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,	)	CA: 1:21-cv-01942-MGL
Plaintiffs,	)	
v.	)	
UNITED STATES DEPARTMENT OF ENERGY, JENNIFER GRANHOLM, in her official capacity as the Secretary, The NATIONAL NUCLEAR SECURITY ADMINISTRATION and JILL HRUBY, Administrator,	)	
Defendants.	)	

DEFENDANTS' BRIEF SEEKING JUDGMENT AND RESPONDING TO PLAINTIFFS' OPENING BRIEF

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Abbreviation	Definition
APA	Administrative Procedure Act
AROD	Amended Record of Decision
ATWIR	Annual Transuranic Waste Inventory Report
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
CT SPEIS	Complex Transformation Supplemental Programmatic Environmental Impact Statement
DOE	Department of Energy
EA	EIS or Environmental Assessment
JSF	Joint Statement of Facts
LANL	Los Alamos National Laboratory
MOX / MFFF	Mixed Oxide Fuel Fabrication Facility
NAS	National Academy of Sciences, Engineering, and Medicine
NEPA	National Environmental Policy Act
NNSA	National Nuclear Security Administration
NNSS	Nevada National Security Site
PEIS	Programmatic Environmental Impact Statements
ROD	Record of Decision
SA	Supplement Analysis
SEIS	Supplemental EIS
SNM	Special Nuclear Material
SRS	Savannah River
TRU	TRU Transuranic Waste
WIPP	Waste Isolation Pilot Plant

INTRODUCTION

Plutonium pits are a core component of nuclear weapons. Joint Statement of Facts ("JSF"), ECF No. 187, ¶ 3. The Department of Energy ("DOE") via its sub-agency, the National Nuclear Security Administration ("NNSA"), is responsible for producing plutonium pits and has analyzed pit production in at least five environmental impact statements ("EIS"). *Id.* ¶¶ 2, 7, 14, 17, 21, 31, 36, 63. Following the 1989 closure of the Rocky Flats facility, which produced up to 2,000 pits per year, production moved to a national laboratory in Los Alamos, New Mexico ("Los Alamos") where, from 1999 to 2020, pits were authorized to be produced at a rate of 20 per year. *Id.* ¶¶ 23, 33, 60. During this time DOE/NNSA studied the environmental impacts of producing up to 200 pits per year at five different sites. *Id.* ¶ 31. In 2019, Congress directed the agency to produce at least 80 pits per year by 2030. *Id.* ¶¶ 37, 46-49; CT SPEIS_00124-00125.

To comply with Congress's mandate, DOE/NNSA determined it must produce these vital components on a smaller scale between two sites rather than a larger scale at one site. CT SPEIS_00095-00096, CT SPES_71516; CT SPES_70216; CT SPEIS_00124. After exhaustive feasibility studies including a formal Analysis of Alternatives, Engineering Assessment, and Work Force Analysis, three additional NEPA analyses (including one programmatic supplement analysis, an EIS for Savannah River, and a supplement analysis for Los Alamos), and after confirming it would meet national security requirements, the agency decided to: (1) increase existing pit production at Los Alamos to 30 pits per year; and (2) modify the existing Mixed-Oxide Fuel Fabrication Facility ("MFFF" or "MOX") at the Savannah River Site ("Savannah River") in South Carolina, which was designed for Category I/II special nuclear material ("SNM"), to produce 50 pits per year. JSF ¶ 42, 55, 60, 143; CT SPEIS_70218. This decision minimizes environmental impacts, delays and expense, and advances the national security objectives of resiliency, flexibility, and redundancy. *Id.* ¶¶ 40, 43, 54.

Plaintiffs' brief contains five National Environmental Policy Act ("NEPA") claims. Brushing over the fact that DOE/NNSA prepared an entirely new EIS in 2020 that studied the environmental impacts of producing pits at Savannah River (including any cumulative impacts of production at Savannah River and Los Alamos), Plaintiffs challenge DOE/NNSA's decision to begin producing plutonium pits at a second production site without first supplementing the last programmatic EIS conducted in 2008. Pls.' Br. 7, ECF No. 189 (noting a challenge to the "dual site pit production scheme"). None of Plaintiffs' NEPA claims have merit.

As a threshold matter, Plaintiffs cannot demonstrate standing for the last four of their claims because they allege injuries that are either remote and speculative, or that are causally unrelated to the challenged agency action. As to the merits of Claim 1, the record unequivocally establishes that DOE/NNSA studied alternatives and, using its technical expertise, rejected unviable options in favor of maintaining small-scale pit production capacity at Los Alamos and modifying the MOX facility to also produce pits. Regarding Claim 2, DOE/NNSA examined how much transuranic ("TRU") waste would be produced, including the cumulative effects of producing 30 pits at Los Alamos and 50 pits at Savannah River. *See* JSF ¶¶ 58, 60, 63, 119-121, 152-162, 228-235. As to Claim 3, DOE/NNSA considered TRU waste data before making its decision and can proceed to comply with Congress' pit production mandate even if the Waste Isolation Pilot Plant ("WIPP")—the United States' only repository of TRU waste—*may* become oversubscribed at some point in the distant future. Claim 4 also fails because DOE/NNSA did not have to study the environmental impacts of packaging accidents associated with legacy materials when deciding where to locate pit production because *the location* of production has nothing to do with how waste is packaged and, additionally, legacy waste will not be packaged with pit production waste. And finally, as to Claim 5, NEPA requires agencies to study

reasonably foreseeable impacts; however, given the distant likelihood of a hypothesized terrorist attack, the agency must be given latitude on whether to conduct NEPA analysis for the potential impacts of such attenuated risk.

In sum, DOE/NNSA has spent decades studying the environmental impacts of pit production via other NEPA analyses, has provided thousands of pages of information to the public, has spent countless hours engaging the public through meetings and comments, and has considered comments received, all in compliance with both the spirit and letter of NEPA, which has the dual purpose of informing the public and facilitating informed agency decision-making. DOE/NNSA selected an alternative that is consistent with the impacts previously studied in its programmatic EIS and that helps assure the agency meets Congressionally mandated production levels. Considering the entire record, Plaintiffs cannot demonstrate that DOE/NNSA acted in a manner that was not in full accord with the law and certainly cannot demonstrate it acted in a manner that is arbitrary and capricious. Therefore, the Court should enter summary judgment in Defendants' favor.

LEGAL STANDARDS

A. APA Standard of Review

For an Administrative Procedure Act ("APA") claim, the Court must decide at summary judgment whether the agency's action is supported by the administrative record and otherwise consistent with the APA standard of review. *See Defs. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 392–93 (4th Cir. 2014). Plaintiffs have the burden of proof and must demonstrate that the defendants' actions were arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law. *See Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 586-87 (4th Cir. 2012) (citing 5 U.S.C. § 706(2)(A)). "Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid," *Ohio Valley Env'tl*

Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009), especially in cases where the issues turn on a "high level of technical expertise." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)

B. NEPA

Congress enacted NEPA, 42 U.S.C. §§ 4321-4370, to establish a process for federal agencies to consider the environmental impacts of major federal actions. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989); *Ohio Valley Env't Coal.*, 556 F.3d at 191 (NEPA is a "procedural and not a results-driven statute."). Agencies' actions can have adverse environmental effects but will "be NEPA-compliant so long as the agency has considered those effects and determined that competing policy values outweigh those costs." *Id*. Further, in conducting a review of compliance with NEPA,[1] a court "must make a searching and careful inquiry into the facts," but does not "second-guess agency decisions, so long as the agency has given a hard look at the environmental impacts of its proposed action." *No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp.*, 60 F.4th 794, 800 (4th Cir. 2023) (internal quotations omitted).

Under NEPA's implementing regulations, an agency must supplement an existing EIS if "the agency makes substantial changes to the proposed action *that are relevant to environmental concerns*" or "[t]here are significant new circumstances or information relevant to environmental

[1] Actions that directly affect the physical environment are generally subject to NEPA and are analyzed in either an EIS, an environmental assessment ("EA") or are authorized in a categorical exclusion ("CE"). *See* 40 C.F.R. §§ 1508.11, 1508.9, 1508.4. DOE's implementing procedures provide that the agency should perform a formal review, called a Supplement Analysis ("SA"), to determine whether "(i) [a]n existing EIS should be supplemented; (ii) [a] new EIS should be prepared; or (iii) [n]o further NEPA documentation is required." *See* 10 C.F.R. § 1021.314(c)(2).

concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(d)(1)(i) & (ii) (2024)(emphasis added); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 372 (1989). Such changes trigger a supplemental EIS only if such changes "present a seriously different picture of the environmental impact of the proposed project." *Save Our Sound OBX, Inc. v. N.C. Dep't of Transp.*, 914 F.3d 213, 221–22 (4th Cir. 2019).

ARGUMENT

Plaintiffs lack standing to raise four of their five arguments and, moreover, Plaintiffs' last argument is barred due to waiver and, as such, the Court should dismiss these claims. However, should the Court find sufficient basis for standing and non-waiver, all five arguments are unmeritorious on numerous bases, and summary judgment should be entered in favor of Defendants as to each.

To assist in focusing the argument, the most relevant NEPA evaluations pertaining to pit production are the 2020 *Final Environmental Impact Statement for Plutonium Pit Production at Savannah River Site; Aiken, South Carolina* **("2020 SRS EIS")**, and the following additional analyses: the 2008 *Final Complex Transformation Supplemental Programmatic Environmental Impact Statement* **("2008 CT SPEIS")** and the related 2019 *Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement* **("2019 SPEIS SA")**; and the 2008 *Final Site-Wide Environmental Impact Statement for the Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico* **("2008 LANL SWEIS")** and the related 2020 *Final Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory for Plutonium Operations* **("2020 LANL SA")**. These documents (and the impacts analyses they contain) form the core basis of DOE/NNSA's analysis of potential environmental impacts as discussed at

length in the parties' Joint Statement of Facts, ECF No. 187. Rather than repeating the complete factual discussion in the Joint Statement, Defendants discuss relevant facts in the context of the arguments below.

A. Plaintiffs lack standing to assert Claims 2 through 5.

"[S]tanding to sue is a jurisdictional issue of constitutional dimensions[.]" *Hodges v. Abraham*, 300 F.3d 432, 443 (4th Cir. 2002). To demonstrate standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiff has the burden of establishing all three elements, for *every* claim. *See Bostic v. Schaefer*, 760 F.3d 352, 370–71 (4th Cir. 2014).

To establish injury in fact, a plaintiff must show it suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560). A plaintiff whose alleged injuries are forward-looking must show "a material risk of future harm" that is "sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435 (2021). A threatened injury must be "certainly impending," and allegations of "possible future injury" fail to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). While "'imminence' is an elastic concept, it cannot be stretched beyond its purpose to ensure that "the alleged injury is not too speculative for Article III purposes." *Id.* Requiring an injury to be concrete and imminent "ensures that plaintiffs have a 'personal stake in the outcome of the controversy.'" *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018).

Moreover, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). "[T]he requirement of injury

in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id.* Thus, an "alleged deprivation of NEPA procedural rights" is insufficient absent a demonstration of injury to specific concrete interests. *Wild Va. v. Council on Env'tl Quality*, 56 F.4th 281, 297 n.8 (4th Cir. 2022).

