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

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

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Plaintiffs in this action have brought federal claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370, and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. As explained herein, this Court possesses jurisdiction over each of these claims, and Defendants' motion to dismiss under FRCP Rule 12(b)(1) must be denied.

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INTRODUCTION

Defendants' motion to dismiss suffers from two fatal flaws: it asks the Court to dismiss a claim that Plaintiffs did not bring and it ignores clear harms to Plaintiffs' interests that the government has already conceded will occur.

Federal Defendants seek dismissal on two grounds: lack of Article III constitutional standing and, pursuant to Rule 12(b)(6), that Plaintiffs' claims are not justiciable because Congress has mandated an increase in the number of pits to be produced; and, therefore, Defendants do not have discretion as to whether they implement this mandate. In their Memorandum in Support, Federal Defendants attempt to side-step and oversimplify many of the issues raised in the Complaint. The plan being implemented by the Federal Defendants and challenged through the filing of this lawsuit involves more than a mere increase in the number of pits and the production at two locations contemporaneously, although these are actions that warranted a new or supplemental Programmatic Environmental Impact Statement ("PEIS"). The additional concerns about storage capacity and safety issues at the Savannah River Site ("SRS") and the Los Alamos Nuclear Laboratory ("LANL"), as well as the impacts to sites in California and other locations throughout the country, were glossed over by the Federal Defendants and the clear environmental risk of these aspects of the plan have never been evaluated.

Reviewing the Complaint in the light most favorable to the Plaintiffs and assuming the veracity of the allegations, this Court has jurisdiction over this case and controversy and the Plaintiffs have stated a claim on which relief can be granted.

LEGAL FRAMEWORK

I. Rule 12(b)(1), FRCP

"A defendant may challenge subject-matter jurisdiction in one of two ways: facially or factually. In a facial challenge, the defendant contends 'that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based.'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2020) (quoting *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009)) (internal citations omitted). Under a facial challenge, "the facts alleged in the complaint are taken as true," and the defendant's motion "must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Id*. In addition, a Court must "accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff." *Wikimedia Found. v. NSA/Cent. Sec. Serv.*, 857 F.3d 193, 208 (4th Cir. 2017) (citing *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 422 (4th Cir. 2015)). "[W]hat may perhaps be speculative at summary judgment can be plausible on a motion to dismiss." *Id*. at 212.

A. Standing

A party may move to dismiss under FRCP 12(b)(1) by challenging Article III standing. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The elements include (1) injury in fact, (2) causation, and (3) redressability. *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Id*. (quoting

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)). When considering a motion to dismiss based on standing, the court must assume that the plaintiffs will prevail on the merits. The question before the court is whether, presuming the plaintiffs are correct in their theory of the case, they will sustain a sufficient cognizable injury to have standing. *See, e.g., LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011)([I]m assessing plaintiffs' standing, we must assume they will prevail on the merits"), *Muir v. Navy Federal Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008)("In reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims."). Furthermore, this Court need only identify one plaintiff with standing and need look no further than one to hear the case. *See e.g. Outdoor Amusement Business Ass'n. v. Dep't. of Homeland Sec.*, 983 F.3d 671, 681 (4th Cir. 2020)("[O]nly one plaintiff needs to have standing for a court to hear the case.").

II. Rule 12(b)(6) FRCP

FRCP 12(b)(6) authorizes a party to move for dismissal for failure to state a claim upon which relief can be granted. FRCP 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. A complaint challenged under Rule 12(b)(6) can be dismissed for two reasons— "(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory." *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. United States Dept. of Interior*, 2012 U.S. Dist. LEXIS 194310 (C.D. Cal. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The factual allegations of a Complaint do not need to be detailed but do need to include "more than labels and conclusions" because "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

To survive a motion to dismiss, the complaint must contain a facially plausible claim. *Id.* at 570. A claim is plausible on its face when the plaintiff asserts sufficient factual content,

allowing the court to reasonably infer the defendant's liability for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The pleadings are construed in a light most favorable to the nonmoving party. *Frye v. Brunswick Cnty. Bd. of Educ.*, 612 F. Supp. 2d 694, 701 (E.D.N.C. 2009) (citing *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967 (4th Cir. 1992)). Overall, when a party brings forth a claim, the issue is whether the party "is entitled to offer evidence to support the claims." *Diaz v. Int'l Longshore and Warehouse Union, Local 13*, 474 F.3d 1202, 1205 (9th Cir. 2007). A motion to dismiss should not be granted solely because there are doubts whether a plaintiff would prevail. *Toussaint v. Ham*, 292 S.C. 415, 415 (1987). Additionally, it is improper to grant a Motion to Dismiss without leave to amend except when it is clear beyond doubt that no amendment can save the Complaint. *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009).

