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

SAVANNAH RIVER SITE WATCH, TOM CLEMENTS, THE GULLAH/GEECHEE SEA ISLAND COALITION, NUCLEAR WATCH NEW MEXICO and TRI-VALLEY COMMUNITIES AGAINST A RADIOACTIVE ENVIRONMENT, Plaintiffs, vs. UNITED STATES DEPARTMENT OF ENERGY, JENNIFER GRANHOLM, *in her official capacity as the Secretary*, THE NATIONAL NUCLEAR SECURITY ADMINISTRATION, and JILL HRUBY, *Administrator*, Defendants.	§	CIVIL ACTION NO.1:21-1942-MGL

MEMORANDUM OPINION AND ORDER
GRANTING JUDGMENT IN FAVOR OF PLAINTIFFS AS TO CLAIM ONE
AND DISMISSING WITHOUT PREJUDICE
CLAIMS TWO, THREE, FOUR, AND FIVE FOR LACK OF STANDING

I. INTRODUCTION

Plaintiffs Savannah River Site Watch, Tom Clements (Clements), the Gullah/Geechee Sea Island Coalition, Nuclear Watch New Mexico, and Tri-Valley Communities Against a Radioactive Environment (collectively, Plaintiffs) brought this action against Defendants United States Department of Energy (DOE), Jennifer Granholm, in her official capacity as the Secretary of DOE, the National Nuclear Security Administration (NNSA), and Jill Hruby, in her official capacity as

Administrator of NNSA (collectively, Defendants). Plaintiffs' suit, however, is actually against just DOE and NNSA. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a [federal] official in . . . her official capacity is not a suit against the official but rather is a suit against the official's office.").

In Plaintiffs' amended complaint, they assert violations of the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA). They seek both declaratory and injunctive relief, as well as fees, costs, and expenses. Plaintiffs maintain the Court has jurisdiction over the matter in accordance with 28 U.S.C. § 1331.

Pending before the Court are Plaintiffs' brief in support of judgment as to their five claims, and Defendants' brief in support of judgment as to Claim One, and dismissal of Claims Two, Three, Four, and Five. Having carefully considered the briefs, the replies, Plaintiffs' objection to a declaration filed by Defendants, Defendants' response to Plaintiffs' objection, the record, and the applicable law, the Court will enter judgment in favor of Plaintiffs as to Claim One and dismiss without prejudice Claims Two, Three, Four, and Five for lack of standing, and will overrule Plaintiffs' objection.

II. FACTUAL AND PROCEDURAL HISTORY

As per the amended complaint, "Plaintiffs are non-profit and/or community organizations and an individual who have strong interests advocating for protection of the environment from impacts of nuclear facilities, those currently in existence, as well as future additions or expansions to the United States nuclear weapons program, including environmental justice-related impacts, and advocating against nuclear proliferation." Amended Complaint ¶ 10.

DOE "is the agency charged with the administration of the [NNSA] Act." *Id.* ¶ 73. NNSA "is a semi-autonomous agency within DOE charged with managing the U.S. nuclear weapons stockpile, including design, production and testing." *Id.* ¶ 75.

"Plaintiffs challenge [Defendants'] failure to prepare a new or supplemental Programmatic Environmental Impact Statement (PEIS [or EIS]) pursuant to NEPA." *Id.* § 1 (internal quotation marks omitted). According to Plaintiffs, "Defendants intend to undertake the major federal action to quadruple the production of plutonium pits, as mandated by Congress, which are the fissile cores of nuclear warheads, and to split the production between two facilities located across the country from each other, in furtherance of producing newly-designed nuclear warheads." *Id.*

The executive and legislative branches of the United States government have decided to eventually produce eighty pits per year to service the Nation's nuclear arsenal. Defendants' Brief at 1. NNSA decided the way to meet the production and timing requirements is to implement a two-site strategy, which involves expanding existing plutonium pit production at Los Alamos and re-purposing the government's MOX Facility at Savannah River. *Id.*

As is relevant here, after Plaintiffs filed their amended complaint, the parties filed a joint statement of material facts. After that, Plaintiffs filed their brief in support of judgment as to their five claims, after which Defendants filed their brief in support of judgment as to Claim One, and dismissal of Claims Two, Three, Four, and Five. They then each filed a reply brief.