"[A] statutory violation alone does not create a concrete informational injury sufficient to support standing." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017). Instead, a "constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled and that the denial of that information creates a 'real' harm with an adverse effect." *Id.* In the context of a NEPA claim, plaintiffs must allege more than injury from the "loss of information." *Wild Va. v. Council on Env't Quality*, 544 F. Supp. 3d 620, 641 (W.D. Va. 2021), *aff'd*, 56 F.4th 281 (4th Cir. 2022); *see also Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 84–85 (D.C. Cir. 1991) (explaining that "sustain[ing] an organization's standing in a NEPA case solely on the basis of 'informational injury' . . . would potentially eliminate any standing requirement in NEPA cases, save when an organization was foolish enough to allege that it wanted the information for reasons having nothing to do with the environment"). Under NEPA, "a cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under NEPA [and] when the plaintiff also alleges a concrete interest—such as an aesthetic or recreational interest—that is threatened by the proposed action." *Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n.*, 457 F.3d 941, 949–50 (9th Cir. 2006) (cleaned up).

1. For Claims 2, 3, 4, and 5, Plaintiffs have not established an imminent, non-speculative injury-in-fact.

Regarding their waste-related claims, *i.e.*, Claims 2 and 3, none of the Plaintiffs live or recreate near the WIPP in New Mexico, which is where DOE/NNSA currently disposes TRU

waste. Plaintiffs, therefore, cannot argue that their concrete interests will be harmed by disposing of more TRU waste at the WIPP. *See*, *e.g.*, *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) ("For claims brought under NEPA, we have described this 'concrete interest' test as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact."); *see also* ECF No. 189-1, 189-2, 189-3. Therefore, as Plaintiffs themselves concede, the only potential injury-in-fact is that the WIPP *may* become oversubscribed at some distant point in the future and that TRU waste *may* then be stored at Los Alamos or Savannah River on a long-term basis. *See* ECF No. 189 at 44–45. But this injury is far from imminent and is wholly speculative.

In support of their WIPP-related claims, Plaintiffs rely on two unsupported assumptions: (1) the WIPP will become oversubscribed approximately 50 years after pit production begins, and (2) if the WIPP's current capacity is exceeded, DOE/NNSA will be forced to store TRU waste at Los Alamos and Savannah River. ECF No. 189 ¶¶ 38, 45. Neither of these conjectures give rise to an injury-in-fact, which Plaintiffs must establish even in a procedural injury case such as this. *Summers*, 555 U.S. at 496.-97.

First, even assuming the WIPP will reach its Congressionally authorized capacity limit *and* TRU waste is stored at Los Alamos or Savannah River, Plaintiffs' alleged environmental injury would not occur for fifty years. An injury that will not materialize until, at the earliest, 2080 cannot be imminent,[2] particularly when future congressional and administrative decisions

[2] *See*, *e.g.*, *Conservation L. Found., Inc. v. Gulf Oil Ltd. P'ship*, No. 3:21-CV-00932 (SVN), 2022 WL 4585549, at *7 (D. Conn. Sept. 29, 2022) ("[A]llegations of harms that will occur in the distant future are insufficient to establish an injury in fact for Article III standing."); *Conservation L. Found., Inc. v. Shell Oil Prod. US*, No. CV 17-396 WES, 2020 WL 5775874, at *1 (D.R.I. Sept. 28, 2020) (same); *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1130 (D.N.M. 2011) (same).

will almost certainly materialize during this lengthy lead up. *See* Decl. of Jill Hruby ¶ 14, attached as Ex. A; Decl. of Mark Bollinger ¶ 5, attached as Ex. B. Much can change, as fifty years ago WIPP was neither authorized, constructed, nor in operation. CT SPEIS_41309-41311.

In addition to Plaintiffs' imminence problem, the source of the claimed environmental injury—long-term storage of TRU waste at Savannah River and Los Alamos because of the WIPP's over-subscription—is wholly speculative. Their theory of injury supposes that the WIPP will become oversubscribed and, if that happens, DOE/NNSA will do nothing over the next 50 years to address potential disposal issues. *See* Ex. A ¶ 13–14. Countless contingencies make Plaintiffs' supposition unlikely. For example: DOE could develop new storage technologies to extend the WIPP's lifespan; DOE could modify other programs that produce TRU waste; or the United States, as a matter of national policy, could modify or cease the pit production program before the WIPP becomes oversubscribed. *Id.* Plaintiffs cannot predict the future, and standing cannot be predicated on facts that may never occur. *See*, *e.g.*, *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 631-32 (4th Cir. 2023); *see also South Carolina v. United States*, 912 F.3d 720, 729-30 (4th Cir. 2019).

Plaintiffs have also not established an injury in fact for Claim 4. As noted, *infra* (Argument)(I)(B), the 2014 and 2018 packaging accidents are unlikely to reoccur because the causes of the accidents have been remedied. *See* Decl. of Raymond Sykes ¶¶ 4–5, attached as Ex. C; Decl. of Mark Brown ¶¶ 6–9, attached as Ex. D. Furthermore, the legacy materials involved in the 2018 accident and discussed in the 2020 Defense Nuclear Facilities Safety Board Report ("2020 DNFSB Report") will not be packaged with newly generated TRU waste from pit production activities, regardless of where those activities occur. *Id.* Plaintiffs cannot simply rely on unrelated incidents from the past to establish a "material risk of future harm" that is "*certainly*

impending," when the agency has taken concrete steps to ensure similar accidents do not happen again. *TransUnion LLC*, 594 U.S. at 435; *Clapper*, 568 U.S. at 409.

Plaintiffs have also not established an injury in fact for Claim 5. Plaintiffs' assertion that DOE/NNSA's decision to also produce pits at Savannah River increases the likelihood of "terror threats to transportation of nuclear materials and waste" is speculative. ECF No. 189 at 49. There has never been a terror attack on a DOE/NNSA convoy.[3] *See* Ex. A ¶ 10. It is hard to imagine an alleged injury more hypothetical, more speculative, and less imminent. *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 451–52 (10th Cir. 1996) ("[A] plaintiff cannot merely allege that some highly attenuated, fanciful environmental risk will result from the agency decision; the risk must be actual, threatened or imminent."). At the very least, Plaintiffs must establish a "substantial risk" that the asserted harm will occur. *Clapper*, 568 U.S. at 409 ("[W]e have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient."). For national security purposes, DOE/NNSA carefully considers how to protect its transports from intentional destructive acts; however, that does not mean that intentional destructive acts are "certainly impending," or that there is a "substantial risk" that an attack will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Furthermore, whether 80 pits per year are produced at one site or a combination of sites, Plaintiffs have not established that the supposed threat is in any way different.

[3] The Court can take judicial notice of the fact that there has never been a terror attack on a DOE/NNSA convoy. *See United States v. Doe*, 962 F.3d 139, 147 & n.6 (4th Cir. 2020) (taking judicial notice of governmental reports and generally known facts); *see also Nolte v. Cap. One Fin. Corp.*, 390 F.3d 311, 317 n.* (4th Cir. 2004) ("[I]ndisputable facts are susceptible to judicial notice." (citing Fed. R. Evid. 201(b))).

Moreover, Plaintiffs' claim to a risk of injury from a terrorist attack on transported nuclear materials or waste is also not particularized to them. This is an additional critical defect to their standing. To demonstrate standing, a plaintiff must show an injury that is both concrete and particularized. To be particularized, "the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1. As the Fourth Circuit explained, "[t]here must be some connection between the plaintiff and the defendant that "[] differentiate[s]" the plaintiff so that his injury is not "common to all members of the public." *Griffin v. Dep't of Lab. Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019). But only one of Plaintiffs' declarations discusses potential harm due to terrorist attacks on the transportation of nuclear materials—and his declaration expressly indicates the risk from terrorist attacks is *not* particularized to him. Specifically, Mr. Clements identifies "in-transit accident risks, or radiation exposure risks due to terrorist attacks seeking to obtain nuclear weapons materials, or seeking to expose the public to radiation from wastes, to myself and *the traveling public* . . . ." ECF No. 189-1 ¶ 11 (emphasis added). Plaintiffs have not established a likely injury-in-fact that would confer standing to raise their fifth claim.

2. Plaintiffs have also not established a causal connection between the challenged agency action and their alleged harm for Claims 2, 3, and 4.

For Claims 2, 3, and 4, Plaintiffs fail to establish a causal connection between an injury-in-fact and the challenged agency action. *Nat'l Council for Adoption v. Jewell*, 156 F. Supp. 3d 727, 734 (E.D. Va. 2015) (requiring a causal connection between the injury-in-fact and the challenged conduct); *Martin v. Int'l Dryer Corp.*, 637 F. Supp. 101, 102-03 (E.D.N.C. 1986) (same). It is important to distinguish decisions over which DOE/NNSA may exercise some discretion, *i.e.*, where to produce pits, and decisions over which DOE/NNSA has no discretion, *i.e.*, whether to comply with Congress's direction on how many pits to produce. Plaintiffs'

WIPP-related claims target the latter, not the former, and Plaintiffs' waste packing claim has nothing to do with either.

Regardless of where DOE/NNSA produces pits, the amount of waste resulting from producing 80 pits per year will be fairly consistent. Decl. of Patrick Moss ¶ 3, attached as Ex. E. While it is true that Los Alamos' practice of recovering and selling americium-241 (a radioactive byproduct) can slightly reduce the amount of waste produced per pit, *see* JSF ¶ 230, the americium recovery program's reduction of waste is not infinite. Ex. E ¶ 4. In fact, the market demand for americium would be met if Los Alamos produces 30 pits per year. *Id.* Therefore, irrespective of *where* the additional 50 pits per year are produced, there would not be a sufficient market demand to justify recovering and selling that additional americium, and therefore, that americium (*i.e.*, the amount above and beyond what Los Alamos sells as a byproduct of producing 30 pits per year) will have to be disposed as TRU waste. *Id.* Therefore, regardless of how much or how little DOE/NNSA studies waste, DOE/NNSA must produce 80 pits per year, which will create similar amounts of collective waste at any site (or combination of sites). Because Plaintiffs have not established a causal connection between the challenged agency action and increased waste production, they lack standing as to Claims 2 and 3. *See Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 668 (D.C. Cir. 1996).

Regarding Claim 4—that DOE/NNSA has inadequately studied the risk of chemical reactions in packaged waste—Plaintiffs have not established a causal connection between increased pit production and packaging accidents. Nor could they because DOE/NNSA's waste packaging standards and protocols apply uniformly across the complex regardless of where the waste is produced or packaged. *See* Ex. B ¶ 6. Relying on the 2020 DNFSB Report, SRS_7175–7216, Plaintiffs claim that because packaging incidents occurred at the WIPP in 2014 and the

Idaho National Laboratory in 2018, DOE/NNSA was required to study the environmental impacts of future, hypothetical packaging accidents. But neither of these accidents, which were the focus of the 2020 DNFSB Report, relate to how waste generated from pit production will be packaged. *See id.* The first accident was caused by inattention and did not involve newly generated TRU waste from current pit production. *See* Ex. C ¶ 3. The second accident occurred at a non-NNSA facility and also had nothing to do with the current pit production program. *See* Ex. D ¶¶ 6–7. Specifically, the 2018 accident at Idaho National Laboratory involved mixing TRU waste with legacy waste,[4] which has unknown or difficult to characterize chemical origins, and future waste from pit production at Savannah River and Los Alamos will not be mixed with legacy waste or constituents with unknown chemical origins. *Id.*; *see also* Ex. A ¶ 16. Because Plaintiffs have not connected DOE/NNSA's decision to produce pits at two locations with any increased risk of a packaging accident, Plaintiffs have also failed to establish the second element of standing as to Claim 4. *See Fla. Audubon Soc.*, 94 F.3d at 668.[5]

3. Informational injuries absent concrete harm do not confer standing.

In its order denying Defendants' motion to dismiss, the Court noted that one of the Plaintiffs, Tom Clements, had asserted an informational injury tied to his purported interest in "making choices regarding the safety of visiting and recreating" in areas near the SRS and decided that, at the pleading stage, this was sufficient to avoid dismissal for lack of standing.