ARGUMENT

I. Plaintiffs sufficiently have alleged the elements of Article III standing.

"The standing doctrine is designed to ensure that federal litigants possess a sufficiently personal stake in the outcome of any litigation they pursue." *Hodges v. Abraham*, 300 F.3d 432, 443 (4th Cir. 2002) (citing *Lujan*, 504 U.S. at 560). Of the three elements of standing, Federal Defendants primarily rely on the argument that Plaintiffs have failed to establish injury in fact and question the traceability of the Defendants' planned actions. Where, as here, Plaintiffs challenge the serious analytical deficiencies in the Defendants' NEPA analyses, the injury in fact standard is different, which Federal Defendants fail to recognize in their memorandum. Plaintiffs satisfy the requisite connection between the impacts Plaintiffs would suffer and the change in the plans for pit production, including not only the dual production sites but also the multiple sites implicated across the country. Particularly at this stage of the litigation when there has been a motion to dismiss based on a facial challenge, Federal Defendants' motion has no merit.

A. Plaintiffs have alleged a concrete injury in fact in the context of their NEPA claims.

It is well established the injury in fact alleged by the Plaintiffs must be concrete and particularized as well as actual or imminent. *Lujan*, 504 U.S. at 560. However, NEPA is a procedural statute and the *Lujan* Court recognized the unique nature of a procedural right:

> There is much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan, 504 U.S. at 572, n.7. *See also, Nat'l. Audubon Soc'y v. Dep't. of Navy*, 422 F.3d 174 (4th Cir. 2005 In the NEPA context, courts have found a concrete injury when a "geographic nexus" exists "'between the individual asserting the claim and the location suffering an environmental impact,' *i.e.*, when the plaintiff uses the area affected by the challenged activity." *WildEarth Guardians v. Ashe*, 2016 U.S. Dist. LEXIS 103306, 16 (D. Ariz. 2016) (quoting *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005)). Also with a NEPA claim, "the harm itself need not be immediate, as 'the federal project complained of may not affect the concrete interest for several years.'" *Sierra Club v. United States DOE*, 287 F.3d 1256, 1265 (10th Cir. 2002) (citing *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449, n.4 (10th Cir. 1996)).

Federal Defendants cite to *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015) for the proposition that an allegation of an increased risk of harm is too speculative to confer standing. Memo. In Supp. at 16. *Food & Water Watch* did not involve NEPA, however,

and the *Lujan* court made clear that the increased-risk-of-harm analysis in a NEPA case like this is very different. *Lujan*, 504 U.S. at 572, n.7. *See also Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1265-66 (10th Cir. 2002)("To establish an increased risk of environmental injury, Sierra Club does not need to prove that the mining project will surely harm the environment, and that it will go forth because of the easement… Sierra Club need only show that, in making its decision without following the NEPA and ESA procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm.").

Federal Defendants cite to Paragraph 10 of the Complaint, the general allegation applicable to all Plaintiffs, to argue there has not been sufficient articulation of the injury in fact requirement. Defs.' Mem. in Supp. at 9. The Complaint alleges, however, in detail the missions and objectives of the Plaintiffs and how the Federal Defendants' failure to take the "hard look" at the plans to change the pit production program, including alternatives to the dual locations, will increase the real risk of harm – a harm that the government has already recognized and yet failed to consider.

In this case, the Plaintiffs have demonstrated the additional unevaluated impacts that flow from the indisputable fact that there will be significant environmental impacts from the Federal Defendants' plutonium pit plan. The Defendants' failure to complete the PEIS precluded them from considering connected, cumulative, and similar actions as well as other programmatic alternatives. Compl. ¶¶ 3-5. The Plaintiffs have members who reside in diverse geographic locations across the country and therefore their injuries are distinct. Further, aside from Individual Plaintiff Tom Clements, the Plaintiffs have organizational standing through their members. "An organization has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought

requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir. 2000).

Accepting the Complaint's allegations as true, in addition to the allegations of the deprivation of environmental analysis and denial of an opportunity for informed public participation, Plaintiffs have set forth their particular interests and allegations of injury as follows:

1. Tom Clements

Plaintiff Tom Clements, individually and as a member and the Director of Plaintiff Savannah River Site Watch ("SRS Watch") will most clearly experience a certain increased risk of harm from pit production at SRS. He lives near SRS, within 50 miles of the nuclear facility and frequently recreates in the natural areas adjacent to or nearby SRS, "including the Crackerneck Wildlife Management Area and Ecological Reserve, owned by the U.S. Department of Energy and managed by the South Carolina Department of Natural Resources, and Audubon's Silver Sanctuary located on the Savannah River." Compl. ¶ 13. He "regularly travels on Interstate 20 between Columbia, SC and Atlanta, GA, the main DOE transport corridor between SRS and LANL, where plutonium shipped to SRS for disposal will be processed before being shipped back to New Mexico for disposal in the Waste Isolation Pilot Plant ("WIPP") facility, and the Pantex site in Texas, where plutonium pits will be stored prior to shipment to SRS for processing, if the SRS pit project proceeds as planned." Compl. ¶ 14. Mr. Clements alleged he "would be especially vulnerable to the impacts of the release of radioactive and hazardous materials" and to the "risk of a catastrophic failure of the repurposed and overhauled MOX facility, a facility that was never designed to support plutonium pit production." Compl. ¶ 15.