Thereafter, at the Court's direction, the parties filed a joint reply as to alternative remedies, after which Plaintiffs filed an objection to a declaration Defendants filed with the joint reply. Defendants then filed a response to Plaintiffs' objection.

The Court, having been fully briefed on the relevant issues, will now adjudicate the issues raised by the parties.

III. STANDARD OF REVIEW

A. Standing

"Article III of the Constitution provides that federal courts may consider only '[c]ases' and '[c]ontroversies.'" U.S. Const. art. III, § 2. Thus, "a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has a personal stake in the outcome[]" of the lawsuit. *Gill v. Whitford*, 585 U.S. 48, 54 (2018) (citation omitted) (internal quotation marks omitted).

To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant[s], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

"When standing is challenged on the basis of the pleadings, all material allegations of the complaint must be taken as true, and the complaint must be construed in favor of the complaining party." *Pennell v. City of San Jose*, 485 U.S. 1, 1–2 (1988).

"Standing does not turn on whether a plaintiff has definitively stated a valid cause of action." *DiCocco v. Garland*, 52 F.4th 588, 591 (4th Cir. 2022). "In other words, a valid claim for relief is not a prerequisite for standing." *Id.* "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 682 (1946).

The "plaintiff[] bears the burden of establishing standing to assert each of its claims." *S.C. v. U.S.*, 912 F.3d 720, 726 (4th Cir. 2019).

B. The APA and NEPA

"The statutory requirement that a federal agency contemplating a major action prepare . . . an environmental impact statement serves NEPA's 'action-forcing' purpose in two important respects." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; [and second,] it . . . guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.*

"Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provides a springboard for public comment." *Id.* (citation omitted) (internal quotation marks omitted).

Although NEPA fails to grant Plaintiffs a private cause of action against Defendants, 5 U.S.C. § 702 provides that one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review" under the APA. *Id*.

NEPA claims are subject to judicial review under the APA, which permits the Court to set aside an agency action if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "This inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 378 (1989) (citation omitted) (internal quotation marks omitted).

"[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully

reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information." *Id.* "A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Id.* (internal quotation marks omitted).

"A reviewing court must ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted) (internal quotation and alteration marks omitted), and must not reduce itself to a "rubber-stamp" of agency action. *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745–46 (1973).

IV. DISCUSSION AND ANALYSIS

Both parties well exceeded the page limits in their filings, although neither sought permission to do so. Nevertheless, the Court has considered their voluminous filings with their many arguments.

It would take hundreds of pages to address each argument. Therefore, the Court will broadly address only those necessary to decide Plaintiffs' five claims.

The Court will refer to the following four documents in the discussion below:

1. The 2008 Final Complex Transformation Supplemental Programmatic Environmental Impact Statement (2008 CT SPEIS);

2. The 2019 Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement (2019 SPEIS SA);

3. The 2020 Final Environmental Impact Statement for Plutonium Pit Production at Savannah River Site; Aiken, South Carolina (2020 SRS EIS); and

4. The 2020 Final Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory (LANL) for Plutonium Operations (2020 LANL SA).

A. Whether Defendants violated NEPA by failing to undertake a proper alternatives analysis given the change in need and purpose and changed circumstances since the 2008 CT SPEIS

In Claim One, Plaintiffs assert "Defendants violated NEPA by not undertaking a proper alternatives analysis given the change in need and purpose and changed circumstances since the 2008 CT SPEIS." Plaintiffs' Brief at 23 (emphasis omitted). This is the only claim in which Defendants fail to raise the issue of standing.

According to Plaintiffs, "the last programmatic evaluation that included pit production was the 2008 CT SPEIS." Plaintiffs' Brief at 8. Plaintiffs contend "Defendants violated NEPA by not undertaking a proper alternatives analysis given the change in need and purpose and changed circumstances since the 2008 CT SPEIS." *Id.* at 23 (emphasis omitted).

Defendants, unsurprisingly, see things differently. They state their "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 conducted a new EIS for the site, did not require a supplemental programmatic EIS." Defendants' Brief at 15 (emphasis omitted). According to Defendants, "the record unequivocally establishes that [they] studied alternatives and, using [their] technical expertise, rejected unviable options in favor of maintaining small-scale pit production capacity at Los Alamos and modifying the MOX facility [at Savannah River] to also produce pits." *Id.* at 12.