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[4] Legacy TRU waste is preexisting, historical waste that has nothing to do with future pit production. *See* Ex. A ¶ 16.

[5] Contrary to Plaintiffs' representations that DOE/NNSA have not reacted to the 2020 DNFSB report, NNSA has updated its operating procedures and standards to address the DNFSB's concern. *See* Ex. C ¶ 4; Ex. D ¶¶ 8–9. DOE's Standard 5506 was revised in August 2021, almost a year before the filing of the Amended Complaint. *Id.* The revision of DOE's packaging standards and protocols, which was a decision-making process wholly apart from DOE/NNSA's pit production program, shows the disconnect between packaging standards and pit production.

ECF No. 31. But now at the summary judgment stage, Plaintiffs still fail to demonstrate any cognizable informational injuries associated with the speculative storage of TRU waste at some point far in the future, conjectural packaging incidents, or hypothetical terrorist attacks. They simply cannot credibly claim that DOE/NNSA's decision to not prepare a new programmatic EIS deprives Plaintiffs of information in a way that threatens their concrete interests in recreating near these facilities. ECF No. 189-1 ¶¶ 6, 8; ECF No. 189-2 ¶¶ 3, 6; ECF No. 189-3 ¶¶ 8, 9. As such, Plaintiffs' barebone assertions of informational harm are archetypal procedural injuries *in vacuo*. *See Summers*, 555 U.S. at 496.

The inadequacy of Plaintiffs' "informational harm" argument is exemplified by the declaration of Scott Yundt, who lives and recreates in California, but claims standing based on "informational" injuries relating to agency actions in South Carolina and New Mexico. ECF No. 189-3. ¶ 2. If Plaintiffs' generalized claims of informational injury were sufficient to confer standing, NEPA would completely displace Article III's gatekeeping purpose. *Summers*, 555 U.S. at 496-97 (a statute cannot supplant constitutional standing requirements). If Plaintiffs have standing based on informational injuries, any plaintiff anywhere in the country could raise a NEPA challenge and claim an informational injury no matter how disconnected they are to a concrete environmental harm. *Lyng*, 943 F.2d at 84–85. That is not the law. Where, as here, Plaintiffs have not identified how they will suffer a "certainly impending" environmental harm from an alleged NEPA violation, they have not met *their burden* to establish standing.

B. If the Court reaches the merits, the Court should enter summary judgment in favor of Defendants on each claim.

1. DOE/NNSA's decision to implement pit production at a second site, where that site was previously analyzed for pit production in a programmatic EIS and the agency conduced a new EIS for the site, did not require a supplemental programmatic EIS.

Plaintiffs argue that a supplemental programmatic EIS was necessary because DOE/NNSA did not undertake a "proper alternatives analysis" before increasing production at Los Alamos and beginning production at Savannah River. ECF No. 189 at 23 (capitalization altered). This claim falters for at least five reasons. First, NEPA and its regulations do not require programmatic analyses at all, especially where, as here, pit production at Los Alamos and Savannah River are purposefully independent of one another to create a "resilient and responsive option to meet Department of Defense (DoD) requirements." CT SPEIS_00095. Second, there was no change to the Purpose and Need. Third, DOE/NNSA's decision not to prepare a supplemental programmatic EIS was not arbitrary and capricious because DOE/NNSA confirmed that its preferred two-site alternative, when compared to the alternatives studied in the 2008 CT SPEIS, did not affect the environment "to a significant extent not already considered." *No Mid-Currituck Bridge-Concerned Citizens*, 60 F.4th at 801. Fourth, contrary to Plaintiffs' representations, DOE/NNSA adequately considered a range of alternatives. And fifth, even if the Court were to find that the conclusion of the 2019 SPEIS SA, which was that a supplemental programmatic EIS was not required, to be improper any technical violation of NEPA was harmless in light of the agency's preparation of the wholly new 2020 SRS EIS.

a. Neither NEPA nor the implementing regulations require a new or supplemental programmatic EIS as opposed to a new site-specific EIS.

Plaintiffs claim that DOE/NNSA violated NEPA by not preparing a new or supplemental programmatic EIS. However, this claim fails because neither NEPA nor its implementing

regulations mandate a programmatic EIS and DOE/NNSA did prepare a new EIS. Moreover, to the extent an agency decides to prepare a programmatic EIS, NEPA's regulations allow the agency to supplement programmatic EISs with site-specific EISs through a process known as tiering. *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1090 (9th Cir. 2020) ("Tiering refers to the incorporation by reference in subsequent EISs or EAs, which concentrate on issues specific to the current proposal, of previous broader EISs that cover matters more general in nature.") (citing 40 C.F.R. § 1508.28). Because DOE/NNSA clearly identified and evaluated the potential environmental impacts from its decision in site-specific analyses, the fact that it did not prepare a "new or supplemental PEIS" cannot, accordingly, violate NEPA. *See* Am. Comp. ¶ 181, ECF No. 21.

After 2020, NEPA's implementing regulations[6] provide that "environmental impact statements *may* be prepared for programmatic Federal actions, such as the adoption of new agency programs." 40 C.F.R. § 1502.4 (emphasis added). Even before the regulation was amended to emphasize the permissive nature of the obligation,[7] courts left the decision of

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[6] NEPA established the Council on Environmental Quality ("CEQ"), within the Executive Office of the President, and authorized CEQ to promulgate regulations implementing NEPA. *See Wild Va.,* 56 F.4th at 288 (citing 42 U.S.C. § 4332(2); 40 C.F.R. § 1500.1(b)). We refer to these regulations throughout as NEPA's "implementing regulations" or the "CEQ regulations". Agencies may promulgate additional NEPA implementing regulations, they are consistent with CEQ's regulations. *Id.* The DOE (within which NNSA is a semi-autonomous agency) has promulgated such regulations at 10 C.F.R. Part 1021.

[7] In the prior (1978) version of the CEQ regulations, 40 C.F.R. § 1502.4(b) provided that "[e]nvironmental impact statements may be prepared, and *are sometimes required*, for broad Federal actions such as the adoption *of new agency programs* or regulations (§1508.18) . . . ." (emphasis added). However, as indicated above, in the current iteration of the CEQ regulations (as applicable in this case), § 1502.4(b) has been amended to provide only that "[e]nvironmental impact statements *may be* prepared for programmatic Federal actions . . ." (emphasis added). DOE's implementing regulations also address programmatic EISs, stating: "[w]hen required . . . DOE shall prepare a programmatic EIS or EA (40 C.F.R. § 1502.4). DOE may also prepare a

whether to prepare a programmatic EIS to the agency's discretion. *See Kleppe*, 427 U.S. at 412-14; *Nev. v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006) ("The decision whether to prepare a programmatic EIS is committed to the agency's discretion."); *Tex. Comm. on Nat. Res. v. Bergland*, 573 F.2d 201, 210-11 (5th Cir. 1978). As such, an agency's decision to not prepare a programmatic EIS cannot generally be a violation of NEPA, consistent with CEQ's regulations. *Id.* By extension, where an agency has prepared a programmatic EIS, the agency's decision to either supplement that programmatic EIS or to rely on a site-specific EIS certainly cannot be deemed a violation of NEPA.

To be sure, NEPA's implementing regulations continue to bar the improper segmentation of environmental review by preventing an agency from dividing up a project to segregate and minimize potential impacts. 40 C.F.R. § 1502.4 ("Agencies shall evaluate in a single environmental impact statement proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action."). The updated CEQ regulations provide that actions are connected if they: "(i) [a]utomatically trigger other actions that may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification."[8] 40 C.F.R. § 1501.9(e)(1). While, as a factual

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programmatic EIS or EA at any time to further the purposes of NEPA." 10 C.F.R. § 1021.330(a). Because current CEQ regulations make it clear that preparation of a programmatic EIS is discretionary, DOE's must likewise be interpreted as bestowing discretion on the agency about when to prepare a programmatic EIS.

[8] Before 2020, the CEQ regulations "cast a wider net" for when agencies needed to consider multiple actions in a single NEPA document. The pre-2020 regulations required agencies to consider whether they should address "connected," "cumulative," or "similar" actions in one EIS. *See Dakota Res. Council v. U.S. Dep't of Interior*, No. 22-CV-1853 (CRC), 2024 WL 1239698, at *14 (D.D.C. Mar. 22, 2024) (citing 40 C.F.R. § 1508.25 (2019)). In 2020, the CEQ

matter, pit production at Savannah River and Los Alamos are connected to the extent they operate in tandem to accomplish DOE/NNSA's required production of 80 pits per year, they are not "connected," in the legal sense, within the meaning of CEQ's regulations.

Pit production at Los Alamos and Savannah River are, by design, independent of one another to provide resiliency, flexibility, and redundancy. *See* JSF ¶ 54 (noting that one of the reasons for preferring a two-site production strategy is that the two sites would be "redundant."); *see also* CT SPEIS_00095-00096. If pit production at Los Alamos ceased for some reason, pit production at Savannah River would continue uninterrupted, and vice versa. Likewise, production at Los Alamos does not automatically trigger actions (or impacts) at Savannah River and vice versa; production at Los Alamos can proceed without any actions being taken at Savannah River and vice versa; and production at Los Alamos and Savannah River are independent of one another, not interdependent. Under these circumstances, DOE/NNSA was not required to consider actions at Los Alamos and Savannah River in a single NEPA document, much less a programmatic one. That said, the 2020 SRS EIS did consider cumulative impacts.

Therefore, even if the Court were to find that DOE/NNSA should have considered the impacts of production at Los Alamos <u>and</u> Savannah River in a single supplemental programmatic EIS, that does not mean that (1) a new programmatic EIS was required; or, more importantly, that (2) DOE/NNSA violated NEPA by failing to supplement an earlier programmatic EIS. As discussed, *infra* (Argument)(II)(A)(3), DOE/NNSA considered the impacts of production at both sites in multiple EISs, including the 2020 SRS EIS which was tiered to the 2008 CT SPEIS.

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regulations eliminated the requirements to consider "cumulative" or "similar" actions in a single EIS, leaving only the requirement that agencies consider grouping "connected actions" into a single impact statement. *Id.* at 13-15. The 2020 LANL SA, 2020 SRS EIS, and the associated records of decision ("RODs") were all finalized after the CEQ regulations were amended in July 2020.

DOE/NNSA ensured those prior evaluations remained valid *vis-a-vis* two Supplement Analysis reviews—the 2019 SPEIS SA and 2020 LANL SA. *See* JSF ¶¶ 143-192, 205-225. Where an agency considers the cumulative impacts of connected actions in separate EISs or EAs, the failure to combine that discussion in a single EIS or EA is harmless. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engr'sEngr's*, 301 F. Supp. 3d 50, 73 (D.D.C. 2018) (anti-segmentation doctrine can be excused by harmless error doctrine when each of the independent NEPA documents considers cumulative impact). But regardless, DOE/NNSA did in fact consider the cumulative impacts of pit production in a single EIS—the 2020 Savannah River EIS. Under these circumstances, Plaintiffs' claim fails outright.

b. There has been no change to the purpose and need of the programmatic EIS that would necessitate direct supplementation of that EIS.