There can be no doubt of the significant environmental consequences of producing plutonium pits at SRS Not only have pits never been produced there, but production requires a

total overhaul of the defunct Mixed Oxide ("MOX") facility, which was the underlying subject matter in *South Carolina v. United States*, 912 F.3d 720, 742 (4th Cir. 2019). Not insignificant to the analysis is the fact that SRS has suffered from so much environmental contamination that it has been designated since 1989 a "Superfund" National Priorities List Site by the Environmental Protection Agency. Compl. ¶ 11; National Priorities List for Uncontrolled Hazardous Waste Sites, 44 Fed. Reg. 48,184 (Nov. 21, 1989) (to be codified at 40 C.F.R. pt. 300).

Federal Defendants have already recognized the environmental consequences of producing pits at SRS through their own determination preparation of an EIS was necessary for the SRS portion of the pit production program in 2020. As alleged in the Complaint, the EIS prepared for only the SRS portion of the plan acknowledges the harm from the Federal Defendants' conduct: "[i]f an accident involving the release of radioactive or chemical materials occurred, workers, member of the public, and the environment would be at risk. . . . The offsite public would also be at risk of exposure to the extent that meteorological conditions exist for the atmospheric dispersion of released hazardous materials." Compl. ¶ 96. The purpose of preparing a full EIS is to "provide a full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. ¶ 1502.1. The Federal Defendants clearly recognized there are impacts associated with repurposing a multi-billion-dollar facility on a Superfund site, for the purpose of producing components of nuclear weapons that will generate radioactive waste.

As a citizen and resident of the State of South Carolina, who has stated his clear recreational interests and proximity to SRS, Tom Clements has standing akin to the standing recognized by the Fourth Circuit in *Hodges v. Abraham*, 300 F.3d 4324th Cir. 2002). In *Hodges,*

Governor Jim Hodges sought a declaratory judgment and preliminary injunction based on alleged violations of his procedural rights under NEPA from Defendant's decision to transfer surplus plutonium to the Savannah River Site. 300 F.3d at 445. The Court in *Hodges* recognized that "[a] plaintiff only possesses such standing, however, if 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Id*. at 444 (quoting *Lujan*, 504 U.S. at 573 n.8). The Fourth Circuit held Governor Hodges had standing to bring the claim. "[T]he Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage" as a result of the DOE's plan to ship and store plutonium at the SRS. *Id.* at 445. The Governor's "threatened concrete interest" as a neighboring landowner was sufficient and his allegation that the "*uninformed* shipment of plutonium into South Carolina and its proposed storage of such plutonium at SRS" and the attendant risks of nuclear waste contamination established standing to enforce his procedural rights under NEPA. *Id.* at 444. (emphasis added).

2. Plaintiff Savannah River Site Watch (SRS Watch)

SRS Watch's Director, Tom Clements has personally been actively involved with the mission of the organization, which advocates in connection with DOE programs and policies relating to plutonium management and pit production. Compl. ¶ 11. "The harms to SRS Watch also include the deprivation of environmental information and analysis to which it is legally entitled and denial of an opportunity for informed public participation that is a cornerstone of the NEPA process." Compl. ¶ 15. Federal Defendants state that SRS "does not allege that such harm would arise specifically from the decision being challenged – as opposed to existing operations at Savannah River." Defs.' Mem. in Supp. at 10. However, to the extent the SRS allegations do not specifically identify the harm coming from the planned activities of Federal Defendants,

director and member Tom Clements does specifically allege the connection. Compl. ¶ 15. The Complaint clearly identifies the evidence giving rise to a real threat of a nuclear accident or failure given the events surrounding the failed MOX facility. Compl. ¶¶ 114-125. In addition, the threat of such an accident highlights the importance of the Federal Defendants' failure to conduct a new or supplemental PEIS—the crux of the Complaint—and further supports the Plaintiffs' claims that the decision not to prepare the requested PEIS amounted to an abuse of discretion and, therefore, a violation of NEPA.