The 2008 CT SPEIS "analyze[d] the potential environmental impacts of alternatives for transforming the nuclear weapons complex . . . into a smaller, more efficient enterprise that can respond to changing national security challenges." *Id.* One of "[t]he purposes of NNSA's proposed

actions" was to consolidate nuclear materials to "fewer sites and locations within sites to reduce risks and safeguard costs[.]" *Id.* The alternatives also sought to "eliminate redundant activities." *Id.* The 2008 CT SPEIS dealt with pit production occurring at a single location at Los Alamos. *Id.*

According to the 2008 CT SPEIS, "[a Consolidated Plutonium Center] could consist of new facilities, or modifications to existing facilities at one of the following sites: Los Alamos, [Nevada Test Site], Pantex, SRS, and [Y-12 National Security Complex]." *Id.* As of 2008, "the net production at Los Alamos would be limited to a maximum of twenty pits per year." *Id.* The 2008 CT SPEIS failed to consider dual-site pit production.

But, in the 2019 SPEIS SA, Defendants changed course. In that document, they stated the purpose was to "improve the resiliency, flexibility, and redundancy of the Nuclear Security Enterprise by not relying on a single production site." *Id.* In other words, the new purpose was to increase redundancy.

Yet, although the 2008 CT SPEIS, among other things, looked to "eliminate redundant activities[,]" *id.*, the 2019 SPEIS SA curiously claims "the purpose and need has not changed from the [2008 CT SPEIS.]" *Id.*

Defendants provided a sufficient in-depth evaluation of neither the suitability of alternative sites for pit production beyond SRS and LANL nor the feasibility of a single site production. And, the only alternative the 2020 SRS EIS evaluated was related to various amounts of pit production at SRS. The 2020 LANL SA also neglected to evaluate pit production at other sites, focusing only on pit production at LANL. Nevertheless, Defendants wish to go forward with dual-site pit production.

Defendants offer five reasons they say the Court should reject Plaintiffs' NEPA claim. The Court will discuss them briefly below.

"First," Defendants argue, "NEPA and its regulations do not require programmatic analyses . . . where, as here, pit production at Los Alamos and Savannah River are purposefully independent of one another[.]" Defendants' Brief at 15. This is inaccurate.

As Plaintiffs note, "their respective production schedules are interdependent in that[,] [for example,] if a criticality event occurred at one facility causing it to suspend production, the other facility will necessarily increase production to attempt to meet the goal of producing at least 80 pits per year." Plaintiffs' Reply at 9. "It is plain that the goal of this project, to produce at least 80 pits per year, is to be met by the interrelated production at both SRS and LANL." *Id.*

Under Defendants first argument, they also contend "pit production at Savannah River and Los Alamos . . . are not 'connected,' in the legal sense, within the meaning of [Council on Environmental Quality's] regulations." Defendants' Brief at 18. But, they fail to provide any convincing rationale for this statement.

In Defendants' second argument, they contend "there was no change to the Purpose and Need." Defendants' Brief at 15. The Court is unconvinced.

As the Court has already noted, the 2008 CT SPEIS, for example, stated one of the purposes was to "eliminate redundant activities." *Id.* But, the 2019 SPEIS SA stated the purpose was to "improve the . . . redundancy of the Nuclear Security Enterprise by not relying on a single production site." *Id.*

"Third," Defendants maintain their "decision not to prepare a supplemental programmatic EIS was not arbitrary and capricious because [they] confirmed that [their] 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." Defendants' Brief at 15. (citation omitted) (internal quotation marks omitted). The Court is unpersuaded.

Defendants neglected to properly consider the combined effects of their two-site strategy and have failed to convince the Court they gave thought to how those effects would affect the environment.

In Defendants' fourth argument, they state they "considered a range of alternatives." Defendants' Brief at 15.

Except, as the Court just stated, they, among other things, failed to conduct a proper study on the combined effects of their two-site strategy. And, they have neglected to present a good reason for their decision. The Court is of the firm opinion one was required.

"And fifth," according to Defendants, "even if the Court were to find that the conclusion of the 2019 SPEIS SA . . . to be improper[,] any technical violation of NEPA was harmless in light of the agency's preparation of the wholly new 2020 SRS EIS."