Plaintiffs argue that DOE/NNSA cannot rely on its prior NEPA evaluations because: (1) the dual-site alternative is "so different" from the one-site alternatives previously studied, and (2) the stated "purpose and need" in the prior analysis has changed. To support their argument, Plaintiffs rely on a Fourth Circuit decision finding that two land management agencies violated NEPA by approving construction of a natural gas pipeline, because they did not analyze the environmental impacts of the drilling method (conventional boring) for stream crossings, and yet still authorized that method. *Wild Va. v. U. S. Forest Serv*., 24 F.4th 915, 928-29 (4th Cir. 2022). That case is not on point. First, unlike in that case, DOE/NNSA *has* fully evaluated the impacts of the dual site approach—albeit in multiple documents. Further, in that case, the court ultimately determined that the agencies' approval was "premature"—because a different permitting agency (the Federal Energy Regulation Commission)—was in the process of preparing an evaluation of the environmental impacts of conventional boring on adjacent private lands. *Id.* at 929-30 (noting that the agencies "in deciding whether to approve the Pipeline's route

over those lands, would surely benefit from FERC's environmental analysis of the use of the conventional bore method" and that the agencies therefore "improperly approved the use of the conventional bore method . . . without first considering FERC's analysis"). Again, no such circumstance exists here.

Plaintiffs also cite *Dubois v. U.S. Dep't. of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996), which does not support their position. In that case, the plaintiffs argued that the proposed alternative for expanding a ski area, which was added to the final EIS, was a substantial change to the proposed action requiring issuance of a supplemental draft EIS because the expansion was in an area not previously analyzed. This case addressed a very different context, and therefore is inapposite for that reason alone. Ultimately, though, the court's concern was that had the alternative been presented earlier, "public commenters might have pointed out, if given the opportunity—and the Forest Service might have seriously considered—wholly new problems posed by the new configuration." *Id.* Here, no such concerns are present because impacts associated with both sites were evaluated. The public had robust opportunities to present concerns regarding the dual site approach (which Plaintiffs fully availed themselves of), *see*, *e.g.*, CT SPEIS_68302–68306;[9] and further, DOE/NNSA seriously considered the potential impacts from the approach—in multiple documents.

Plaintiffs' concern about the purpose and need is also unavailing. The fundamental principle continues to be, and has always been, to "continue to meet existing and reasonably foreseeable national security requirements." *See* CT SPEIS_024694. The CT SPEIS envisioned

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[9] In complying with the letter and spirit of NEPA's public participation prong, Defendants went above and beyond, including engaging with Plaintiffs' comments. SRS_7166-7295; SRS_6933-6962; LANL SA_09145-09190; CT SPEIS_14421-14450; CT SPEIS_14452-15012. The Court also ordered two mediations in this case where Defendants continued to engage with Plaintiffs in good faith.

that this may include producing pits at a level of 200 pits per year and evaluated those impacts. Current national security requirements include producing 80 pits per year by 2030 and to do that between Los Alamos and Savannah River to "improve the resiliency, flexibility, and redundancy. JSF." JST ¶¶ 48, 54; CT SPEIS_00095-00096.

The 2008 CT SPEIS' Purposes and Need statement includes four additional statements that help meet the agency's objectives: (1) Maintain a safe and reliable nuclear weapons stockpile; (2) create a responsive nuclear weapons infrastructure that is cost-effective and has adequate capacity to meet reasonably foreseeable national security requirements; (3) consolidate Category I/II special nuclear material ("SNM") at fewer sites and locations within sites to reduce the risk and safeguards costs; and (4) expanding the scientific and technical capabilities of NNSA's workforce. *Id.* at ¶¶ 28, 52, Each of these statements is fully compatible with the two-site approach. The third statement, which Plaintiffs reference, is compatible with the two-site alternative because both Los Alamos and Savannah River already handled Category I/II SNM. Plaintiffs' bald assertion that implementing pit production at two sites at a smaller scale is somehow contrary to the purpose of "consolidating Category I/II special nuclear material at fewer sites" demonstrates a fundamental misunderstanding of the basic fact that all Programmatic Alternatives in the 2008 CT SPEIS contemplated that both Los Alamos and Savannah River could continue to hold Category I/II SNM. *See* CT SPEIS_24669-70 (describing that both Los Alamos and Savannah River hold Category I/II SNM); CT SPEIS_24709– 16; CT SPEIS_24793-24801. The distinction is that now Savannah River may hold Category I/II SNM for an additional reason – to produce pits. The agency's issuance of the concurrent November 2020 RODs did not affect the further consolidation of Category I/II SNM at fewer sites beyond that which had been envisioned under the CT SPEIS, and Plaintiffs provide no basis for the

Court to find otherwise. In sum, the two-site alternative will not expand DOE/NNSA's footprint, and Plaintiffs have no evidence for their suggestions that producing 80 pits as between two locations results in a larger complex than producing up to 200 pits at one location, which is what DOE/NNSA previously considered. ECF No. 189 at 23 (suggesting that the 2008 CT SPEIS envisioned a "smaller, more efficient enterprise.").

c. DOE/NNSA properly found that producing 30 pits at Los Alamos and 50 pits at Savannah River, which generally has fewer environmental impacts than previously analyzed for either site, did not constitute a significant change.

Plaintiffs argue that DOE/NNSA's shift from the multiple one-site alternatives discussed in the 2008 CT SPEIS[10] to a two-site alternative required a new supplemental programmatic EIS. *See id*. at 24 (arguing that the "2008 CT SPEIS never considered a dual site pit production"); Am. Compl. ¶ 134 ("[s]hifting from pit production at one site to pit production at two sites . . . is a substantial change in the proposed action"). However, there is no requirement that an agency "start the environmental assessment process anew with every change in a project." *Price Road Neighborhood Ass'n v. Dep't. of Transp*., 113 F.3d 1505, 1509 (9th Cir. 1997). A new or supplemental environmental impact statement is only required when changes or new information present a "'*seriously* different picture of the environmental impact of the proposed project from what was previously envisioned.'" *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990). Again, the agency did produce a new EIS—just not the type that Plaintiffs demanded. As previously noted, an agency's determination of whether supplementation is required (and, by extension, how to do so) "implicates substantial agency expertise" and courts should defer to "'the informed discretion of the responsible federal agencies.'" *Marsh*, 490 U.S.

[10] The 2008 CT SPEIS evaluated, among other things, constructing a new pit production facility ("Greenfield") at five site alternatives: Los Alamos, Savannah River, NNSA's Pantex Plant ("Pantex") in Texas, NNSA's Y-12 National Security Complex ("Y-12") in Tennessee, or NNSA's Nevada Security Site ("NNSS"). *See* JSF ¶¶ 31.

at 376–77. Consistent with DOE/NNSA's administrative procedures and DOE's NEPA implementing procedures (specifically 10 C.F.R. § 1021.314(c)), DOE/NNSA properly concluded that its preferred alternative of producing pits at two locations at a lower level did not constitute an environmentally significant change from the alternatives previously considered.

The Fourth Circuit has instructed that a court should review an agency's decision not to prepare a supplemental EIS ("SEIS") in two steps:

> At step one, we determine whether the agency took a hard look at the proffered new information." If the agency concludes after a preliminary inquiry that the "environmental effect of the change is clearly insignificant," its decision not to prepare a SEIS satisfies the hard look requirement. . . . Next, at step two of the SEIS inquiry, we review whether the agency's decision not to prepare a SEIS after taking a hard look was arbitrary or capricious.

Save Our Sound OBX, Inc., 914 F.3d at 222 (internal citations and quotations omitted).

Here, DOE/NNSA took the requisite hard look. JSF ¶¶ 143-192. It compared the potential environmental impacts of the two-site alternative to the larger and more impactful one-site alternatives analyzed in the 2008 CT SPEIS, and DOE/NNSA found few differences, none of which were significant and nearly all of which were less. *See* CT SPEIS_68262–68263. The 2019 SPEIS SA quantitatively compared the combined environmental impacts of the second site approach to the impacts of producing at a single site, as analyzed in the 2008 CT SPEIS. *Id.* Impacts to water consumption, air emissions, noise, visual resources, ecological resources, cultural resources, geology, soils, traffic, and health and safety from two-site production were expected to be same as or less than the impacts of the single-site alternatives studied in the 2008 CT SPEIS. *See* CT SPEIS_68277–682790.

The 2019 SPEIS SA also evaluated the implications of the few combined impacts at Los Alamos and Savannah River that exceeded some of the 2008 CT SPEIS' single-site estimates. For example, the 2019 SPEIS SA estimated that production at Los Alamos and Savannah River

would produce 57,550 cubic meters (m^3) of TRU waste over 50 years, *see* JSF ¶ 162; whereas the 2008 CT SPEIS estimated that production at a single site over 50 years would generate up to 49,313 m^3 of TRU waste. *Id.* ¶ 120. However, before DOE/NNSA implemented the two-site strategy, it completed two additional NEPA analyses—the 2020 LANL SA and the 2020 SRS EIS—both of which provided more focused evaluations of the projects at a site-specific level and found that DOE/NNSA's preferred alternative of producing 80 pits per year at two locations would be lower than the waste impacts previously analyzed. Specifically, the 2020 LANL SA projected that both sites would collectively generate only 36,700 m^3 of TRU waste over 50 years. *See* LANL SA_14683. The 2020 SRS EIS, which was completed after the 2020 LANL SA and further refined the waste estimates for Savannah River,[11] projected that both sites would collectively generate only 28,300 m^3 of TRU waste over 50 years. *See* JSF ¶ 231. These evaluations are well below the threshold of 49,313 m^3 found in the 2008 programmatic EIS.

DOE/NNSA's conclusion in the 2019 SPEIS SA that programmatic supplementation was unnecessary, but that further site-specific evaluation was necessary, was confirmed by the 2020 SRS EIS and 2020 LANL SA, which upon closer evaluation found that the 80 pit per year, two-site alternative would have lower environmental impacts (including impacts from waste generation) than the alternatives studied in the 2008 CT SPEIS. The agency took the requisite "hard look" at environmental consequences of its preferred alternative and reasonably concluded that any differences between the new and previously studied alternatives did not constitute a substantial change. Moreover, this decision is entitled to deference given the highly complex and

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[11] The waste estimates in the 2019 SPEIS SA were conservative to allow production design at Savannah River to mature. *See* JSF ¶ 229 ("As [Savannah River's] design matured, the estimates for TRU waste generation decreased."). Therefore, the most recent EIS, namely the 2020 SRS EIS provides the most accurate estimates of TRU waste generation.

technical nature of the analysis. *See No Mid-Currituck Bridge-Concerned Citizens*, 60 F.4th at 801. DOE/NNSA's evaluation was manifestly reasonable, and not arbitrary and capricious. *See*, *e.g.*, *Save Our Sound OBX, Inc.* 914 F.3d at 222 (a supplemental EIS was unnecessary where the agency considered the environmental impacts of altering the alignment of a bridge project and determined that the new alignment would not have seriously different environmental impacts); *Beyond Nuclear v. U. S. Dep't of Energy*, 233 F. Supp. 3d 40, 51-52 (D.D.C. 2017) (deferring to DOE's reasoned conclusion that a supplemental EIS was unnecessary to ship liquid uranium target material rather than solid uranium target material because the change did not pose significantly greater impacts to the environment than those previously studied); *S.C. Coastal Conservation League v. U. S. Army Corps of Engr's*, No. 2:17-CV-3412, 2021 WL 3931908, at *10 (D.S.C. Sept. 2, 2021) (although new information showed a highway project would have greater noise impacts than those studied in the impact study, supplementation was unnecessary when agency considered the increased noise impacts and determined they were insignificant in the context of the environment).