3. Gullah/Geechee SIC

Plaintiff Gullah/Geechee Sea Island Coalition's ("Gullah/Geechee SIC") clear mission is to "preserve, protect, and promote its people's history, culture, language, and homeland." Compl. ¶ 16. Specifically, they allege that their members heavily rely on the water and that they reside downstream of SRS along the coasts of South Carolina and Georgia, receiving "the downward flow of the Savannah River," and would be significantly injured from a spill of radioactive material. *Id*. Thus, their members constitute a portion of the offsite public facing the risk of exposure to hazardous materials referenced in the Complaint. Compl. ¶ 96. Their members reside in the vicinity of what has been formally recognized as a completely new and risky production project and process. Gullah/Geechee SIC further alleges that it requested the preparation of a "new or supplemental programmatic EIS" in an April 20, 2021 letter to address the concerns regarding the uninformed environmental impacts of the Federal Defendants' plan to initiate and expand production of plutonium pits at the SRS. Compl. ¶ 16.

The significance of the Gullah/Geechee Nation has been recognized by Congress through the passage of the e Gullah/Geechee Cultural Heritage Act, H.R. 694, 109th Cong. § 2(3) (2005), an act aimed at protecting the interests of the Gullah/Geechee Nation. One of the three main purposes of the Act is to "assist in identifying and preserving sites, historical data, artifacts, and

objects associated with the Gullah/Geechee for the benefit and education of the public." *Id.* Furthermore, when conducting activity that directly affects the Heritage Corridor, all federal agencies must:

> (1) consult with the Secretary and the Commission with respect to such activities;
> (2) cooperate with the Secretary and the Commission in carrying out their duties under this Act and, to the maximum extent practicable, coordinate such activities with the carrying out of such duties; and
> (3) to the maximum extent practicable, conduct or support such activities in a manner in which the Commission determines will not have an adverse effect on the Heritage Corridor.

Gullah/Geechee Cultural Heritage Act, H.R. 694, 109th Cong. § 2(3) (2005).

The Gullah/Geechee Nation is an officially recognized nation via international human rights laws. The leaders of the Gullah/Geechee Nation and members of the Gullah/Geechee Sea Island Coalition work to protect the land and human rights of the citizens of the Gullah/Geechee Nation. The Federal Defendants' failure to comply with NEPA in regard to its pit production plan significantly increases the threat of injury to their interests, which are their reliance on the water for their livelihoods.

4. NukeWatch

Plaintiff Nuclear Watch of New Mexico's ("NukeWatch") mission "is to use research, public education, and effective citizen action to promote safety, environmental protection and cleanup at nuclear facilities, including LANL . . . ." Compl. ¶ 18. Jay Coghlan, who is certainly a member as its executive director since its inception in 1999, "regularly recreates just outside the boundaries of LANL and has been rock climbing on nearby crags for over 40 years." Compl. ¶ 19. Mr. Coghlan has alleged a concrete interest from both a geographic and recreational perspective. Further, the Complaint alleges the increased threat becomes likely and foreseeable given the safety issues that have already arisen at LANL. LANL's main plutonium facility was

closed for over three years due to safety concerns. Compl. ¶ 126. A faulty radioactive waste barrel that was prepared at LANL exploded at WIPP, also located in New Mexico, and resulted in a shutdown of almost three years. *Id.* Significantly, this accident occurred subsequent to the 2008 CT SPEIS, which the Federal Defendants claim is dispositive evidence they have evaluated the risks. Defendant DOE published its 2019 Assessment of the Management of Nuclear Safety Issues at LANL and specifically found deficiencies in their management of nuclear safety issues. Compl. ¶ 127.

In addition, the very real concerns regarding storage capacity at the WIPP facility in New Mexico alleged in the Complaint support the real threats to NukeWatch's concrete interests, such as the fact that its capacity is in significant question given its existing storage commitments. Under its current state approvals, the WIPP facility is actually required to cease accepting radioactive waste in 2024 and the facility must be closed down over a period of time thereafter. Compl. ¶ 86. WIPP is obligated to accept waste already from Idaho and South Carolina under two separate agreements. Compl. ¶ 91. Further, there are 11.5 metric tons of plutonium being stored at SRS and much of that waste is also planned to be sent to the WIPP. Compl. ¶ 94.

Given that a motion to dismiss is before this Court, assuming the Plaintiffs' allegations are true, these storage and safety issues significantly increase the threat to the interests of Mr. Coghlan as a member of NukeWatch, as well as the other members.

