impact Statement
LANL	Los Alamos National Laboratory
MOX Facility	Mixed Oxide Fuel Fabrication Facility
NAS	National Academy of Sciences, Engineering, and Medicine
NEPA	National Environmental Policy Act
NNSA	National Nuclear Security Administration
PEIS	Programmatic Environmental Impact Statement
SA	Supplement Analysis
SRS	Savannah River Site
SWEIS	Site-Wide Environmental Impact Statement
TRU	Transuranic Waste
WIPP	Waste Isolation Pilot Plant

ARGUMENT AND CITATION OF AUTHORITIES

I. PLAINTIFFS HAVE STANDING TO PURSUE ALL OF THEIR NEPA CLAIMS.

Yet again, Defendants challenged Plaintiffs' standing, despite the earlier ruling by this Court which found that Plaintiff, Tom Clements easily met the standing requirements to pursue his claims. " '[O]ne party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, ECF No. 31 at p. 4 (internal citations omitted). This Court concluded Plaintiff Tom Clements met all three elements of Article III standing.[1] Because Plaintiffs have already submitted a lengthy response when Defendants raised the issue of standing to Plaintiffs' claims earlier, ECF No. 27, Plaintiffs will not weary the Court by recounting all of their arguments here and, instead, incorporate those arguments by reference. Plaintiffs will, however, address certain points raised in Defendants' brief, even if they may have already been somewhat addressed.

In their Brief, Defendants appear to concede, at least implicitly, that Plaintiffs have standing to raise their NEPA claim regarding the new, and intertwined, dual site pit production scheme. Defendant's Brief at p. 6, ECF No. 190. As to Plaintiffs' four other claims, Defendants contend that Plaintiffs have not met the imminency or the causal connection requirements. Defendants also argue that informational injuries without concrete harm are insufficient for standing purposes. Defendants, as they were earlier, are mistaken.

[1] "[Clements] has established that his alleged informational injury is concrete." ECF No. 31 at 11; "Clements has satisfied the injury-in-fact standing requirement." *Id*. at 13; "Clements has also met the causation standing requirement." *Id*. at 14; Redressability "is not a close call." *Id*. at 15.

A. Plaintiffs' Injuries are Imminent and far from Speculative.

Addressing first whether Clements demonstrated an injury in fact, this Court concluded, "Clements easily satisfies the requirement that, without a new or supplemental PEIS, he suffers … 'the type of harm Congress sought to prevent by requiring disclosure,'" ECF No. 31 at 11 (internal citations omitted), and "Clements's informational injury is particularized." *Id*. at 12. The Court "determined Plaintiffs have established that Clements 'suffers a concrete informational injury where he is denied access to information required to be disclosed by statute, and he suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.'" *Id*. at 12-13 (internal citations omitted).

Defendants seek to begin pit production at SRS in the near future—although still some years away. Increased pit production at LANL will begin much sooner. Once these operations begin, they will immediately result in the generation of extensive amounts of hazardous TRU waste: approximately 57,550 cubic meters over the 50-year life of the project. ECF No. 81-1, CT SPEIS_68289.

Defendants' argument on this issue for Claims 2 and 3 is premised on two mistaken points: (1) that it is only possible (or speculative) that WIPP will be oversubscribed due to pit production and (2) and that it is only possible that TRU waste will therefore be stored at SRS and LANL in the event WIPP capacity is exhausted. Far from being "two unsupported assumptions[,]" Plaintiffs' assertions are based on the actual language contained in both the SRS EIS and the LANL SA SWEIS, as well as the SA CT SPEIS and the 2020 NAS report. The SA CT SPEIS and the 2020 NAS Report, as well as the 2020 ATWIR, show that WIPP's capacity will be exceeded with the additional pit production TRU waste. ECF No. 161-4, SRS_00092749-92750, Table 3-2; ECF No. 160-11, 2020 Annual Transuranic Waste Inventory Report at pp. 11, 38, 43-44, 127. The CT SPEIS

SA states that when WIPP is unavailable for pit TRU disposition, it is expected that this waste will remain at the respective producer's site for as long as WIPP is unavailable. ECF 81-1, CT SPEIS_68289-68290 (noting respective storage capacities for TRU waste at both SRS and LANL to cope with "potential fluctuations in shipments to WIPP").