Plaintiffs also argue that DOE/NNSA may not use the impact analyses in the 2008 CT SPEIS to bound the impact analyses in the 2019 SPEIS SA, implying that the estimates in the 2008 CT SPEIS were unreasonably high so as to obscure the impacts discussed in the 2019 SPEIS SA. ECF No. 189 at 31–32. But this argument also fails for multiple reasons. First, and critically, the dispositive question is not whether DOE/NNSA improperly or inaccurately used a "bounding analysis," but whether DOE/NNSA took a hard look at whether there was new information or changed circumstances mandating a supplemental EIS. As discussed above, it did so through detailed evaluations. Second, Plaintiffs' argument also fails to consider one important fact: regardless of the magnitude of the estimated impacts discussed in the 2008 CT SPEIS, and

whether they were unreasonably high or not, the 2008 CT SPEIS found that the impacts from pit production would be similar at Los Alamos, Savannah River, Pantex, Y-12 National Security Complex or NNSS. CT SPEIS_03489–03508. In other words, whether the estimate for annual TRU waste generation was 950 cubic yards or 350 cubic yards is immaterial because the estimate, whether high or low, *would apply uniformly* across the alternative locations.

For example, Table 3.4.1-4 from the 2008 CT SPEIS shows that production at Savannah River, Pantex, Y-12 or NNSS would generate the same amount of waste no matter where production took place.[12] *See* CT SPEIS_24745. Therefore, when DOE/NNSA prepared the 2019 SPEIS SA, it could rely on the conclusion in the 2008 CT SPEIS that impacts would be similar regardless of the location of production. Simply put, requiring DOE/NNSA to study multiple combinations of sites (other than Los Alamos and Savannah River) would have been superfluous because the estimated impacts for pit production at Pantex, Y-12, or NNSS would have been similar to the estimates for Savannah River and in proportion to previously studied impacts.

In sum, DOE/NNSA's determination that producing 30 pits at Los Alamos and 50 pits at Savannah River did not constitute an environmentally significant change from the alternatives it had previously considered was well evaluated and was not arbitrary and capricious.

d. The 2008 CT SPEIS and 2020 SRS EIS properly considered alternatives.

Plaintiffs argue that DOE/NNSA, by structuring its analysis as it did, resulted in the agency not adequately evaluating alternatives to the dual site approach. But this is not the case. As described in the section above, in prior programmatic NEPA, DOE/NNSA considered reasonable alternatives. Furthermore, through the new 2020 EIS, DOE/NNSA again considered alternatives. As a result, remanding for additional analysis would serve no purpose.

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[12] Waste estimates for Los Alamos were slightly lower than the other four sites because Los Alamos had existing research and development activities that accounted for some TRU waste.

Plaintiffs take issue with the breadth of alternatives DOE/NNSA considered, specifically arguing DOE/NNSA violated NEPA by considering only one alternative—its preferred two-site alternative. ECF No. 189 at 24–34. The facts contradict Plaintiffs' argument. In fact, in its multiple NEPA processes, DOE/NNSA has evaluated numerous alternatives, to inform its determination that a supplemental EIS was not required. Further, as noted above, the 2008 CT SPEIS evaluated constructing a new pit production facility at Los Alamos, Savannah River, Pantex, the Y-12, or NNSS. *See* JSF ¶¶ 31, 32. The 2008 CT SPEIS also considered both modifying and upgrading facilities at Los Alamos, as opposed to constructing a new facility, and also considered the MOX facility at Savannah River as a reference location for a new pit production facility, stating that the MOX infrastructure could support at pit production facility. *See* CT SPEIS_24737-24755. The 2019 SPEIS SA discussed these alternatives and did a comparative analysis between those one-site alternatives and the preferred alternative. The 2020 SRS EIS also invited comments on the second site approach, and the public had an opportunity to participate. SRS_292-294 (announcing the proposal to repurpose MOX at SRS "while also maximizing pit production activities at Los Alamos"). The 2019 SPEIS SA also discussed a potential pit production facility at Idaho National Laboratory but explained that this alternative was not appropriate for further evaluation because it would expand DOE/NNSA's complex outside of its existing sites. JSF ¶ 141. In total then, DOE/NNSA considered nine different alternatives across its various NEPA documents: (1) a greenfield site at Los Alamos; (2) a greenfield site at Savannah River; (3) a greenfield site at Pantex; (4) a greenfield site at Y-12; (5) a greenfield site at NNSS; (6) upgrading existing facilities at Los Alamos; (7) converting the MOX facility at Savannah River; (8) combining and modifying alternatives 6 and 7; and (9) a new site at Idaho National Laboratory. DOE/NNSA also considered additional alternatives in

the 2017 Analysis of Alternatives.[13] CT SPEIS_71551-71554. Given the breadth and depth of DOE/NNSA's alternatives analysis, the agency took the requisite hard look at a reasonable range of alternatives—and accordingly, supplementation was not necessary to ensure that it did so.[14] *No Mid-Currituck Bridge-Concerned Citizens*, 60 F.4th at 805 ("[T]he agencies took a hard look at the new information proffered, and their decision to not prepare a supplemental EIS [to study non-bridge alternatives] wasn't arbitrary or capricious.").

Plaintiffs cite several cases that they believe support their argument that DOE/NNSA did not consider an acceptable range of alternatives: *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 605 (4th Cir. 2012); *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. 22-15259, 2023 WL 3267846, at *2 (9th Cir. May 5, 2023); *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1101–02 (9th Cir. 2006); and *Colo. Env't Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999). Each of these cases is inapposite.

In *N.C. Wildlife Fed'n,* the agency conducted a detailed study of two alternatives for a proposed road project – the Monroe Connector and a no action alternative. 677 F.3d 596, 602. When comparing impacts, the agency affirmatively represented to the public that the estimated impacts for its no action alternative did not assume the construction of the Monroe Connector.

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[13] Contrary to Plaintiffs' representations, the 2017 Analysis of Alternatives, on its face, accepts that Los Alamos will produce 30 pits per year as a program of record, and then goes on to recommend the best additional option for pit production beyond this level, which was to repurpose the MOX facility at Savannah River. In addition to leading with the recommendation to repurpose the MOX facility, the 2017 Analysis of Alternatives goes on to state that all other alternatives that involve constructing a new building (sometimes referred to as a Greenfield alternative) at any feasible site would all have similar risks which would be greater than maintaining the pit program of record at Los Alamos and repurposing MOX. CT SPES_71516; *see also* CT SPES_70216.

[14] As noted *supra* at 28–29, requiring DOE/NNSA to study various permutations of two-site alternatives would have been superfluous because DOE/NNSA would have estimated the same (or similar) impacts for Pantex, Y-12, and NNSS that it estimated for Savannah River.

Id. However, the agency had in fact assumed the construction of the Monroe Connector when estimating the impacts of the no action alternative. *Id.* at 603. Because the agency misrepresented its impact analysis to the public, the Fourth Circuit ordered it to redo its NEPA process to ensure that both the agency and the public were using accurate information. *Id.* The decision is irrelevant in this case, where DOE/NNSA did not misrepresent facts to the public. In contrast, DOE/NNSA conducted detailed analyses comparing the impacts of its preferred alternative with other previously considered alternatives, including disclosing in the 2019 SPEIS SA that the estimated TRU waste impacts were slightly higher for the preferred alternative and that, therefore, the agency would conduct a new, more detailed site-specific EIS. Moreover, DOE/NNSA provided accurate information to the public, held public meetings, and engaged with public comments for the 2019 SPEIS SA, 2020 LANL SA, and the 2020 SRS EIS. *See*, *e.g.*, SRS_00074971-SRS_00074973 and SRS_00075033 - SRS_00075057. The Court cannot treat as serious the contention that the public was deprived of any opportunity to discuss the impacts of the two-site alternative.

In *Neighbors of the Mogollon Rim, Inc.*, 2023 WL 3267846, at *1, the Forest Service issued grazing permits, but only considered two alternatives – no grazing (*i.e.*, no action) and the preferred alternative. The Forest Service did not consider plaintiffs' proposed alternative, which would maintain the *status quo*, and result in some grazing but not the full extent of grazing allowed by the preferred alternative. Finding that the *status quo* was a reasonably viable alternative, the Ninth Circuit partially vacated the Forest Service's EA with instructions to consider the *status quo* alternative. Here, in light of the legal requirement to produce pits, DOE/NNSA cannot maintain the *status quo* and so cannot consider a no action alternative – it must produce 80 pits per year. *See* 50 U.S.C. § 2538a. That alone distinguishes this case.

Moreover, unlike in *Neighbors of the Mogollon Rim, Inc.,* where the Ninth Circuit found the agency had only considered two extreme alternatives, DOE/NNSA considered a variety of alternatives including: building completely new production facilities at Savannah River, Pantex, NNSS, or Y-12; modifying or upgrading facilities at Los Alamos; modifying the MOX facility at Savannah River; and, finally, combining its plan to upgrade facilities at Los Alamos and modify the MOX facility at Savannah River.

The case *'Ilio'ulaokalani Coal.*, 464 F.3d at 1083, is likewise of no help to Plaintiffs. In that case, the Army considered modernizing its Second Brigade. However, it only considered modernization efforts in Hawaii—no other locations. The Ninth Circuit held that where it was reasonable for the Second Brigade to be located in other states, the Army was required to consider other alternatives. As explained above, this case is different because over its multiple analyses, DOE/NNSA considered a range of alternatives across multiple states. It did not impermissibly narrow its analysis to sites only in South Carolina, for example. DOE/NNSA considered the viable range of production options—*i.e.*, multiple sites that were already within the nuclear complex.

Furthermore, *Colo. Env'tl Coal.*, 185 F.3d 1162, cuts against Plaintiffs' argument. In that case, the Forest Service considered expanding a public ski area into one area of the Forest Service's land, which came to be known as the Category III expansion. *Id.* at 1174–76. The Forest Service then considered a no action alternative and three alternatives within the Category III expansion, which varied in the amount and type of additional skiable terrain that would be added and related amenities that would be developed. *Id.* Environmental groups challenged this decision, arguing the agency had impermissibly narrowed the possible alternatives to the Category III expansion when other viable options were available. *Id.* The Tenth Circuit rejected

this argument and affirmed the agency's decision to limit its action to alternatives analyzed within the Category III expansion. *Id.*

Producing pits at two locations is the only way to meet current national security policy, as mandated by Congress and announced by the NNSA Administrator and Undersecretary of Defense. JSF ¶¶ 46, 140; CT SPEIS_00095-00096. DOE/NNSA cannot maintain the status quo—so a no action alternative is not viable. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) ("[A]n agency should always consider the views of Congress . . . as well as in other congressional directives."). Having national security officials provide that there is the need for "resiliency, flexibility, and redundancy," and the mandate to produce 80 pits per year, DOE/NNSA determined that a two-site production strategy was the only means of reasonably responding to national security objectives. JSF ¶¶ 7, 43, 54, 140.

DOE/NNSA used its discretion and technical expertise to determine that new-construction (*i.e.*, greenfield) alternatives were no longer viable because of their timing, even greater costs, and the greater environmental impacts they would have due to additional construction. *See*, *e.g.*, SRS_6168 ("NNSA considered the alternative of building a new Greenfield pit production facility . . . [and] [t]he mean acquisition cost of such a new facility was determined to be approximately $1.8 billion more than the cost of repurposing the MFFF."); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 69 (D.C. Cir. 2011) ("The range of reasonable alternatives must include 'technically and economically practical or feasible' alternatives. . . . [and] [t]his range is delimit[ed] by the agency's reasonably defined goals for the proposed action."). Therefore, DOE/NNSA turned to two options it had previously considered in the 2008 CT SPEIS—either modifying or upgrading facilities at Los Alamos and modifying the MOX facility at Savannah River.