5. Tri-Valley CAREs

Tri-Valley CAREs has a similarly vested interest in the programmatic changes made by the Federal Defendants and without a complete NEPA analysis, the increase in the threat to its members is significant. Plaintiff Tri-Valley CAREs' members live and conduct the business of the organization within six miles of the Lawrence Livermore Nuclear Laboratory ("LLNL"). Compl. ¶ 22. Marylia Kelley, a member and the Executive Director of the organization, lives

within six miles of LLNL, which also has been designated an EPA Superfund site, identifying it as heavily contaminated. Compl. ¶ 23. One connection between the pit production plans and these Plaintiffs is this: the ultimate purpose of the pit production plan is not for maintenance of the existing nuclear weapons arsenal but for the new, planned W87-1 warhead being developed at LLNL with the elective element of a new-design pit. Compl. ¶¶ 27, 136. These connected, cumulative and similar actions have never been evaluated.

Additional connected actions will take place at LLNL, geographically proximate to Tri-Valley CAREs' members. The Complaint alleges that "expanded pit production will involve LLNL [Lawrence Livermore National Laboratory] receiving shipments of plutonium from LANL in New Mexico, 1,100 miles away. Tri-Valley CAREs will be harmed by the presence of material in heavily populated environments and also by significant uncertainties regarding these shipments" because the logistics involved "have neither been disclosed nor analyzed pursuant to NEPA." Compl. ¶ 29. Federal Defendants argue that Plaintiff Tri-Valley CAREs' "alleged risks of harm appear to arise from 'a new warhead replacement program' being undertaken at Livermore and unidentified 'sites other than [Los Alamos] and [Savannah River]'; however, that program is not authorized by the decision challenged by Plaintiffs in this case." Defs.' Mem. in Supp. at 12. This argument misconstrues TriValley CAREs' claims: like the other Plaintiffs, TriValley CAREs challenges the Federal Defendants' decision to not prepare a new or supplemental PEIS, and the additional uncertainty and risk created by that failure to analyze the connected, cumulative, and similar actions that comprise the plan to expand the plutonium pit production at two sites across the country harms TriValley CARE's interests. The Federal Defendants' disregard of the implications of the planned expansion of plutonium pit production on sites like LLNL—that directly affect TriValley CAREs—underscores the basis of Plaintiffs'

claims: the Federal Defendants' have failed to adequately assess the environmental impacts and alternatives to the proposed action across the entire program.

For example, with regard to the WIPP in New Mexico, which is the only site for storing waste from plutonium pit production (Compl. ¶ 85), the Complaint points to the uncertainty created by the state permit modifications that will be required for its continued operation (Compl. ¶¶ 86, 87) and that the storage capacity at the WIPP has been called into question. Compl. ¶¶ 92-94. Further, not only have the environmental impacts not been evaluated, but also no mitigation measures or alternatives have been evaluated. Both SRS and LANL will rely on connected actions at support locations across the country for the planned pit production, such as those at the Lawrence Livermore National Laboratory, the Waste Isolation Pilot Plant, the Pantex Plant and others. Compl. ¶ 104. Furthermore, the Plaintiffs assert in the Complaint their geographic nexus to the area affected by government action. The Complaint details how the Plaintiffs are directly impacted by the DOE and NNSA's conduct, including the connected plan warhead production at LLNL in California, which have never been evaluated together with the dual site pit production and increase in pit production numbers.

B. Federal Defendants' reliance on *South Carolina v. United States* is misplaced.

Federal Defendants rely on *South Carolina v. United States*, 912 F.3d 720 (4th Cir. 2019) to argue the Complaint's allegations are "speculative and rely on an attenuated chain of causation … ." Defs.' Mem. in Supp. At 18. Plaintiffs submit *South Carolin*a is distinguishable and the case at bar is more in line with *Hodges v. Abraham*, 300 F.3d 432, 443 (4th Cir. 2002). Federal Defendants mistakenly focus on Plaintiffs' alleged risk of a nuclear accident as requiring an "attenuated chain of events." Instead, the "injury" alleged is the proposed plan to initiate and expand production of plutonium pits—which does not require an "attenuated chain of events"—

without the appropriate evaluation of environmental risks, including a potential nuclear accident or failure.

South Carolina v. United States involved an action by the State alleging that a failure to prepare a Supplemental EIS would result, after several conditional events occurred, in the State South Carolina becoming a permanent repository for nuclear waste. The State argued it was "being rendered the permanent repository of weapons-grade plutonium as a result of [DOE's] decision to terminate the MOX Facility without first complying with NEPA . . .." *Id.* at 725-27. The Fourth Circuit rejected this argument, finding the alleged injury was "too speculative" and relied on a "highly attenuated set of circumstances" to establish a concrete injury-in-fact to satisfy the standing requirement. *Id.* at 728. The Court emphasized the specific alleged injury—that South Carolina would become the *permanent* repository for nuclear material—was speculative for several reasons. *Id.* First, the existing EIS evaluated the storage of plutonium at SRS for fifty years, and that analysis would not expire for another 28 years, providing DOE adequate time for identifying an alternative method for disposing or otherwise removing the nuclear material from South Carolina. *Id.* Second, "Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina." *Id.* In addition, South Carolina had *already* "successfully brought suit pursuant to the Administrative Procedures Act to enforce these congressionally mandated deadlines via a mandatory injunction." *Id.* (citing *South Carolina v. United States*, 907 F.3d 742 (4th Cir. 2018) (ordering the Department of Energy to remove one metric ton of plutonium within two years). As the Court noted, a speculative "chain of possibilities" had to occur for South Carolina's alleged injury to become a reality:

> (1) The proposed Dilute and Dispose method must fail;
> (2) The Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and

> (3) The Department of Energy must breach its statutory obligation to remove the nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation.