Defendants' argument also ignores that WIPP's unavailability is likely to emerge well before fifty (50) years has elapsed and before WIPP's capacity is exceeded because WIPP only has NEPA coverage for disposals until 2033. The Record of Decision that governs WIPP's "Disposal Phase" states that WIPP's purpose is to allow the safe disposition "of the TRU waste that has accumulated at DOE sites and to provide for the disposal of additional TRU waste to be generated over approximately the next 35 years (through approximately 2033) in a manner that protects public health and the environment." CT SPEIS_34149, ECF No. 59-1; *see also*, Exhibit 4, Declaration of D. Hancock at ¶¶ 3, 4. After 2033, it is uncertain whether, or for how long, WIPP may not be capable of accepting TRU waste for disposal. In addition, there is also a real possibility that WIPP will be unavailable for years, if not decades, because of a lack of requisite approvals from the State of New Mexico and/or EPA well before its capacity is exhausted. Exhibit 4, Declaration of D. Hancock at ¶ 5 (citing ECF No. 161-4, SRS_00092772).

Regardless of the relative timing of or reasons for WIPP's unavailability, the "injury in fact" inquiry, which includes an imminency component, focuses not on a delay between the decision and when harm is experienced; rather, the focus is on whether the harm is hypothetical or speculative. In *Lujan v. Defenders of Wildlife*, the United States Supreme Court provided an example that illustrates the point. 504 U.S. 555, 572 n.7, 112 S.Ct. 2130, 2142 n.7, 119 §L.Ed.2d 351 (1992). The Court said that, for procedural rights (such as NEPA), "the normal standards for redressability and immediacy" need not be met and stated that "one living adjacent to the site for

proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an [EIS], even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, **and even though the dam will not be completed for many years**." *Id.; see also LaFleur v. Whitman*, 300 F.3d 256, 271 (2d Cir. 2002)(accord). As Defendants elected to embark on a project that will span several decades, Defendants are required to address the environmental consequences of the lengthy project at the outset. NEPA's focus is to have an agency prepare an EIS "early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. If Defendants' argument was valid, then they would be able to preclude challenges to projects by simply extending the time period at issue such that a challenge could not occur until well after part or even the majority of the project had already been completed. That would undermine the purpose of NEPA—to require a hard look at the environmental consequences at the outset and to allow for public participation in the decision-making process at that time. *See Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 537 (8th Cir. 2003) (NEPA requires an agency to "asses, consider, and respond to all comments" (citing 40 C.F.R. § 1503.4(a)); *see also Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492–93 (9th Cir. 2011) (agency "required to 'assess and consider … both individually and collectively' the public comments received during the NEPA process and to respond") (citations omitted).

Defendants' imminency argument also misses the point because the deficient NEPA analyses, or lack thereof, at issue here have already occurred and the pertinent records of decisions have been signed, injuring Plaintiffs in that process but also leading to the substantial, reasonable likelihood of Plaintiffs' inevitable, personal environmental injuries. And if these deficient

analyses are left uncorrected, then the dual site pit production project will go forward without having first evaluated several alarming environmental effects that will occur now and across several decades. This aligns the case with the example in *Lujan*. In this case, it is not speculative to conclude that the operations will necessarily produce TRU waste at levels that both exceed WIPP capacity, that will necessarily lead to the storage of TRU waste onsite, and that this storage will necessarily threaten Plaintiffs as they are located near both SRS and LANL. Defendants' own data show that these exceedances are expected and Plaintiffs' declarations establish their respective proximity to SRS and LANL. *See* Declaration of T. Clements, ECF No. 189-1, at 3-7; Declaration of James J. Coghlan, ECF No.189-2 at 2-6. These expected injuries based upon Defendants' own data distinguish this case from the few cases that Defendants cite where injury may never occur or that may occur within the life of the permit. *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F.Supp. 2d 1118, 1130 (D.N.M. 2011)(questioning whether climate injuries will actually occur to plaintiffs or that they are not reversible); *Conservation L. Found., Inc. v. Gulf Oil Ltd. P'ship*, NO. 3:21-CV-00932 (SVN), 2022 WL 4585549, at *6 (D. Conn. Sept. 29, 2022)(recognizing that the threat of harm presently and during the term of a permit at issue would suffice for imminency purposes); *see also, Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984)("Reasonable forecasting and speculation is … implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'")(quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)). Plaintiffs allege in Claim 4 that Defendants failed to address new information and changed circumstances relating to improperly stored TRU waste. Defendants claimed for several months not to have considered the 2020 DNFSB Report in resisting Plaintiffs' attempts to have it added to the Administrative