In light of the discussion herein, however, the Court is unable to agree Defendants' violation of the NEPA here amounts merely to a mere technical violation.

"NEPA imposes a continuing obligation on agencies to consider the environmental impacts of a proposed action, even after a Final Environmental Impact Statement has been issued." *Defenders of Wildlife v. N.C. Dept. of Transp.*, 762 F.3d 374, 394 (4th Cir. 2014). "An agency must issue a supplemental Environmental Impact Statement if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id*. (quoting 40 C.F.R. § 1502.9(c)(1)(i), (ii)).

"In reviewing an agency's decision not to prepare a supplemental EIS, a court must undertake a two-step inquiry. First, the court must determine whether the agency took a hard look at the proffered new information. Second, if the agency did take a hard look, the court must determine

whether the agency's decision not to prepare a supplemental EIS was arbitrary or capricious." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

Here, the Court is unconvinced Defendants took a hard look at the combined effects of environmental impacts of their two-site strategy. But, even assuming they did, their "decision not to prepare a supplemental EIS was arbitrary [and] capricious." *Id.*

As the Fourth Circuit put it, "[i]t would be one thing if the [agency] had adopted a new alternative that was actually within the range of previously considered alternatives. It is quite another thing to adopt a proposal that is configured differently." *Wild Va. v. U.S. Forest Serv.*, 24 F.4th 915, 929 (4th Cir. 2022) (citation omitted) (internal quotation and ellipses omitted). Here, we have the latter.

"NEPA and the APA require agencies to act reasonably in eliminating alternatives from detailed study." *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217, 1227 (10th Cir. 2020). And, an "agency's elimination of an alternative from detailed study . . . [is] arbitrary and capricious [when] its explanation for doing so [is] inconsistent with its stated purpose." *High Country*, 951 F.3d at 1225 (footnote omitted). But, that is exactly what we have here.

Again, the stated purpose of the 2008 CT SPEIS was to consolidate nuclear materials to "fewer sites and locations within sites to reduce risks and safeguard costs[.]" *Id.* It also sought to "eliminate redundant activities." *Id.*

But, the new plan is to expand the number of sites and to increase redundancy. Thus, because Defendants' "elimination of [the two-site strategy] alternative from detailed study" is "inconsistent with its stated purpose[]" in the 2008 CT SPEIS, the Court holds such elimination is arbitrary and capricious. Any attempt by Defendants to employ the principles of tiering and/or bounding fail to produce a different result.

Therefore, for all these reasons, the Court will enter judgment in favor of Plaintiffs as to Claim One.

B. Whether Defendants violated NEPA by failing to assess the cumulative effects of increased pit production on the Waste Isolation Pilot Plant's (WIPP) limited capacity

In Claim Two, Plaintiffs say "Defendants violated NEPA by failing to assess the cumulative effects of increased pit production on WIPP's limited capacity." Plaintiffs' Brief at 34 (emphasis omitted).

1. Whether Plaintiffs have standing to bring this claim

One preliminary note before beginning in earnest to consider the parties' arguments: the Court earlier held Plaintiffs have standing to bring this lawsuit. *Savannah River Site Watch v. U.S. Dep't of Energy*, No. 1:21-cv-1942-MGL, 2023 WL 1802118, at *9 (D.S.C. Feb. 7, 2023). But, Plaintiffs' five individual claims were not then presented or argued.

The Court's earlier order concluding Plaintiffs had standing to bring the suit was based on whether just one of the Plaintiffs, Clements, had standing. *See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) ("[O]ne party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

The Court's decision was based on Clements's alleged informational injuries because of Defendants' failure to prepare a new or supplemental PEIS/EIS in regard to its two-site strategy involving Savannah River and Los Alamos, which is Claim One here.

But, "a statutory violation alone does not create a concrete informational injury sufficient to support standing. Rather, 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." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (internal quotation marks omitted) (emphases omitted).

Clements, who lives near SRS, alleged Defendants' failure to prepare a new or supplemental PEIS or EIS, among other things, interfered with his recreational activities around SRS. So, that was the "real harm with an adverse effect[]" *id.*, the denial of a PEIS/EIS created.