Id. Additionally, "that several of the links in this 'chain of possibilities' the State's standing theory contemplates require our coordinate branches to either breach or abandon their existing commitments to ensure timely removal of the nuclear material at the Savannah River Site further weighs against treating the South Carolina's alleged injury as conferring standing." *Id*.

The *South Carolina* court also distinguished the case before it from *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002). The Fourth Circuit found "unlike in *Hodges*, South Carolina does not argue that its injury, as a neighboring landowner," was "attributable to the *current* storage of nuclear material at the [SRS] or the inadequacy of the [EIS] pursuant to which the nuclear material is *currently* stored." 912 F.3d at 729. Instead, the Court emphasized, South Carolina's alleged injury relied on adverse environmental impacts "*decades in the future*" beyond the year when the existing EIS's analysis expired. *Id*.

The facts in this case align with those in *Hodges*. Here, Plaintiffs have similarly alleged a threatened concrete interest: a geographical nexus to the sites affected by the Federal Defendants' proposed action, in addition to recreational, aesthetic, and environmental interests. Plaintiffs have alleged these interests are "threatened by the [Federal Defendants'] uninformed" plan to initiate production of plutonium pits at SRS and expand production nationwide without adequately evaluating the environmental risks on a programmatic basis. *See Hodges*, 300 F.3d at 444. Unlike in *South Carolina* when the alleged injury would potentially occur nearly thirty years later, this plan is imminent, with production of "qualification plutonium pits" congressionally authorized to begin in 2021. 912 F.3d at 728; *see also* 50 U.S.C. § 2538(a)(1). The fact that this plan may be delayed for an unknown time frame does not negate the

imminence of the intended production. Instead, DOE's plan to expand plutonium pit production is more analogous to the circumstances in *Hodges* when DOE announced it would "immediately begin shipment of the Rocky Flats plutonium to SRS." 300 F.3d at 442.

Federal Defendants cite to two other cases dismissing claims on lack of standing where the Court identified multiple events that would have to occur before an injury could arise. *See Williams v. Lew*, 919 F.3d 466 (D.C. Cir. 2016); *Adult Video Ass'n. v. U.S. Dept. of Just*., 71 F.3d 563 (6th Cir. 1995). Each of these cases is distinguishable from Plaintiffs' claims. Unlike either *Williams* or *Adult Video*, Plaintiffs' claims do not require a series of events for their injury to be realized because their injury is not a potential nuclear accident or catastrophic failure as asserted by the Federal Defendants. Instead, Plaintiffs seek to enforce their *procedural* rights under NEPA and require the Federal Defendants to comply with the statutory mandate to adequately evaluate the environmental impacts of the proposed action, which includes the assessment of potential nuclear accidents and mitigation measures that may avoid such accidents. *See Hodges*, 300 F.3d at 446 (finding Governor Hodges possessed standing to enforce his NEPA procedural rights); 40 C.F.R. § 1502.1 (noting the purpose of NEPA is to inform decisionmakers and the public).

The plan to produce a larger number of pits at both LANL and SRS contemporaneously does not depend on "an attenuated series of events" as in *South Carolin*a; this is a very real and imminent plan. Plaintiffs are not asking the Court to assume anything with regard to the plan to increase pit production and the planned locations for same.

C. Plaintiffs have alleged threatened injuries traceable to the Federal Defendants' actions.

To demonstrate standing, Plaintiffs also must show a causal connection between the injury and the challenged conduct. *Lujan*, 504 U.S. at 560. "[I]n a NEPA procedural injury case, the petitioner need demonstrate only that "the procedural step was connected to the substantive

result," not that "the agency would have reached a different substantive result" but for the alleged procedural error." *Sierra Club v. Federal Energy Regulatory Comm.*, 827 F.3d 59, 65 (D.C. Cir. 2016) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013). In addition, "[o]nce a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed." *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (citing *Lujan*, 504 U.S. at 572 n.7).