Record. Now, months later, that very document has been located in the Administrative Record. ECF No. 108-2, SRS_00007178-7216. Apparently, the document was not considered but even if it had been, there is nothing in the SRS EIS, LANL SA SWEIS or SA CT SPEIS that addresses the dangerous occurrences of TRU waste exploding. The Report clearly stated that "DOE directives do not provide adequate guidance and requirements for analyzing and controlling energetic chemical reaction events at waste generator sites." *Id*. at SRS_00007200. Now, Defendants claim that they have remedied these issues but those post hoc assurances do not obviate prior NEPA violations. Nor do they address the issues noted in the Declaration of Don Hancock—specifically that there is extensive legacy TRU waste at LANL and SRS and that the WIPP Waste Acceptance Criteria ("WAC") does not, in fact, require that legacy waste and waste from pit production be packaged separately. Exhibit 4, at p. 3, ¶ 7 (citing WIPP WAC). Defendants' argument that Plaintiffs lack standing because of a lack of imminent injury is without merit.

Defendants' argument related to Plaintiffs' fifth claim amounts to this—since we, as a country, have been lucky enough to avoid a terror attack on a convoy transporting nuclear waste or nuclear weapons' materials, then this claim is too speculative. But it is Defendants who have claimed that there are "[g]rowing threats" from Russia and China and North Korea. ECF No. 81-1, CT SPEIS_68230. Yet the analyses employed in the SA CT SPEIS, LANL SA SWEIS and the SRS EIS all date to the earlier, less fraught political climate of the 2008 CT SPEIS and appear to focus on terror threats to particular sites. ECF No. 54-8, CT SPEIS_24668, 24694-95. These threats are not speculative as they form part of the justification for the increased pursuit of additional nuclear weapons that is the reason for the increase in pit production. Moreover, these threats are specific to Plaintiffs Tom Clements and James J. Coghlan of Nuclear Watch New Mexico because they live and recreate in close proximity to two of the primary facilities involved

in pit production and thus provide targets with respect to nuclear weapon materials (i.e., pits) as well as toxic nuclear waste. *See* discussion I.B. *infra*. Plaintiff, Tri-Valley Communities Against a Radioactive Environment, is also located in close proximity to another target, the Lawrence Livermore National Laboratory, which is the site of nuclear weapons materials, and specifically submitted comments about the increased risk of terror attacks on nuclear shipments. Plaintiffs have standing to pursue this claim.

B. Plaintiffs' Injuries are Causally Connected to Defendants' NEPA Violations.

In its Order Denying Defendants' Motions to Dismiss, this Court concluded that Plaintiff, Tom Clements, met the causation standing requirement due to his "reticence to 'conduct[] the professional and recreational activities he currently undertakes.'" ECF No. 31 at 14 (internal citations omitted). These allegations are also consistent with Clements' allegations in the Declaration submitted in support of Plaintiffs' Initial Brief—which enlarge upon these injuries. *See* ECF No. 189-1, at pp. 3-7.

Similarly, NukeWatch's Executive Director, James Coghlan, "regularly recreates just outside the boundaries of LANL, and specifically has been rock climbing on nearby crags for nearly 50 years," including an "area contiguous and immediately downstream of LANL and along the Los Alamos Canyon's narrow streambed," where "measurable detections of plutonium" have been discovered up to 17 miles downstream. ECF No. 189-2, at pp. 2-3. Defendants' failure to adequately consider numerous environmental risks from the decision to expand plutonium pit production at LANL and initiate dual site production detrimentally affects Mr. Coghlan's recreational, environmental, and aesthetic interests because of the unanalyzed increased risk of accidents and resultant injury, in particular to Mr. Coghlan who "spends a substantial amount of his free time nearby." *Id.* at 2-5. Through Mr.

Coghlan, NukeWatch is harmed by Defendants' failure to analyze these risks in a supplemental PEIS, and its interests in environmental contamination and safety from nuclear-related activities are directly related to its mission.

Plaintiffs' injuries were and are causally connected to Defendants' various NEPA violations because they are directly affected due to the production and storage of hazardous materials at SRS and LANL associated with the increased pit production at both of those sites.

C. Plaintiffs Will Suffer Concrete Injuries in Addition to Their Informational Injuries.

This Court's earlier ruling supports the fact Plaintiffs will suffer not only informational injuries, but is also injured because of the resulting "reticence to 'conduct[] the professional and recreational activities he currently undertakes.'" ECF No. 31 at 14 (internal citations omitted). Similarly, James Coghlan alleges impacts to his aesthetic and recreational interests as a result of Defendants' NEPA violations. These injuries are expounded upon in the immediately preceding section.

This Court has also concluded that Plaintiff, Tom Clements's informational injury is "particularized" and that he "suffers a concrete informational injury where he is denied access to information required to be disclosed by statute, and he suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." ECF No. 31 at 12-13 (internal citation and quotation marks omitted).