But, that covered just Claim One. Now, the Court must consider whether Plaintiffs have standing to bring each of their other four claims. *See Friends of the Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

With that background in mind, the Court turns to the parties' standing arguments as to Claim Two. Defendants argue Plaintiffs lack standing to bring it. According to Defendants:

> none of the Plaintiffs live or recreate near the WIPP in New Mexico, which is where [Defendants] currently dispose[ ] [transuranic (TRU)] waste. Plaintiffs, therefore, cannot argue that their concrete interests will be harmed by disposing of more TRU waste at the WIPP. 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. 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. Neither of these conjectures give rise to an injury-in-fact. . . .
>
> [E]ven 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, particularly when future congressional and administrative decisions will almost certainly materialize during this lengthy lead up. Much can change, as fifty years ago WIPP was neither authorized, constructed, nor in operation.

> 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. 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. Plaintiffs cannot predict the future, and standing cannot be predicated on facts that may never occur.

Defendants' Brief at 7–9 (citations omitted).

A bit of background: "TRU waste is solid waste that is contaminated with radioactive and hazardous substances generated at DOE sites across the country from nuclear research and weapons production. At WIPP, this waste is permanently emplaced 2,150 feet underground in an ancient salt formation." https://wipp.energy.gov/national-tru-programs.asp (last accessed September 20, 2024).

Plaintiffs claim, however, that

> Defendants' argument . . . is premised on two mistaken points: (1) that it is only possible (or speculative) that WIPP will be oversubscribed due to pit production and (2) and that it is only possible that TRU waste will therefore be stored at SRS and LANL in the event WIPP capacity is exhausted. Far from being two unsupported assumptions, . . . [the relevant documents] show that WIPP's capacity will be exceeded with the additional pit production TRU waste. The CT SPEIS SA states that when WIPP is unavailable for pit TRU disposition, it is expected that this waste will remain at the respective producer's site for as long as WIPP is unavailable.
>
> Defendants' argument also ignores that WIPP's unavailability is likely to emerge well before fifty . . . years has elapsed and before WIPP's capacity is exceeded because WIPP only has NEPA coverage for disposals until 2033. The Record of Decision that governs WIPP's Disposal Phase states that WIPP's purpose is to allow the safe disposition of the TRU waste that has accumulated at DOE sites and to provide for the disposal of additional TRU waste to be generated over approximately the next 35 years (through approximately 2033) in a manner that protects public health and the environment.

Plaintiffs' Reply at 2–3 (citations omitted) (internal quotation and alteration marks omitted).

"[T]he requirement of injury in fact is a hard floor of Article III jurisdiction[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). "To establish injury in fact, a plaintiff must show that he or she 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 (citation omitted) (internal quotation marks omitted).

"[U]nder the injury in fact prong, 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." *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 451–52 (10th Cir. 1996). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes[.]" *Lujan v. Def. of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (citation omitted) (internal quotation marks omitted). "A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990).

Defendants are right: Plaintiffs' claimed "injury is far from imminent and is wholly speculative." Defendants' Brief at 8.

"The Supreme Court has repeatedly held that an alleged harm is too 'speculative' to support Article III standing when the harm lies at the end of a 'highly attenuated chain of possibilities.'" *S.C.*, 912 F.3d at 727 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). "[W]hile it is true that threatened rather than actual injury can satisfy Article III standing requirements, . . . not all threatened injuries constitute an injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (citation omitted) (internal quotation marks omitted).

"Rather, as the Supreme Court has emphasized repeatedly, an injury-in-fact must be concrete in both a qualitative and temporal sense." *Id.* (citation omitted) (internal quotation marks omitted).

"The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract." *Id.* (citation omitted) (internal quotation marks omitted). In other words, "this threat of injury must be both real and immediate, not conjectural or hypothetical." *Id.* at 277.

This precedent strongly tugs the Court away from Plaintiffs' argument they have standing to bring this claim. The threat WIPP may be oversubscribed at some point in the future is an insufficient basis for Plaintiffs to establish standing as to this claim. Plaintiffs' alleged injury is years out and is merely "conjectural and hypothetical." *Id.* Yes, WIPP may, in fact, be oversubscribed at some point. But, the opposite is also true.

As Defendants stated,

> Countless contingencies make Plaintiffs' supposition unlikely. 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. Plaintiffs cannot predict the future, and standing cannot be predicated on facts that may never occur.