Having ruled out greenfield alternatives, which would have been required to produce any pits at Pantex, Y-12, or NNSS, and also having ruled out a new facility at Idaho National Laboratory (which is not an NNSA facility), *see* JSF ¶ 141, DOE/NNSA determined that modifying and combining two previously studied alternatives—*i.e.*, upgrading at Los Alamos and modifying a facility at Savannah River—was the only viable alternative with respect to the location of sites that met the Congressional production mandate and the instruction from national security officials to emphasize resiliency, flexibility, and redundancy. That lone remaining alternative was the selected alternative—upgrading facilities at Los Alamos and modifying the MOX facility at Savannah River to produce a total of 80 pits per year between the two sites. *See Tongass Conservation Soc'y. v. Cheney*, 924 F.2d 1137, 1140-42 (D.C. Cir. 1991) (rejecting a challenge to the Navy's alternatives analysis where the Navy demonstrated that only one site for acoustic testing for submarines was feasible); *Ctr. for Env't L. & Pol'y v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1012 (9th Cir. 2011) ("[T]here is no numerical floor on alternatives to be considered," especially where the agency had previously developed, considered, and rejected other alternatives); *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153–54 (9th Cir. 2008) (NEPA's alternatives requirement was satisfied where an agency had previously considered a range of alternatives but had narrowed its discussion to only two alternatives—a modified version of a previously studied alternative and a no action alternative).

Ultimately, Plaintiffs' objection that DOE/NNSA did not consider and analyze alternatives to the dual site approach has no support in fact or law. In its multiple NEPA documents, DOE/NNSA evaluated numerous alternatives, thoroughly supporting its determination that a supplemental programmatic EIS was not required—and further ensuring that its decision was fully informed by also conducting the new 2020 SRS EIS. Simply put, Plaintiffs

are not objecting to DOE/NNSA's plan, they are objecting to the national security policy underlying that plan. NEPA may not be weaponized to fight policy battles.

e. Even if the 2019 SPEIS Supplement Analysis review should have resulted in a conclusion to perform a supplemental programmatic EIS, DOE/NNSA had all the information it needed, shared that information with the public, and the public was able to fully participate.

Plaintiffs assert that a supplemental programmatic EIS, rather than the new 2020 EIS, is necessary to ensure that NEPA's goals of ensuring informed decision-making and public involvement in government decision-making are satisfied. To the extent the Court agrees, any error from failing to supplement the programmatic EIS was harmless. As conclusively demonstrated above, DOE/NNSA reasonably determined that a supplemental programmatic EIS was not required. Moreover, and not surprisingly under these circumstances, DOE/NNSA's NEPA analyses irrefutably ensured that NEPA's purposes were robustly fulfilled, and a supplemental programmatic EIS would not measurably add to the information nor opportunity for public involvement.

As discussed above, (1) the 2019 SPEIS SA provided additional information and analysis demonstrating that a supplemental programmatic EIS was not necessary, and (2) the 2020 SRS EIS, which supplements the programmatic EIS, and 2020 LANL SA included all of the information that a supplemental programmatic EIS would have included.[15] Plaintiffs, in their effort to covertly challenge the increase of plutonium pits, notwithstanding the Congressional mandate, seek any possible procedural hook for a NEPA violation. But even if there are some ways in which DOE/NNSA's process was structured differently from prototypical NEPA analyses, its process in no way prevented NEPA's goals from being met. As such, Plaintiffs must

[15] Although a public comment period is not a requirement for a draft Supplement Analysis, DOE/NNSA provided both the draft 2019 SPEIS SA and the draft 2020 LANL SA for public comment. *See*, *e.g.*, CT SPEIS_68239–68240; LANL SA_09067-09068.

do more to meet their burden of demonstrating a NEPA violation requiring judicial remedy. *See Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.,* 42 F.3d 517, 527 (9th Cir. 1994) (declining to grant relief in face of technical violation of NEPA because "decision-maker was otherwise fully informed as to the environmental consequences and NEPA's goals were met"); *Coal. For Lower Beaufort Cnty. v. Alexander*, 434 F. Supp. 293, 295 (D.D.C. 1977) (NEPA "was not intended to create a bureaucratic nightmare in which form rather than substance governs."); *see also Ariz. Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100, 1118 (D. Ariz. 1998) ("[E]ven where there is a 'technical violation' of NEPA because of a procedural defect, such as an incomplete discussion of probable effects, the court must look to the ultimate harm NEPA seeks to prevent: the risk of damage to the environment . . . [and] [u]nless this ultimate goal is threatened, relief will not be granted if the decision-maker was otherwise fully informed as to the environmental consequences.") (citations and internal marks omitted). DOE/NNSA has already undertaken an extensive analysis of alternatives in the 2008 CT SPEIS, and via the 2017 Analysis of Alternatives and 2018 Engineering Assessment, CT SPES_71516, 70216, the 2019 SPEIS SA, 2020 SRS EIS, and 2020 LANL SA. At each step of the way in the NEPA processes, the public was able to engage with these alternatives. *See*, *e.g.*, CT SPEIS_68239–68240; LANL SA_09067–09068; SRS_ 6143-6144.

Even if the Court finds a single supplemental programmatic EIS was appropriate, Plaintiffs do not automatically prevail. As noted above, DOE/NNSA considered all the necessary information and conveyed that information to the public. Moreover, Plaintiffs were fully able to participate, and did participate, in the public process, including engaging with DOE/NNSA on the second-site alternative. *See*, *e.g.*, CT SPEIS_66808. Under these circumstances, even if the letter of NEPA required a single programmatic EIS (which it did not), the purpose of NEPA was

fully complied with and any technical error would be harmless. *See*, *e.g.*, *Pub. Emps. for Envt'l. Responsibility v. Hopper*, 827 F.3d 1077, 1087–88 (D.C. Cir. 2016) (applying harmless-error analysis in NEPA context); *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration."); *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 59–62 (1st Cir. 2001) (same); *Laguna Greenbelt, Inc.*, 42 F.3d at 527 (same).

2. DOE/NNSA exhaustively considered and studied the impacts of TRU waste generated by pit production and any information associated with the WIPP's disposition capacity.

In their closely related second and third arguments, Plaintiffs claim that DOE/NNSA failed to adequately consider the amount of TRU waste produced by pit production and other waste streams. ECF No. 189 at 34–39. Plaintiffs' WIPP-related arguments are unmeritorious. First, Plaintiffs have not shown how generation of TRU waste and the potential oversubscription of the WIPP have a close causal relationship to DOE/NNSA's decision about *where* to produce pits. Second, contrary to Plaintiffs' representations, DOE/NNSA *did* consider the cumulative impacts of past, present, and future TRU waste.

a. The amount of waste produced is not causally connected to where it is that pits are produced.

Plaintiffs assert that "the SA CT SPEIS [*sic*] neglected to assess the cumulative effects on WIPP capacity from *the increase in pit production's generation of TRU waste* [and that] this failure to properly consider *the cumulative effects of the dual site pit production* in a programmatic EIS was arbitrary and capricious and violated NEPA." *Id.* at 40 (emphasis added). Importantly, Plaintiffs are only challenging DOE/NNSA's decision of *where* to produce pits and any reasonably foreseeable environmental impacts that could arise from that decision. Plaintiffs cannot use NEPA to challenge how many pits DOE/NNSA must produce each year because

Congress has prescribed that amount, *see* JSF ¶ 14, and the agency lacks discretion to alter the number of pits produced. Therefore, Plaintiffs must establish a causal connection between the agency action they are challenging—*i.e.*, DOE/NNSA's decision of where to produce pits—and the alleged environmental impact—*i.e.*, "the increase in pit production's generation of TRU waste." ECF No. 189 at 40.

Under NEPA, an agency must consider an environmental effect of a proposed major federal action if there is a "'reasonably close causal relationship' between the environmental effect and the alleged cause." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). The Supreme Court has "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Id.* "Where an agency has no ability to prevent a certain effect due to its limited statutory authority *over the relevant actions*, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770.

Here, the "effect" Plaintiffs have identified is the increased generation of TRU waste. The cause of this increase in waste generation is Congress's command to produce 80 pits per year, a decision over which the agency exercises no discretion. Increased waste generation arising from Congress' directive is going to happen regardless of where DOE/NNSA decides to locate its facilities. Furthermore, requiring DOE/NNSA to prepare a programmatic EIS addressing the cumulative effects of increased pit production on the WIPP would be senseless. *See Pub. Citizen,* 541 U.S. at 769 ("It would not, therefore, satisfy NEPA's "rule of reason" to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform"); *Nat'l Wildlife Fed'n v. Sec'y of the U.S. Dep't of Transp.*, 960 F.3d 872, 880 (6th Cir. 2020) (NEPA's rule of reason does not require agencies to prepare an impact statement when the agency lacks discretion to act on the information in the impact statement).

The Court should reject Plaintiffs' attempt to indirectly challenge Congress's decision to increase pit production. Congress mandated the increased pit production; therefore, DOE/NNSA's decision-making did not cause the "increased pit production." Under these circumstances, DOE/NNSA had no obligation under NEPA to address the cumulative effects of increased pit production. *See Public Citizen*, 541 U.S. at 767. Nonetheless, these cumulative effects were studied, as discussed below.

b. DOE/NNSA studied the cumulative effects of the pit production program.

Even assuming that DOE/NNSA had an obligation to address the cumulative impacts of "increased pit production," which as noted above it did not, it still easily satisfied this requirement. The CEQ regulations define cumulative effects as "the incremental effects of the action when added to the effects of other past, present, [and] reasonably foreseeable future actions." 40 C.F.R. § 1508.1. DOE/NNSA, in multiple analyses, assessed the cumulative impacts of waste generation, including TRU waste, including considering the WIPP's capacity.

The 2008 CT SPEIS considered the potential complex-wide and site-specific cumulative effects of producing up to 200 pits per year at a consolidated plutonium center, including impacts from TRU waste. JSF ¶¶ 95, 119–120. Chapter 6 of the 2008 CT SPEIS, and its associated technical appendix, studied the cumulative impacts of pit production at the alternative sites, including Los Alamos and Savannah River. CT SPEIS_17711–17737; CT SPEIS_ 18061–18153. For example, Section 6.3.4.7 of the 2008 CT SPEIS discussed estimated TRU waste volumes from pit production at Savannah River, while also discussing legacy TRU waste that would ultimately have to be disposed of at the WIPP. CT SPEIS_17723. The 2008 CT SPEIS discussed the 2007 Annual Transuranic Waste Inventory Report ("ATWIR"). CT SPEIS_17773. Each annual ATWIR reports on a comprehensive inventory of TRU waste stored and projected to be generated at 27 sites over the course of 35 years. Based on DOE/NNSA's review of the 2007

ATWIR, the 2008 CT SPEIS concluded that the WIPP should have ample storage to accommodate all DOE/NNSA activities, including producing up to 200 pits per year. CT SPEIS_17773. The 2008 CT SPEIS acknowledged, however, that should waste projections show that DOE/NNSA needed more disposition capacity than the WIPP provided, it would eventually have to develop strategies for expanding disposition capacity. CT SPEIS_17774; 18086–18087.