II. DEFENDANTS VIOLATED NEPA BY NOT UNDERTAKING A PROPER ALTERNATIVES ANALYSIS GIVEN THE CHANGE IN NEED AND PURPOSE AND CHANGED CIRCUMSTANCES SINCE THE 2008 CT SPEIS.

In a surprising turn, Defendants now claim that the dual site pit production is connected "as a factual matter" but are "not 'connected,' in the legal sense, within the meaning of CEQ's regulations." Def. Brief at pp. 17-18. In reality, the answer is that this scheme is both connected factually as well as legally as Defendants acknowledged in response to comments. In response to the CT SPEIS SA, several commenters stated that the dual site pit production scheme was connected legally such that a PEIS or Supplemental PEIS was required. In response, Defendant, NNSA stated that it "agrees that expanding pit production at LANL and repurposing the MFFF [at SRS] are connected actions." ECF No. 81-1, CT SPEIS_68306. Defendant then claimed that there was no substantial change or new information to warrant a new or supplemental PEIS. *Id*. As Plaintiffs have shown, that is not the case.

Regardless of Defendants' about-face, the pit production at LANL and SRS is necessarily interdependent as that was the idea with having two, redundant pit-producing facilities. Moreover, the idea is that their respective production schedules are interdependent in that if a criticality event occurred at one facility causing it to suspend production, the other facility will necessarily increase production to attempt to meet the goal of producing at least 80 pits per year. This is why the respective analyses at SRS and LANL both anticipate production beyond at least 30 pits per year at LANL and at least 50 pits per year at SRS. ECF No. Indeed, the SRS EIS envisions "[a] two-site pit production strategy, in which each site would have the capability to produce 80 pits per year, would enable NNSA to meet national security requirements if one facility became unavailable." ECF No. 107-4, SRS_00006135. It is plain that the goal of this project, to produce at least 80 pits per year, is to be met by the interrelated production at both SRS and LANL.

Defendants contend that the 2020 SRS EIS considered cumulative impacts. Def. Brief at p. 18. This concedes that the SA CT SPEIS, the analysis that was supposed to determine whether

a new programmatic EIS should be conducted, did not consider the cumulative impacts of the pit production. This is problematic because the SA CT SPEIS is the where Defendants were supposed to consider cumulative impacts of the "connected" projects to determine whether to prepare a new or supplemental PEIS. The SRS EIS, is neither a programmatic document nor did it purport to consider alternatives beyond various levels of pit production at SRS. ECF No. 107-4, SRS_00006135 (evaluation of production 50, 80 and 125 pits per year at SRS). The die, as they say, had been cast. Moreover, the cumulative effects it purported to consider are inconsistent with and contradicted by the later data in the 2020 ATWIR that is required to be used for NEPA purposes. ECF No. 160-11, pp. 11, 38, 43-44.

Defendants claim that there has been "no change to the purpose and need" between the 2008 CT SPEIS and the purpose and need now, Def. Brief at p. 19, and, in support, cite the most broad, generic "fundamental principle" they could find. Def. Brief at p. 20. Plaintiffs recounted, at length, the obvious change and differences between the purpose and need of the earlier programmatic analysis and what is now contemplated. Plaintiffs' Initial Brief at pp. 8-9. The change to purpose and need is obvious because the earlier purpose and need included the need to "eliminate redundant activities[,]" ECF No. 54-8, CT SPEIS_24718, while the new purpose and need included the need to "improve the resiliency, flexibility, and **redundancy** of the Nuclear Security Enterprise by not relying on a single production site." ECF No. 81-1, CT SPEIS_68229 (emphasis added). When a need is changed to the opposite of what is espoused in a prior document, the need has changed.

Defendants attempt to massage this by noting that both LANL and SRS "could continue to hold Category I/II SNM" as if this is equivalent to the vast overhaul and production regime that attends a dual pit production scheme. The "distinction," as Defendants put it, is that instead of a

consolidated, single site for pit production, there are now two located across the country allegedly to improve "redundancy" when the initial idea was to eliminate redundant activities.

There is nothing in Defendants' Brief that counters Plaintiffs' assertion that the dual site pit production approach was not one of the previously considered alternatives in the CT SPEIS. Defendants spend considerable time reviewing the various alternatives that were actually considered, but this lengthy recitation does not cloud the reality that the alternative they pursued was never considered in the 2008 CT SPEIS. Instead of selecting an alternative that was considered in a NEPA analysis, so that it was capable of being properly tiered, Defendants selected something else without considering options about whether to pursue a dual site alternative and, if so, where the new dual pit production scheme should be sited or allowing the public to weigh in various alternatives. ECF No. 81-1, CT SPEIS_68241; CT SPEIS_68261; *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1073 (9th Cir. 2002)(tiering only permissible to prior NEPA document). Defendants simply analyzed various levels of pit production at the preselected sites in the SRS EIS and LANL SWEIS SA. ECF No. 107-4, SRS_6169; ECF No. 89-3, LANL SA_09056, 09067.