Federal Defendants claim that SRS does not allege the requisite traceability: that it "does not allege that such harm would arise specifically from the decision being challenged – as opposed to existing operations at Savannah River." Defs.' Mem. in Supp. at 10. Plaintiffs have shown a traceable, causal connection between the injury and the challenged conduct, a requirement of Article III standing. *Lujan*, 504 U.S. at 560. A NEPA claim only requires a plaintiff to show "that the agency's failure to follow the NEPA's procedures led to an increased risk of environmental harm," rather than "that the Defendant's decision will certainly cause environmental injury." *Jarita Mesa Livestock Grazing Ass'n v. United States Forest Serv.*, 140 F. Supp. 3d 1123, 1162 (D.N.M. 2015); *See Lucero*, 102 F.3d at 451.

In *Jarita Mesa*, the court found that the Plaintiffs could trace the risk of harm (to their environmental, aesthetic, recreational, cultural, and spiritual interests) to the agency's alleged failure to follow the procedures of NEPA. *Jarita Mesa*, 140 F. Supp. 3d at 1162, 1173-74. The Plaintiffs asserted that the agency's *uninformed* decision failed to take into consideration multiple factors that would lead to damaged lands. *Id.* at 1123, 1173-74. Though this case pertains to land management rather than plutonium pit production, it is analogous to the pit case because the Plaintiffs of both cases are challenging whether the Defendants correctly followed NEPA's procedures. Here, the Plaintiffs sufficiently asserted that the agencies' failure to

complete the proper PEIS will lead to an increase in environmental harm; as a result, Plaintiffs have established the causation element of standing for the alleged NEPA violations.

If the Court agrees with the Defendants that the existing Complaint fails to include allegations sufficient, Plaintiffs request leave to amend in order to clarify the harms to their interests.

II. Federal Defendants have focused their challenges on a claim the Plaintiffs did not bring in this case.

Plaintiffs have challenged the Federal Defendants' *discretionary decision* on how to fulfill the mandate by Congress on plutonium pit production, not the congressional mandate itself. Federal Defendants selectively pluck portions of sentences out of context to falsely assert that Plaintiffs brought a challenge they plainly did not bring. Federal Defendants ignore the actual "Claims for Relief" section in the Complaint, which very clearly and specifically describes the claims that were actually brought. None of these claims challenge Congress's mandate for increased pit production.

The Complaint alleges the Defendants' failure to complete a new or supplemental PEIS precluded the Defendants from taking the necessary "hard look" at the programmatic decisions on pit production; thus, they violated NEPA. Instead, Federal Defendants improperly took a tiered approach to the NEPA process, fundamentally burying the most accurate picture of the project's environmental impact under documents that have either already lost relevancy or merely scratched the surface of the potential effects. The allegations in the Complaint demonstrate why a PEIS is required and therefore, the Federal Defendants' failure to complete the proper evaluation violates NEPA.

NEPA's main purpose is to provide a procedural framework. *Nat'l. Audubon Soc'y. v. Hoffman*, 132 F.3d 7, 14 (2d. Cir. 1997). Thus, courts have the responsibility to ensure that

governmental agencies are complying with their Congress-imposed statutory duty. *Id*. The court reasonably can infer from the factual allegations in the Complaint that because the programmatic decision of the Federal Defendants constitutes connected, cumulative, and similar actions, a single PEIS is required under NEPA.

Federal Defendants assert this Court lacks subject matter jurisdiction because Congress imposed the requirement for expansion of plutonium pit production; as a result, Defendants contend that Plaintiffs cannot challenge the decision under the APA and the Defendants "have no obligation under NEPA to evaluate the expansion of plutonium pit production." Defs.' Mem. in Supp. at. 25.

First, Federal Defendants misunderstand and mischaracterize Plaintiffs' claim as one that "directly challenges the 'decision to more than quadruple the production of plutonium pits.'" *Id*. at 26 (quoting Compl. ¶ 1). Federal Defendants notably omit the beginning of that sentence from the Complaint, which clearly indicates that the challenge is the failure to prepare a new or supplemental Programmatic Environmental Impact Statement. Defendants effectively concede such a claim can proceed in footnote 12 of its memorandum upon the Court's determination that Plaintiffs have standing.

Plaintiffs recognize that "NEPA itself does not mandate particular results, but simply prescribes the necessary process," and the complaint seeks relief for the Defendants' failure to comply with NEPA's necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The policy goals of NEPA are accomplished "through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." *Id.* at 350. Although the "hard look" mandated by NEPA may affect the agency's substantive decision, it is not "constrained by NEPA from deciding that other values outweigh the environmental costs" *Id.* Nonetheless, the agency must comply with the statute's and the

regulations' procedural requirements, such as preparing an environmental impact statement and considering alternatives, or a court may require compliance. *Sierra Club v. Watkins*, 808 F.Supp. 852, 859 (D.D.C. 1991).