Defendants' Brief at 9.

Therefore, because Plaintiffs' alleged injury is too speculative and thus fails to give rise to a concrete injury-in-fact, the Court holds Plaintiffs lack standing to bring Claim Two. A contrary conclusion would be in contravention of well-settled law.

2. Whether Defendants violated NEPA as to this claim

Given Plaintiffs lack standing to bring this claim, it is unnecessary for the Court to pass judgment on the merits of the claim. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in judgment) ("If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more.").

Accordingly, because Plaintiffs lack standing to bring Claim Two, the Court will dismiss this claim without prejudice.

C. Whether Defendants violated NEPA by failing to author a supplemental programmatic environmental impact statement to address the changed circumstances regarding WIPP capacity

In Claim Three, Plaintiffs state "Defendants violated NEPA by not authoring a supplemental programmatic environmental impact statement to address the changed circumstances regarding WIPP capacity." Plaintiffs' Brief at 40 (emphasis omitted).

1. Whether Plaintiffs have standing to bring this claim

The Court holds Plaintiffs lack standing to bring Claim Three for the same reasons they lack standing to bring Claim Two.

2. Whether Defendants violated NEPA as to this claim

As above, where the Court concludes Plaintiffs lack standing to bring this claim, it is unnecessary to consider the merits of this claim. *See Dobbs*, 597 U.S. at 348 (Roberts, C.J., concurring in judgment) (stating the Court should address only that which is "necessary . . . to dispose of a case").

Therefore, the Court will also dismiss Claim Three without prejudice.

D. Whether Defendants violated NEPA by failing to address the new information and changed circumstances concerning radiation risks from improperly stored transuranic waste

In Claim Four, Plaintiffs contend "Defendants violated NEPA by not addressing the new information and changed circumstances concerning radiation risks from improperly stored transuranic waste." Plaintiffs' Brief at 46 (emphasis omitted).

1. Whether Plaintiffs have standing to bring this claim

Defendants maintain "Plaintiffs . . . have not established standing for their fourth claim, which asserts that Defendants failed to adequately evaluate environmental impacts of potential packaging accidents arising from mixing chemically incompatible legacy materials, because it is

highly speculative that legacy waste will ever be mixed with newly generated pit production waste." Defendants' Reply at 9.

In response, Plaintiffs argue they "allege in Claim 4 that Defendants failed to address new information and changed circumstances relating to improperly stored TRU waste. . . . [T]here is nothing in the [relevant documents] that addresses the dangerous occurrences of TRU waste exploding." Plaintiffs' Reply at 5. According to Plaintiffs, "Defendants did not evaluate the new information related to potential radiation exposure to workers and the public that could result from improperly packed and stored TRU waste. Defendants also failed to consider how the frequent reactions . . . increase risk for this extreme exposure. Defendants violated NEPA by these arbitrary and capricious acts." Plaintiffs' Brief at 49.

So, Plaintiffs have identified a threat "concerning radiation risks from improperly stored transuranic waste." Plaintiffs' Brief at 46 (emphasis omitted). As the Court stated earlier, however, "while it is true that threatened rather than actual injury can satisfy Article III standing requirements, . . . not all threatened injuries constitute an injury-in-fact." *Beck*, 848 F.3d at 271 (citation omitted) (internal quotation marks omitted). The "threat of injury must be both real and immediate, not conjectural or hypothetical." *Id.* at 277.

And, that is why this claim falters under a standing analysis. It is both "conjectural [and] hypothetical[,]" *id.*, whether Defendants will improperly store transuranic waste. And, Plaintiffs are unable to show it is either "real [or] immediate[.]" *Id.* This seems to the Court to be too plain to require further discussion.

Consequently, the Court concludes Plaintiffs lack standing to bring this claim, as well.

2. Whether Defendants violated NEPA as to this claim

As before, in light of the Court's holding Plaintiffs lack standing to bring Claim Four, it will refrain from considering the merits of that claim. *See Dobbs*, 597 U.S. at 348 (Roberts, C.J.,

concurring in judgment) (stating the Court should address only that which is "necessary . . . to dispose of a case").

Consequently, the Court will dismiss Claim Four without prejudice, too.