Defendants' attempts to distinguish Plaintiffs' cases are unsuccessful because they don't acknowledge the underlying similarity between this case and those Plaintiffs cited. The respective courts in these cases all found NEPA violations because there was a lack of consideration of alternatives at the front end of the analysis. In *'Ilio'ulaokalani Coalition v. Rumsfeld*, the Ninth Circuit ruled that NEPA had been violated because the Army had selected Hawaii as the site for expanded operations without considering any alternative sites either at the PEIS stage or at the SEIS stage. 464 F.3d 1083, 1097 (9th Cir. 2006). A selection of an alternative that was not previously considered doomed analyses in *Wild Virginia v. United States Forest Serv.*, 24 F.4th

915, 929 (4th Cir. 2022) and *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1292–93 (1st Cir. 1996)). And it would have doomed the project in *Defenders of Wildlife v. North Carolina Dep't of Transp.*, 762 F.3d 374, 398 (4th Cir. 2014) had the project been outside of the scope of previously studied alternatives.

Plaintiffs anticipate that Defendants will argue that there is no need to further evaluate alternatives because the environmental impacts evaluated in the 2008 CT SPEIS were sufficiently large to "bound" the effects of the dual site proposal at issue here. As Plaintiffs pointed out in comments, bounding is inappropriate here under DOE's own guidance. The comment quotes DOE's guidance as follows: "DOE must ensure that the [alternatives] analysis is not so broad and all-encompassing as to mask the distinctions among alternatives, or to hinder consideration of mitigations[;] [e]ven where overall impacts are small, detailed analysis for each alternative may be needed where the differences in impacts may help to decide among alternatives or to address concerns the public has expressed, as sometimes applies when DOE must select sites or transportation routes and methods for conducting its operations[;] [i]t is never appropriate to 'bound' the environmental impacts of potential future actions (not yet proposed) and argue later that additional NEPA analysis is unnecessary because the impacts have been bounded by the original analysis." ECF 106-1, SRS_00000557 (quoting DOE NEPA guidance). The limitations on bounding analysis are consistent with that noted by the court in *Oak Ridge Environmental Peace Alliance v. Perry*. 412 F.Supp.3d 786, 807 (E.D.Tenn. 2019) ("even where overall impacts are small, DOE's own internal guidance suggests that a bounding analysis would be inappropriate if it obscures differences among alternatives or fails to address concerns the public has expressed"). Here, reconfiguring the alternatives and invoking a bounding analysis not only obscures differences among alternatives, it necessarily precludes consideration of new alternatives given

new purposes and needs and not only fails to address concerns the public has expressed but also prevents the public from even commenting on new alternatives related to the new purpose and need.

Defendants also cite to the CEQ regulations that took effect on September 20, 2020 even though the SA CT SPEIS was finalized as of December 2019, and the amended record of decision for the LANL SA SWEIS was dated September 2, 2020 and the draft SRS EIS was issued in April, 2020. As Plaintiffs stated in their Amended Complaint, the prior version of the CEQ regulations should control. *See* ECF No. 21, n. 6.

Because the alternatives on offer were necessarily so limited, as mentioned above, and because the decision had, essentially, already been made by Defendants, any public participation related to the evaluation of whether to pursue a dual site production plan and, if so, which potential sites in a dual site pit production scheme should be considered, was illusory at best. Certainly, as Defendants note, Plaintiffs attempted on multiple occasions to offer comments about the plan, but these comments were geared toward making Defendants appreciate that they were moving forward without involving the public in the decision-making process, as required by NEPA. Beginning in October 2018, Plaintiffs repeatedly asked Defendants to prepare a programmatic environmental impact statement so that the question of a dual site pit production scheme could be vetted by the public and so that, in the event that course was chosen, any potential alternative sites could also be vetted. This never happened in the nearly six years since Plaintiffs petitioned Defendants for a PEIS that could have been already completed in that time. Thus, there has been no requisite springboard for public comment as required by NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 331, 349, 109 S. Ct. 1835, 104 L.Ed.2d 351 (1989) (quoting *Baltimore Gas &*

Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97, 103 S. Ct. 2246**,** 2252 **(**1983)) (citing L. Caldwell, Science and the National Policy Act 72 (1982)).