The final agency action Plaintiffs challenge is not Congress' decision to require the production of at least 80 plutonium pits, but the Defendants' decision *not* to prepare a new or supplemental PEIS assessing significant environmental impacts and reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. *See* 40 C.F.R. § 1502.1. This Court has the jurisdiction to determine whether the Defendants' decision not to prepare a new or supplemental PEIS was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; … [or] without observance of the procedure required by law." 5 U.S.C. § 706(2)(A) & (D). The issue here is effectively same as the one presented in *Marsh v. Oregon Natural Resources Council*: whether the agency's decision not to prepare a supplemental environmental impact statement should be set aside under the arbitrary and capricious standard of the APA. 490 U.S. 360 (1989). The Supreme Court determined the agency's decision was reviewable despite the fact that the underlying federal action was the construction of a dam *authorized by Congress*. *Id.* at 363-64.

Second, the implication of Defendants' argument that they have no obligation to evaluate the expansion of plutonium pit production is that they have no obligation to comply with NEPA's mandate for "all agencies of the Federal Government" to provide a "detailed statement" for any "report on proposals for … major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

NEPA requires the agency's "detailed statement" to address:

> (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action,

> (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

Among the "alternatives to the proposed action" that must be addressed, "agencies shall . . . [i]nclude the no action alternative." 40 C.F.R. § 1502.14(c). Neither the Act itself nor its implementing regulations exempt agencies from conducting this analysis simply because Congress authorized or ordered the underlying action, and such a blanket exemption would contradict the purpose of the environmental impact statement. As the regulations outline,

> The primary purpose of an environmental impact statement. . . is to ensure agencies consider the environmental impacts of their actions in decision making. It shall provide full and fair discussion of significant environmental impacts and *shall inform decision makers and the public* of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.

40 C.F.R. § 1502.1 (emphasis added). NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision[-]making process and the implementation of that decision." *Robertson*, 490 U.S. at 339 (1989). "This audience includes the President, who is responsible for the agency's policy, and Congress, which has authorized the agency's actions." *Watkins,* 808 F.Supp. at 858 (noting the larger audience also includes the public). Therefore, even when Congress has legislatively mandated an action, the environmental impact statement's discussion of alternatives offers both the public and elected officials the critical opportunity to evaluate the impact on the environment and determine whether to *alter the decision* based on the best available information. *See id.* ("An environmental impact statement is a document that *informs* Federal agency *decision making* and *the public*." (emphasis added)); *Watkins*, 808 F.Supp. at 858 ("These decisionmakers need access to

information concerning environmental effects of the proposed program to decide whether they will support or overrule the agency's action; environmental documentation aids the President and Congress in deciding larger issues of policy that may include matters outside the scope of a single agency's discretion.").

The Federal Defendants' assertion that it has no obligation to evaluate the expansion of plutonium pit production violates NEPA's requirements and impedes the public and decision makers—Congress, and by extension the public who elected its representatives—from having the necessary information to assess whether the expansion of plutonium pit production generally and across two sites specifically is appropriate. Effectively, the Federal Defendants seek to insulate themselves from their NEPA responsibilities by blaming Congress and ignoring the clear statutory mandate to evaluate the environmental impacts and the available alternatives.

Further, the Federal Defendants' argument that Plaintiffs' claims somehow constitute a "political question" (Mem. in Supp. At 32) is misplaced. Congress is well aware it can exempt particular activities or projects from NEPA review but the pit production process was not exempted. If Congress had thought this warranted exempting the plan from NEPA review it would have done so. *See Izaak Walton League of America v. Marsh*, 655 F.2d 346, 367-68 (D.C. Cir. 1981)("Congress has shown that it is fully capable of expressing its desire to exempt projects from NEPA… . Given Congress' clearly expressed desire to ensure that all government actions are taken in accordance with NEPA, and its ability to expressly override the requirements of the Act, we believe that, even when substantive legislation is involved, repeal by implication should be found only in the rarest of circumstances. Absent very strong evidence in the legislative history demonstrating a congressional desire to repeal NEPA, or a direct contradiction between that Act and the new legislation, claims under NEPA should be reviewed.").

Plaintiffs allege the determination to expand plutonium pit production, and to do so at two different sites across the United States, necessitates a new or supplemental PEIS because it represents a significant change from prior NEPA analyses and involves "connected, similar actions" that will generate cumulative impacts. As a result, the Federal Defendants' refusal to prepare a new or supplemental PEIS is a final agency action that is properly reviewable by this Court under the APA.

CONCLUSION

Based on the foregoing, Plaintiffs request this Court deny the Federal Defendants' Motion to Dismiss. In the event this Court finds clarification of Plaintiffs' interests and threatened injuries necessary, Plaintiffs request leave to amend their Complaint.

Respectfully submitted this 25th of October, 2021.

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