The 2019 SPEIS SA acknowledges that between 2008 and 2019 DOE/NNSA decided to forgo the MOX facility, which affected the amount of surplus plutonium that will need to be disposed. JSF ¶ 170. The 2019 SPEIS SA states that "[t]he dilute and dispose approach could require new, modified, or existing capabilities at Pantex, SRS, LANL, and WIPP. If there were new programmatic decisions regarding surplus plutonium disposition, potential cumulative impacts at all involved sites would be analyzed prior to NNSA making a decision for that program." JSF ¶ 172. Nevertheless, the 2019 SPEIS SA concluded that "[t]he available capacity at WIPP would be adequate to support pit production TRU wastes. . . ." JSF ¶ 169. After studying the cumulative effects of dual site production, the 2019 SPEIS SA concluded that as of 2019 the WIPP had approximately 108,048 m^3 of disposal capacity and that future pit production TRU waste would only amount to 57,550 m^3 over fifty years. JSF ¶¶ 162, 175. After considering the underlying data and information as well as intervening new information, the 2019 SPEIS SA confirmed that "[t]he available capacity at WIPP would be adequate to support pit production TRU wastes . . . and other reasonably foreseeable TRU waste." CT SPEIS_68279. Having taken a hard look at the amount of waste produced by pit production at a second site and other past, present, and future waste, DOE/NNSA determined that dual site production was not a significant change in terms of DOE/NNSA's ability to safely dispose of TRU waste or in WIPP's ability and capacity to dispose of it. *See* JSF ¶ 167.

Furthermore, the 2020 LANL SA and the new 2020 SRS EIS considered the cumulative impacts of waste management and included projections for all TRU waste volumes for disposal at the WIPP – including past, present, and reasonably foreseeable future TRU waste generation. The 2020 LANL SA estimated that all past, present, and future TRU waste would be 166,005 m^3. JSF ¶ 235. The 2020 SRS EIS, which was published after the 2020 LANL SA and removed additional conservatism from the waste estimate, projected that all past, present, and reasonably foreseeable future TRU would equal 156,560 m^3. *Id.* ¶ 234. Both the 2020 LANL SA and 2020 SRS EIS concluded that total TRU waste generation would be less than the WIPP's TRU waste volume limit of 175,564 cubic meters. *Id.* For example, Table 5-4 from the 2020 SRS EIS clearly demonstrates that DOE/NNSA comprehensively studied all sources of waste before deciding to implement its two-site production alternative. *See* SRS_6371–6387.

In sum, the 2008 CT SPEIS, 2019 SPEIS SA, 2020 LANL SA and 2020 SRS EIS considered and discussed the impacts of waste generation, including the cumulative impacts of various waste streams like the surplus plutonium disposition program. SRS_6371–6387; LANL SA_09111. Each of these analyses affirm that the incremental impact of each of the actions considered when added to other past, present, and reasonably foreseeable future actions, would not result in exceeding WIPP's capacity. Under these circumstances, there can be no NEPA violation for failure to consider waste management impacts.

Faced with the plain evidence that DOE/NNSA considered the cumulative impacts of pit production, including collective waste impacts, Plaintiffs may argue that the cumulative impact analyses in the 2008 CT SPEIS and 2019 SPEIS SA are inadequate and that the 2020 SRS EIS and 2020 LANL SA are site-specific NEPA analyses, not programmatic analyses. But agencies are allowed to forgo detailed, specific analyses at the programmatic level by tiering more

detailed site-specific analyses to programmatic analyses. 40 C.F.R. § 1508.28. Courts view tiered analyses as a whole – not as distinct, segmented documents. *See*, *e.g.*, *W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1098–99 (D. Nev. 2011), aff'd, 443 F. App'x 278 (9th Cir. 2011) ("Only where neither the general nor the site-specific documents address significant issues is environmental review rejected."). Therefore, it is appropriate for the Court to treat the 2020 SRS EIS and 2020 LANL SA as an extension of the earlier programmatic analyses. Because the 2020 SRS EIS and 2020 LANL SA clearly show that DOE/NNSA conducted the analysis that Plaintiffs claim they did not, DOE/NNSA took the required "hard look" before implementing its decision to produce pits at a second site.

To the extent Plaintiffs suggest DOE/NNSA was required to affirmatively address all potential concerns about WIPP's future capacity before implementing its decision to produce pits at Los Alamos and also Savannah River, the Court must reject this argument. "An EIS is not supposed to resolve all contentions but rather to identify them in a full disclosure sense in order to enable the decision makers to undertake informed choices." *Env't Def. Fund, Inc. v. Andrus*, 619 F.2d 1368, 1378 (10th Cir. 1980); *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 554 (9th Cir. 1977); *Olmsted Citizens for a Better Cmty. v. United States*, 606 F. Supp. 964, 979 (D. Minn. 1985), aff'd, 793 F.2d 201 (8th Cir. 1986). As already discussed, NNSA considered and fully disclosed all waste issues relating to pit production—including cumulative impacts.

c. There is no new information or changed circumstances regarding the WIPP's disposal capacity that warrants a new or supplemental PEIS.

Plaintiffs claim that information about TRU waste volumes contained in the National Academies of Sciences, Engineering, and Medicine's ("NAS") 2020 Report and in the 2020 ATWIR "constitutes new information that necessitates a supplemental or new programmatic environmental impact statement." ECF No. 189 at 40. Contrary to Plaintiffs' assertions,

DOE/NNSA took a hard look at the disposal limitations of the WIPP, as noted above, and the information asserted by Plaintiffs does not present a "seriously different picture of the environmental impact of the proposed project." *Save Our Sound OBX, Inc.*, 914 F.3d at 221. Indeed, DOE/NNSA actually considered the information (or similar information) Plaintiffs claim it did not.

A supplemental EIS is required only if the asserted "new information" shows that the action will "affect the quality of the human environment in a significant manner or to a significant extent not already considered." *No Mid-Currituck Bridge-Concerned Citizens*, 60 F.4th at 801 (*quoting Marsh*, 490 U.S. at 374); *see also* 40 C.F.R. § 1502.9(c)(1). Where an agency decides that a supplemental NEPA analysis is unnecessary, courts will only disturb that decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1109 (9th Cir. 2010).

"Whether new information requires supplemental analysis is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Tri–Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012). Agencies are not required to address every study or piece of information brought to their attention, only that information that "show *the proposed action* would 'affec[t] the quality of the human environment in a significant manner or to a significant extent not already considered . . . .'" *Friends of Animals v. U. S. Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 62 (D.D.C. 2017) (citing *Marsh*, 490 U.S. at 374). And where "analysis of the relevant documents requires a high level of technical expertise, [courts] must defer to the informed discretion of the responsible federal agencies." *Marsh*, 490 U.S. at 377; *see also League of Wilderness Defs. Blue Mtns. Biodiversity Proj. v. Allen*, 615 F.3d

1122, 1130 (9th Cir. 2010) (deference towards the agency "is highest when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise.").

As discussed above, DOE/NNSA thoroughly evaluated the potential disposal limitations of the WIPP and concluded that past, present, and reasonably foreseeable future TRU waste would not exceed the WIPP's capacity limit. *See supra* (Argument)(II)(B)(2). Further, Plaintiffs cannot convincingly argue that DOE/NNSA violated NEPA's supplementation rule with respect to the 2020 NAS Report and the 2020 ATWIR. In response to the draft 2020 SRS EIS, commenters stated that DOE/NNSA should prepare a programmatic EIS for a variety of reasons, including that the NAS recommended that a PEIS be prepared. SRS_5822. DOE/NNSA prepared a lengthy response to such comments explaining why a PEIS was unnecessary, including that the NAS report used conservative waste estimates from the 2019 SPEIS SA. *See* JSF ¶ 229; SRS_5822–45824. The court should defer to DOE/NNSA's technical expertise, including its more recent and detailed analysis from the 2020 EIS, as to whether the 2020 NAS Report presented information that "present[ed] a seriously different picture of the environmental impact of the proposed project," than those previously studied. *Save Our Sound OBX, Inc.*, 914 F.3d at 221–22.

In addition to considering the 2020 NAS Report, DOE/NNSA considered the 2019 ATWIR, *see* SRS_53458-53886, but could not have considered the 2020 ATWIR, because it was published after the 2020 ROD for the SRS EIS and after the November 2020 Amended ROD for the 2008 CT SPEIS. Nonetheless, the 2020 ATWIR confirms 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.

DOE/NNSA's experts evaluated the complex scientific information presented in the 2020 NAS Report and the 2019 ATWIR and concluded that this information did not show that the proposed action – *i.e.*, two site pit production – would "'affec[t] the quality of the human environment in a significant manner or to a significant extent not already considered ....'" *Friends of Animals*, 232 F. Supp. 3d at 62. Notably, the 2020 NAS Report used the waste data from DOE/NNSA's NEPA analyses to make its predictions about future WIPP capacity. JSF ¶ 269. The 2020 NAS Report did not find that waste from pit production would be higher than DOE/NNSA had previously studied; it found that more legacy waste would have to be disposed of at the WIPP because of the cancellation of the MOX project, among other reasons. *Id.* ¶¶ 270, 271. Because the disposition of legacy waste (*i.e.*, the surplus plutonium disposition program) is separate and distinct from the pit production program, DOE/NNSA satisfied its NEPA obligations by: (1) fully studying the environmental impacts of the proposed agency action – *i.e.*, pit production at Los Alamos and also at Savannah River; and (2) considering the cumulative effects of past, present, and future TRU waste, *see supra* (Argument)(II)(B)(2).

Ultimately, Plaintiffs' claims that a programmatic EIS is required to address disposal at the WIPP are not focused on a concern that DOE/NNSA did not assess or disclose potential future issues with WIPP disposal capacity, but rather their general policy disagreement that plutonium pit production should be increased at all. NEPA "was not intended to resolve fundamental policy disputes," *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015), but only to "ensure that the agency has adequately considered and disclosed the environmental impacts of its actions." *Indian River Cnty., Fla. v. U. S. Dep't of Transp.*, 945 F.3d 515, 523 (D.C. Cir. 2019). Moreover, Plaintiffs demand too much of NEPA. NEPA does not require that an agency solve all future problems that ultimately might arise from a proposed action. For instance, while

NEPA requires consideration of how to mitigate impacts, it does not require that a "complete mitigation plan be actually formulated and adopted." *Mayo v. Reynolds*, 875 F.3d 11, 16 (D.C. Cir. 2017) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)). Because DOE/NNSA considered waste and how to mitigate impacts from waste, *see*, *e.g.*, SRS_6347, the agency satisfied its NEPA obligations. The Court should reject Plaintiffs' implicit argument that DOE/NNSA was required to fully resolve how to dispose of all pit production waste, as well as all potential legacy waste, before proceeding with pit production. *See Standing Rock Sioux Tribe v. U. S. Army Corps of Eng'rs*, 985 F.3d 1032, 1039 (D.C. Cir. 2021) ("NEPA simply requires the federal agency "undertaking any ... major project to take a hard look at" and "rigorously appraise[ ] the project's environmental effects.").[16]

3. The 2020 DFNSB Report, which was not provided to DOE/NNSA until after the pit production RODs were signed, did not contain new information that required a supplemental programmatic EIS.

a. An agency is not required to consider every new piece of information; otherwise, NEPA would prove intractable.

The 2020 DNFSB report, which was not provided to DOE/NNSA until just before the relevant RODs were issued, did not trigger additional NEPA review. Plaintiffs' argument that NNSA should have delayed issuing its Amended ROD and undertaken a new analysis does not comport with Supreme Court guidance, stating that:

> An agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision-making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.