Defendants soft-pedal their missteps when they characterize the process as simply "structured differently from prototypical NEPA analyses" and Defendants are wrong when they claim that the "process in no way prevented NEPA's goals from being met." Def. Brief at p. 33. NEPA requires due consideration for the environment and an avenue for public participation at the front end--before the significant decisions have been made. Defendants' approach was structured differently to preclude the requisite NEPA alternative considerations.

III. DEFENDANTS VIOLATED NEPA BY FAILING TO ASSESS THE CUMULATIVE EFFECTS OF INCREASED PIT PRODUCTION ON WIPP'S LIMITED CAPACITY.

Cumulative effects of TRU waste from dual site pit production on WIPP capacity in addition to other transuranic waste disposition was not addressed in or contemplated by the SA CT SPEIS SA in 2019. The SA CT SPEIS evaluated WIPP capacity by comparing projections for pit transuranic waste for producing varying amounts of pits per year at LANL and SRS, ECF No. 81-1, CT SPEIS_68398-68399, and temporary storage of TRU waste in the event WIPP was unable to accept TRU waste for a limited time period. *Id*. Total WIPP capacity beyond whether it had capacity to accept TRU waste from pit production which could be "given priority" for disposition was not considered. *Id*.

Of course, the SA CT SPEIS did recognize, as it must, that the cancelation of the MOX Facility was a "significant change" related to TRU waste disposition. *Id*. at CT SPEIS_68395. Likewise, Defendants seem to acknowledge that the "dilute and dispose" approach that they are now undertaking in the wake of the abandonment of the MOX Facility requires additional programmatic analyses, Def. Brief at p. 38. But the import of this significant change in relation to

the pit production project, which was recognized by the NAS 2020 Report when the authors stated that pit production waste and the disposal of "far larger" qualities of excess plutonium will exceed WIPP capacity, [not a complete sentence?]. ECF No. 161-4, SRS_00092749, 92786, 92771. Defendants have not similarly recognized this inevitability and have not undertaken any analyses to address it prior to embarking on the decades spanning dual site pit production project.

Defendants contend that the location of pit production does not affect waste generation but the prior analyses made that distinction when they concluded that SRS generates more TRU waste generated on a per-pit basis. This is because, for example, the TRU pit waste at SRS "would include americium-241" which "limits the amount of waste that can be packaged for disposal because of americium's radioactivity. The americium-241 in the LANL process is recovered as a byproduct." ECF No. 107-4, SRS_6382. That is but one example of how the pit production process at SRS is less efficient than what is at LANL. There is no indication that the recovery process is dependent upon the americium market or that the americium market is the sole reason that TRU and LLW projected by the 2019 SA CT SPEIS was so much higher than projections for those categories in the 2008 CT SPEIS. ECF No. 81-1, CT SPEIS_68252.

There was no evaluation of relative waste production, TRU or otherwise, relative to other sites in the SA CT SPEIS, the SRS EIS and the LANL SA SWEIS, because the alternatives under consideration were, for the SRS EIS, various amounts of pit production at those two facilities.

Defendants next contend that since the LANL SA SWEIS and the SRS EIS considered cumulative impacts (with the implication being that the SA CT SPEIS did not), any prior deficiency regarding cumulative impacts was remedied. Def. Brief at pp. 39-40. That is not correct because the long-delayed cumulative impacts analysis only occurred well after the SA CT SPEIS, which was where it had to occur in order for the cumulative impacts analysis to matter. Per ZNEPA

regulations, it was the SA CT SPEIS that was charged with determining whether to conduct a new or supplemental programmatic environmental impact statement.

Defendants' reliance on *Western Watersheds Project v. Bureau of Land Management* is unavailing. The court in that case recognized both that a PEIS "may obviate the need for a site-specific [EIS]" and that new or consequential issues that arise after a PEIS may necessitate further analysis. 774 F.Supp. 2d 1089, 1098-99 (D. Nev. 2011)(citations omitted). Both have occurred here as detailed in Plaintiffs' initial brief.

The latter analyses were also insufficient because the data that was used in both was superseded by the data in the 2020 ATWIR, which is required to be used in NEPA analyses. The 2020 ATWIR data show that the cumulative TRU waste production from pit production is consistent with the SA CT SPEIS which the 2020 NAS Report concluded will exceed WIPP capacity. ECF No. 160-11, pp. 11, 38, 43-44; ECF No. 161-4, SRS_00092749-50.