E. Whether Defendants violated NEPA by failing to take a hard look at changed circumstances concerning terror threats to transportation of nuclear materials and waste

In Claim Five, Plaintiffs claim "Defendants violated NEPA by failing to take a hard look at changed circumstances concerning terror threats to transportation of nuclear materials and waste." Plaintiffs' Brief at 49 (emphasis omitted).

1. Whether Plaintiffs have standing to bring this claim

Defendants insist Plaintiffs lack standing to bring this claim because they "have . . . 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." Defendants' Brief at 10 (citation omitted) (internal quotation marks omitted). According to Defendants, "[t]here has never been a terror attack on a DOE/NNSA convoy. It is hard to imagine an alleged injury more hypothetical, more speculative, and less imminent." *Id.* (citation omitted).

Plaintiffs, however, have a different take:

> Defendants' argument related to Plaintiffs' fifth claim amounts to this—since we, as a country, have been lucky enough to avoid a terror attack on a convoy transporting nuclear waste or nuclear weapons' materials, then this claim is too speculative. But it is Defendants who have claimed that there are growing threats from Russia and China and North Korea. Yet the analyses employed in the SA CT SPEIS, LANL SA SPEIS and the SRS EIS all date to the earlier, less fraught political climate of the 2008 CT SPEIS and appear to focus on terror threats to particular sites. These threats are not speculative as they form part of the justification for the increased pursuit of additional nuclear weapons that is the reason for the increase in pit production. Moreover, these threats are specific to Plaintiffs Tom Clements and James J. Coghlan of Nuclear Watch New Mexico because they live and recreate in close proximity to two of the primary facilities involved in pit production and thus provide targets with respect to nuclear weapon materials (i.e., pits) as well as toxic nuclear waste.

> Plaintiff[] Tri-Valley Communities Against a Radioactive Environment, is also located in close proximity to another target, the Lawrence Livermore National Laboratory, which is the site of nuclear weapons materials, and specifically submitted comments about the increased risk of terror attacks on nuclear shipments. Plaintiffs have standing to pursue this claim.

Plaintiffs' Reply Brief at 6–7 (citations omitted) (internal quotation and alteration marks omitted).

As the Court stated above, "under the injury in fact prong, 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." *Lucero*, 102 F.3d at 451–52. "A threatened injury must be certainly impending to constitute injury in fact." *Whitmore*, 495 U.S. at 158.

The Court agrees with Defendants: "[t]here has never been a terror attack on a DOE/NNSA convoy. It is hard to imagine an alleged injury more hypothetical, more speculative, and less imminent." Defendants' Brief at 10 (citation omitted).

Thus, in the Court's view, binding precedent forecloses Plaintiffs' argument they have standing to bring this claim.

2. Whether the Amended Complaint and Plaintiffs' subsequent actions put Defendants on notice of this claim such that it is waived; and whether Defendants violated NEPA as to this claim

Again, because Plaintiffs lack standing to bring this claim, the Court will decline addressing these two arguments. *See Dobbs*, 597 U.S. at 348 (Roberts, C.J., concurring in judgment) (stating the Court should address only that which is "necessary . . . to dispose of a case").

Inasmuch as Plaintiffs lack standing to bring this claim, the Court will also dismiss Claim Five without prejudice.

F. Whether the Court should accept Defendants' request not to vacate the agency's decision, but only remand with instructions to remedy any NEPA violations

1. Whether Brian Schepens's declaration is proper

Before turning to the parties' arguments on this issue, the Court must first deal with Plaintiffs' objection to the declaration of Brian Schepens (Schepens), Deputy Director Savannah River Acquisition and Project Management Office (SRA-APMO), which Defendants employ in support of their contention as to their preferred remedy in this case.

Plaintiffs maintain it is "evident that this declaration is not based upon the personal knowledge of the declarant and is therefore improper and should be disregarded by this Court." Plaintiffs' Objection at 2. According to Defendants, however, "Schepens' description of his job titles and duties as a Senior Engineer, and then Deputy Director, of the SRA-APMO—and his involvement with the Savannah River Plutonium Processing Facility (SRPPF) Project since its very initiation—conclusively demonstrate that his statements were made based on personal knowledge." Defendants' Response at 4.