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[16] Plaintiffs ask this Court to vacate DOE/NNSA's decision and order a new or supplemental programmatic EIS. Should the Court decide the consideration of waste, including the WIPP's disposal capacity, was inadequate and merits judicial intervention, there are several more closely tailored remedies available than the one Plaintiffs suggest. If the Court agrees that the agency is required to conduct a new programmatic EIS, or supplement it in a different way, Defendants request additional briefing on potential remedies.

Marsh, 490 U.S. at 373; *see also New River Valley Greens v. U.S. Dep't of Transp.*, 129 F.3d 1260 (4th Cir. 1997). Plaintiffs rely heavily on the DNFSB's 2020 report studying potential chemical reactions within packaged legacy waste. *See* SRS_7175–7216. But by their own admission, this report was only provided to DOE/NNSA very late in the process; indeed, Plaintiffs provided it as part of "supplemental" comments after the 2020 LANL SA and 2020 SRS EIS were finalized and only shortly before the November 2020 RODs were issued. ECF No. 189 at 18 ("On October 23, 2020, Plaintiffs submitted supplemental comments and objections regarding the SA CT SPEIS, SRS EIS, and LANL SA SWEIS in which they cited, relied upon and provided a copy of the [2020 DNFSB Report]."). Their argument, therefore, seeks to render NNSA's decision-making process never-ending – an approach that the Supreme Court has rejected. *See Marsh*, 490 U.S. at 373.

b. The risk associated with packaging legacy waste is not causally connected to pit production.

The findings in the 2020 DFNSB report, which focus on two isolated accidents, bear no relation to how DOE/NNSA will package the TRU waste generated from pit production at Los Alamos and Savannah River. Moreover, DOE/NNSA's decision to produce pits at Los Alamos and Savannah River is irrelevant to how TRU waste is packaged. The agency's packaging requirements (*i.e.*, DOE Order 435.1 and 460.1D), and a disposal facility's requirements for receiving waste, apply uniformly across sites and would apply to any location where the agency chose to produce pits. *See*, *e.g.*, SRS_00006256 – SRS_00006259. As with many of Plaintiffs' claims, Plaintiffs are using an issue that has *nothing* to do *with the location* of pit production facilities to attack DOE/NNSA's decision about where to locate pit production facilities. This type of challenge is logically flawed and is precluded because NEPA requires a reasonably close causal connection between the challenged agency action and the potential environmental impact.

Public Citizen, 541 U.S. at 767. Where, as here, Plaintiffs have not shown how the location of DOE/NNSA's pit production facilities relates to a conjectural packaging accident, they cannot claim a NEPA violation based on the agency's decision not to study that issue.

c. Supplementation was also not required because DOE/NNSA had already considered the environmental impacts of similar accident scenarios.

Plaintiffs fail to demonstrate that the 2020 DNFSB Report presented "a seriously different picture of the environmental impact of the proposed project." *Save Our Sound OBX, Inc.*, 914 F.3d at 221–22. The report did not provide "new information" showing that the action will "affect the quality of the human environment in a significant manner or to a significant extent not already considered." *No Mid-Currituck Bridge-Concerned Citizens*, 60 F.4th at 801. To the contrary, DOE/NNSA studied several accident scenarios when considering the potential environmental impacts of pit production at both Los Alamos and Savannah River in the two site-specific EISs. For instance, DOE/NNSA considered a hypothetical accident based on an earthquake and subsequent fire that would result 10.5 latent cancer fatalities in the 50-mile population around the site of the accident at SRS. *See* JSF ¶192. The 2020 SRS EIS also analyzed the impacts of an explosion in a furnace with plutonium material. *Id.; see also* SRS_00006326. With regard to that hypothetical accident, DOE/NNSA estimated there could be 4.9 latent cancer fatalities to the offsite population. *Id.* DOE/NNSA also considered a hypothetical transportation accident involving TRU material, which would result in an average dose of 10 person-rem to the population and a latent cancer fatality risk of 0.006 (which equates to 1 cancer fatality every 166 years). SRS_00006335 – SRS_00006336. For this accident scenario, the dose to the maximally exposed individual was estimated at 1.1 millirem.[17] *Id.*

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[17] Rem measures the biological damage of radiation. A millirem is one one-thousandth of a rem.

Plaintiffs have not shown that the packaging incidents discussed in the 2020 DNFSB Report had greater environmental impacts than the accident scenarios DOE/NNSA had already studied.

Because DOE/NNSA studied hypothetical accident scenarios and considered potential environmental and health impacts, it took the requisite hard look. The 2020 DNFSB report did not demonstrate that the proposed action would "affect the quality of the human environment in a significant manner or to a significant extent not already considered." *No Mid-Currituck Bridge-Concerned Citizens*, 60 F.4th at 801. Plaintiffs have not met their burden of showing that the concerns raised in the report presented more serious environmental impacts than those considered. *See* SRS_6326; SRS_6335 – 6336. Under these circumstances, DOE/NNSA's decision to forgo a new NEPA analysis based on hypothetical packaging accidents was not arbitrary and capricious. *Wildearth Guardians v. S.M.R. Jewell*, No. 2:16-CV-00168-DN, 2017 WL 570749, at *3 (D. Utah Feb. 13, 2017) (a decision not to prepare a supplemental EIS is entitled to deference and cannot be set aside unless it was arbitrary and capricious).

4. Although Plaintiffs waived this claim, DOE/NNSA did not violate NEPA by not publicly discussing the impacts of a hypothetical terror attack on shipments of nuclear materials, because NEPA only requires agencies to study reasonably foreseeable impacts.

a. The Amended Complaint and their subsequent actions did not put Defendants on notice of this claim.

The Amended Complaint only mentions terrorism twice. ECF No. 21 ¶¶ 22, 70. These two passing references to terrorism, which were made in the context of generalized standing allegations, did not put Defendants on notice that Plaintiffs would assert a NEPA claim that NNSA failed to consider the impacts of a potential terror attack on the transportation of nuclear materials. *See Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 F. App'x. 556, 563 (4th Cir.2008) (a plaintiff cannot amend its complaint through arguments in a summary judgment

brief). Here, such claims involve analysis contained in classified appendices associated with multiple EISs. *See*, *e.g.*, CT SPEIS_00043; CT SPEIS_00917.

This case has been ongoing for three years and Plaintiffs have never suggested that any of their arguments would touch upon classified information, the review of which would have required important procedures to ensure protection of the information. Indeed, because Plaintiffs never raised the specter of classified issues, there was no carefully crafted protective order in this case and none of the attorneys had reason to obtain the requisite security clearances to review DOE/NNSA's classified appendices, a lengthy process that would have involved multiple months of background investigations. Thus, by not indicating (until now) that they would be making such arguments, Plaintiffs have impaired DOE/NNSA's ability to fully defend against this claim. Moreover, even if the Amended Complaint had put DOE/NNSA on notice that Plaintiffs intended to challenge the agency's consideration of terrorism, DOE/NNSA would not have been required to publicly disclose the details of any NEPA analysis relating to the transit of nuclear materials. *See San Luis Obispo Mothers for Peace v. Nuclear Regul. Comm'n*, 635 F.3d 1109, 1116 (9th Cir. 2011) (citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981).

5. Even if the Court finds no waiver, NEPA does not require agencies to consider remote, speculative impacts.

NEPA only requires agencies to consider "reasonably foreseeable" effects of the proposed action. *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 429 (4th Cir. 2012) ("[A]lthough agencies must take into account effects that are reasonably foreseeable, they generally need not do so with effects that are merely speculative."). Agencies are not required to "speculate about all conceivable impacts." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d at 1286. Reasonable foreseeability means that "the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Id.*

Here, Plaintiffs assert that "the increased risk of terrorist attack . . . . must be analyzed under NEPA[.]" ECF No. 189 at 51. However, they offer no evidence suggesting that a terrorist attack is sufficiently likely to occur so that a person of ordinary prudence would consider the environmental impacts of a terror attack. History belies any suggestion that a terror attack on a DOE/NNSA convoy is reasonably likely to occur. *See supra* n. 4. Additionally, most courts have held that terror attacks are too speculative to require a NEPA analysis of the potential impacts. As the Third Circuit explained "no . . . circuit [other than the Ninth Circuit][18] has required a NEPA analysis of the environmental impact of a hypothetical terrorist attack." *N.J. Dept. of Env't Prot. v. U.S. Nuclear Regul. Com'n*, 561 F.3d 132 (3d Cir. 2009) (implying that a terror attack is too speculative to require NEPA analysis, but holding that there was no causal connection between relicensing a nuclear facility and an increased risk of environmental impacts for a terror attack) (collecting cases); *see also Comm. of 100 on Fed. City v. Foxx*, 87 F. Supp. 3d 191, 215 (D.D.C. 2015) ("Assessing the marginal risk of an attack would be speculative in any event."); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003) (holding that agency did not err in declining to reopen record for construction of new rail lines in light of terrorist attacks of September 11, 2001); *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 750 (2d Cir. 1983) ("With respect to environmental consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess," and terror attacks are only remote possibilities).

[18] The Third Circuit explained why it disagrees with the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. Nuclear Regul. Comm'n*, 449 F.3d 1016, 1029 (9th Cir. 2006), and believes that decision misreads the Supreme Court's holding in *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983). The Third Circuit also noted that the Second, Eighth, and D.C. Circuits disagreed with the Ninth Circuit, all holding instead that intentional destructive acts are not reasonably foreseeable.

Under these circumstances, NEPA did not require DOE/NNSA to consider the environmental impacts of a purported increased risk of a speculative attack on a DOE/NNSA convoy. The fact that DOE/NNSA, as a matter of national security, does develop security plans for the transport of nuclear materials is immaterial to the application of NEPA's regulations. *See N.J. Dep't of Env't Prot*., 561 F.3d at, 143 (finding agency's other efforts to prevent terrorist attacks not relevant to whether a NEPA analysis was required, noting that "even the Ninth Circuit Court of Appeals has held that precautionary actions to guard against a particular risk do not trigger a duty to perform a NEPA analysis") (citing *Ground Zero Ctr. for Non-Violent Action v. Dep't of the Navy,* 383 F.3d 1082, 1090-91 (9th Cir. 2004)). Agencies charged with ensuring national security are in the business of considering infinitesimal risks; however, that does not mean that NEPA imposes heightened requirements on these agencies to consider remote environmental impacts.

CONCLUSION

DOE/NNSA did not act arbitrarily and capriciously by declining to prepare a new or supplemental programmatic impact statement. The agency's decision to implement pit production at a second site, after supplementing its programmatic EIS with a new site-specific EIS that considered cumulative impacts and connected actions, was procedurally and substantively sound. For these reasons, summary judgment should be entered in favor of all Defendants on all claims. Alternatively, the Court should dismiss Claims 2 through 5 for lack of jurisdiction, and additionally because of waiver as to Claim 5, and enter summary judgment on behalf of Defendants as to Claim 1.

[SIGNATURES INTENTIONALLY ON NEXT PAGE]

Respectfully submitted this 4th day of June 2024,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2024, I electronically filed the foregoing **OPENING BRIEF SEEKING JUDGMENT AND RESPONDING TO PLAINTIFFS' OPENING BRIEF** with the Clerk of the Court using the CM/ECF system, which will send a notification of the filing to all parties.

/s/ *J. Scott Thomas*
JEFFREY SCOTT THOMAS