IV. DEFENDANTS VIOLATED NEPA BY NOT AUTHORING A SUPPLEMENTAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT TO ADDRESS THE CHANGED CIRCUMSTANCES REGARDING WIPP CAPACITY.

Defendants claim that there is no new information or changed circumstances relating to WIPP capacity but that is belied by the significant difference between the TRU projections contained in the SRS EIS and LANL SA SWEIS and the 2020 ATWIR—that is consistent with the 2019 SA CT SPEIS.

Defendants assert that they "actually considered the information (or similar information) Plaintiffs claim [they] did not." Def. Brief at p. 41. This is certainly contrary to the position Defendants have taken with respect to the 2020 ATWIR in response to Plaintiffs' attempt to have the Administrative Record completed or supplemented with that document. ECF No. 162 at pp.

17-18 (challenging consideration of the 2020 ATWIR). Even if Defendants considered "similar" information, that does not excuse their failure to consider this information because its import is very different than the information Defendants claim to have considered. The 2020 ATWIR demonstrates a significant change in circumstances even from the LANL SA SWEIS and the SRS EIS in that the 2020 ATWIR projections, which must be used for NEPA purposes, does not comport with the reduced TRU projections utilized in both of those analyses. However, it does comport with the earlier projections in the NAS 2020 Report which showed that WIPP would be exhausted with the additional TRU waste from pit production. ECF No. 160-11, pp. 11, 38, 43-44; ECF No. 161-4, SRS_00092749-92750; *see also* Exhibit 4, Declaration of D. Hancock at p. 2-3, ¶ 5. Thus, Defendants' contention that the NAS conclusion was superseded by the data in the SRS EIS is incorrect.

The latest NEPA data, the 2020 ATWIR, supports the NAS conclusion that WIPP capacity will be exhausted before the end of the pit production project. It does not "confirm[] DOE/NNSA's analysis in both the 2019 SPEIS SA and the 2020 SRS EIS, that cumulative TRU waste volumes would remain below the WIPP's limit." Def. Brief at p. 42. It doesn't confirm the 2019 CT SPEIS SA because that analysis did not consider WIPP's overall capacity whatsoever and instead just focused on whether WIPP could accommodate TRU waste from pit production. ECF No. 81-1, CT SPEIS_68289; CT SPEIS_68280. It doesn't confirm the SRS EIS's conclusion because the projected TRU waste far outstrips that contained in the SRS EIS which was the basis of that document's conclusion about WIPP capacity. ECF No. 160-11 at pp. 38, 43-44, 127.

V. DEFENDANTS VIOLATED NEPA BY NOT ADDRESSING THE NEW INFORMATION AND CHANGED CIRCUMSTANCES CONCERNING RADIATION RISKS FROM IMPROPERLY STORED TRANSURANIC WASTE.

There is no question that the pit production project will create an extensive amount of additional TRU waste. Nor is there a question that the 2020 DNFSB report discusses how improperly packaged TRU waste may result in lethal doses of radiation to workers and possible carcinogenic radiation exposures to the nearby public. ECF No. 108-2, SRS_00007193. There is nothing to indicate that the SRS EIS, LANL SA SWEIS or SA CT SPEIS considered the dangerous occurrences of radiation exposure associated with these explosions; nor is there anything to indicate that any of these analyses considered radiation exposures with the frequency of the events that occurred at WIPP in February 2014 and at the Idaho National Laboratory in April 2018. *Id*. at SRS_00007184.

Without having addressed these issues in any analyses or supplemental analyses, Defendants now claim that there is nothing to see here but that post hoc justification does not satisfy NEPA. What the Administrative Record shows is that "DOE directives do not provide adequate guidance and requirements for analyzing and controlling energetic chemical reaction events at waste generator sites." *Id*. at SRS_00007200. Defendants' claims are also not consistent with the reality of the extensive legacy TRU waste presently residing at LANL and SRS which is not, per the WIPP Waste Acceptance Criteria, required to be packaged separately from pit waste. Exhibit 4, at p. 3, ¶ 7 (citing WIPP WAC). Defendants also do not address the issue of longer term WIPP unavailability if a repeat of the 2014 event that closed WIPP for just short of three years occurs, or what could happen to the legacy waste onsite or onsite pit production waste in the event it is not capable of being shipped to WIPP for disposition. The 2019 CT SPEIS SA contemplated temporary storage for TRU waste at SRS and LANL "for many years[,]" ECF No. 81-1, CT SPEIS_68289, but it is never stated that TRU waste could be stored at either facility indefinitely

if WIPP is unavailable for as long as it was previously closed—and there would be added stress on onsite storage due to increased TRU waste generation from pit production.

VI. DEFENDANTS VIOLATED NEPA BY FAILING TO TAKE A HARD LOOK AT CHANGED CIRCUMSTANCES CONCERNING TERROR THREATS TO TRANSPORTATION OF NUCLEAR MATERIALS AND WASTE.

The threats from foreign powers were significant enough for Defendants to refer to them as a rationale for the move to produce vastly more nuclear weapons materials than have been contemplated for decades. ECF No. 81-1, CT SPEIS_68230. Despite the growing threats, the analyses employed in the SA CT SPEIS, LANL SA SWEIS and the SRS EIS were the consultation of a prior analysis for a world where there was growing cooperation between or among certain powers and without the rising threat from North Korea; and all appear to focus on terror threats to particular sites. ECF No. 54-8, CT SPEIS_24668, 24694-95. Indeed, one of the needs for the single site, streamlined approach advocated in the 2008 CT SPEIS was "[e]nhanced security, particularly for activities involving special nuclear materials;.]" so that "[c]onsolidation of these materials at fewer sites, and fewer locations at those sites, would enhance security at a reduced cost." ECF No. 54-8, CT SPEIS_24695, 24668. But even without the threats referenced now, terrorist acts have merited concerns because nuclear materials have the ability to cause widespread environmental harms if safeguards are breached. *Id*. at CT SPEIS_24867. The threat from terrorist acts is not remote or speculative but a significant risk that has been recognized by Defendants for decades.

Defendants' case on this point is distinguishable as well. In *New Jersey Department of Environmental Protection v. U.S. Nuclear Regulatory Commission*, the Third Circuit expressly noted the distinction between that case and the more analogous case here, *San Luis Obispo Mothers*

for Peace v. NRC, 449 F.3d 1016, 1021 (9th Cir. 2006), because the latter involved the construction of a new facility with a more direct tie to the environment whereas the former only involved the relicensing of an existing facility. 561 F.3d 132, 142 (3rd Cir. 2009). Beyond that, however, there is a significant difference between whether one must further assess the risk of an air born terrorist attack on a particular existing facility, and whether one must assess the potential for terrorist attacks on shipments of nuclear waste and components between and among several facilities throughout the country due to the establishment of a dual site pit production over a thousand miles apart. This matter is more analogous to the Ninth Circuit case because in that case the court concluded that the construction of the facility would increase the risk at a nearby nuclear facility and that the facility would be a primary target itself. *Mothers for Peace*, 449 F.3d at 1030.

Plaintiffs have not waived this argument. Plaintiffs specifically referenced the potential for increased terrorist attacks on shipments of nuclear materials in comments submitted to Defendants in the public comment process. ECF 106-1, SRS_00000693. And Plaintiffs specifically referenced these same risks in their Amended Complaint, ECF No. 21, at pp. 22, 24, and these allegations were incorporated into Plaintiffs' NEPA claims which specifically referenced "transportation issues" associated with transporting nuclear materials throughout the country in a dual site pit production approach. *Id*. at pp. 55, ¶¶ 179, 180. Defendants were certainly aware of these issues as they made a point of referencing them in their Motion to Dismiss Plaintiffs' Amended Complaint. ECF No. 23-1, at pp. 16-17. Thus, Defendants were and are on notice of this issue and Plaintiffs have no waived this claim. *See, e.g*., *Chao v. Rivendell Woods, Inc*., 415 F.3d 342, 346 (4th Cir. 2005)(notice pleading just requires that complaint gives defendant fair notice of what claim is and grounds upon which it rests).

CONCLUSION

For the reasons stated herein and in their initial brief, Plaintiffs respectfully request that this Court grant Plaintiffs' request to complete or supplement the administrative record, that this Court declare that Defendants violated NEPA by failing to prepare and circulate for comment a new or supplemental programmatic environmental impact statement concerning pit production, that this Court enter an injunction to ensure that Defendants comply with NEPA and any applicable other laws, including Executive Orders, and also to ensure that Defendants take no further actions toward proceeding with their plutonium pit production plans until they have complied with NEPA and other applicable laws, and that this Court award Plaintiffs their fees, costs and other expenses as provided by law.

Respectfully submitted this 27th day of June, 2024.

By: s/ Leslie S. Lenhardt
Leslie S. Lenhardt
Federal Bar No. 7795
Amy Elizabeth Armstrong
Federal Bar No. 9625
Benjamin D. Cunningham
Federal Bar No. 11905
South Carolina Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
Tel: (843) 527-0078; Fax: (843) 527-0540
Email:leslie@scelp.org
amy@scelp.org
ben@scelp.org

Attorneys for Plaintiffs