The Fourth Circuit has held affidavits with "a description of the affiants' job titles and duties," "contain sufficient information . . . to establish that the affiants' statements were made based on personal knowledge." *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 135 n.9 (4th Cir. 2002). In the absence of evidence a parties' affiants are incompetent to testify, the Court will assume they are competent. *Id.*

The Court has carefully reviewed the declaration at issue here, as well as the supplemental declaration Defendants submitted with their response. Given Schepens' description of his job titles and duties with the SRA-APMO, along with his involvement with the SRPPF Project since its very initiation, the Court is convinced the statements in his declarations were made based on personal knowledge. And, Plaintiffs have failed to marshal any evidence Schepens is incompetent to testify.

Therefore, the Court will overrule Plaintiffs' objection to Schepens's declaration.

2. Whether the Court should vacate and remand the matter, or just remand it

Defendants state that, "[s]hould the Court decide that additional NEPA analysis is necessary, [it] should allow NNSA to complete this additional NEPA work without disrupting the vitally important and congressionally mandated national security mission to produce eighty plutonium pits per year." *Id.* at 7. In other words, Defendants ask the Court to remand the matter without vacating their decision. They state, "[b]ecause Plaintiffs have not identified information that NNSA failed to consider that would also likely alter its decision, remand without vacatur is appropriate should the Court find a NEPA violation." *Id.* at 10.

With Defendants' NEPA violation, however, Plaintiffs move the Court to remand the matter and vacate Defendants' decision. According to Plaintiffs, "not vacating the agency's action would subvert NEPA's purpose by giving substantial ammunition to agencies seeking to build first and conduct comprehensive reviews later." Joint Reply at 2–3 (citation omitted) (internal quotation marks omitted). Put differently, Plaintiffs argue "[v]acatur is . . . necessary to ensure that any NEPA analyses are conducted in good faith and not to justify a decision already made." *Id.* at 3.

"The APA empowers federal courts to 'hold unlawful and set aside agency action' that, as relevant here, is arbitrary and capricious or is contrary to law. 5 U.S.C. § 706(2). The Federal Government and the federal courts have long understood § 706(2) to authorize vacatur of unlawful agency rules[.]" *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2460 (2024) (Kavanagh, J., concurring in judgment).

But, some Courts have allowed for just remand, without vacating the agency's decision. *See, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51(D.C. Cir.1993) ("An inadequately supported [agency decision] . . . need not necessarily be vacated. The decision whether to vacate depends on the seriousness of the [agency decision's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." (citation omitted) (internal quotation marks omitted)). The Court notes,

however, the Fourth Circuit "has never formally embraced the *Allied-Signal* remand-without-vacatur approach." *Sierra Club v. U.S. Army Corps of Eng'r*, 909 F.3d 635, 655 (4th Cir. 2018).

Defendants have presented a parade of horribles they say will occur if the Court vacates their decision here, including massive job losses and negative economic impacts. But, as Plaintiffs point out, "[v]acatur . . . [helps] ensure that any NEPA analyses are conducted in good faith and not to justify a decision already made." Joint Reply at 3.

The Court thinks neither of the alternatives presented is ideal; and thus seeks to find a third way, some sort of a middle ground. Therefore, the Court directs the parties to confer and reach some sort of proposed compromise that ameliorates both of the problems listed above. The parties' discussion and proposal should take into consideration Plaintiffs' request for injunctive relief.

V. CONCLUSION

Therefore, based on the foregoing discussion and analysis, the Court **GRANTS** judgment in favor of Plaintiffs as to Claim One; Claims Two, Three, Four, and Five are all **DISMISSED WITHOUT PREJUDICE** for lack of standing; and Plaintiffs' objection to Schepens's declaration is **OVERRULED**.

Plaintiffs shall file a timely and proper motion for fees, costs and expenses.

Not later than fourteen days from the entry of this Order, the parties shall confer, draft, and submit to the Court a joint proposal regarding the appropriate remedies in this case, including Plaintiffs' request for injunctive relief.

The Clerk shall enter judgment as detailed above and mark this case as **CLOSED.** Nevertheless, the Court will maintain jurisdiction over this matter to consider the parties' proposal, as well as Plaintiffs' request for fees, costs, and expenses.

IT IS SO ORDERED.

Signed this 30th day of September, 2024, in Columbia, South Carolina.

/s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE