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

SAVANNAH RIVER SITE WATCH, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF ENERGY, JENNIFER GRANHOLM, in her official capacity as the Secretary, et al., Defendants.	Civil Action Number: 1:21-cv-01942-MGL

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

In 2021 Plaintiffs filed their Original Complaint challenging the Department of Energy's ("DOE") and the National Nuclear Security Administration's ("NNSA") implementation of Congress's statutory command to produce 80 plutonium pits (nuclear weapon components) per year. Plaintiffs' Original Complaint appeared to challenge both the number of plutonium pits to be produced annually and DOE's and NNSA's decision to produce plutonium pits at two locations – a to-be-built facility located at the Savannah River Site ("Savannah River") near Aiken, South Carolina, and an existing facility at Los Alamos National Laboratory ("Los Alamos"), in Los Alamos, New Mexico. After DOE and NNSA moved to dismiss Plaintiffs' Original Complaint, the Court granted Plaintiffs leave to amend. Plaintiffs recently amended their Complaint making clear they are not challenging the Congressional mandate to produce 80 plutonium pits per year. Instead, Plaintiffs sole claim is based on the alleged failure of DOE and NNSA to prepare a new or supplemental programmatic environmental impact statement in violation of the National Environmental Policy Act when it implemented a two-site production strategy.

Despite adding certain allegations and removing others, Plaintiffs have still failed to establish Article III standing and have also failed to state a claim under the Administrative Procedure Act ("APA") and the National Environmental Policy Act ("NEPA"). Specifically, the allegations in Plaintiffs' Amended Complaint are insufficient because:

i. Plaintiffs fail to allege any actual, imminent injury to themselves or the environment sufficient to confer Article III standing;

ii. Plaintiffs fail to establish a causal connection between their alleged injuries and the agencies' decision to forgo additional programmatic NEPA work and have therefore failed to establish standing;

iii. Plaintiffs fail to establish a concrete injury arising from their alleged informational harms and therefore cannot rely on pure procedural violations to establish standing;

iv. The organizational plaintiffs fail to allege facts that could support a finding of direct injury to themselves as organizations because they have not shown that the Federal Defendants' decision not to prepare a new or supplemental environmental impact study of plutonium pit production has impeded their organizational mission or caused them to expend organizational resources to combat the alleged harm.

v. Plaintiffs fail to allege a change to the plutonium pit production plan that will significantly affect the environment in a way that has not been previously studied, and therefore NEPA supplementation pursuant to 40 C.F.R. § 1502.9(d)(1) and 10 C.F.R. § 1021.314(a) is not required;

vi. Plaintiffs fail to allege facts showing that DOE/NNSA improperly segmented their NEPA analyses because Plaintiffs concede that the agencies tiered there site-specific analyses to prior programmatic analyses; and

vii. Plaintiffs fail to allege facts showing that the specific agency inaction they are challenging adversely affected them and therefore have failed to establish statutory standing under the APA.

For these reasons, which are more thoroughly discussed below, the Federal Defendants respectfully request that Plaintiffs' Amended Complaint be dismissed under Rules 12(b)(1) and 12(b)(6).

I. BACKGROUND

A. History of Plutonium Pit Production

NNSA's mission is to establish and maintain a safe, secure, and reliable nuclear weapons stockpile. It is charged with creating an infrastructure that can produce and maintain nuclear weapons and their component parts (also known as the nuclear weapons complex ("Complex")) in a manner that (i) meets our national security requirements and (ii) is cost-effective. A significant part of this mission is to oversee the production of plutonium pits—which are an essential component of nuclear weapons and necessary to maintain the nuclear stockpile.

The executive and legislative branches of the United States' government have consistently recognized a need to eventually produce 80 pits per year to service the Nation's nuclear arsenal.[1] DOE and NNSA have spent decades planning for a program to produce plutonium pits at a rate of no fewer than 80 pits per year beginning in the year 2030. This planning became even more critical when Congress passed the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015 ("2015 Act") and the National Defense Authorization Act for Fiscal Year 2020 ("2020 Act"), both of which amended the Atomic Energy Defense Act ("AEDA") to increase the United States' production of plutonium pits for nuclear weapons to at least 80 plutonium pits by the year 2030.[2] Congress' decision to expand plutonium pit production and establish an express production schedule shows Congress' judgment that both actions were

[1] *See*, *e.g.*, Joint U.S. Department of Defense–DOE white paper, *National Security and Nuclear Weapons in the 21st Century,* September 2008, https://programs.fas.org/ssp/nukes/doctrine/Document_NucPolicyIn21Century_092308.pdf; The 2018 Nuclear Posture Review, https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF.

[2] Plaintiffs' Amended Complaint suggests that NNSA will not be able to comply with the statutory mandate to produce 80 plutonium pits each year by 2030. Am. Compl. ¶ 3, ECF No. 21. 50 U.S. Code § 2538a(b) requires the Secretary of Energy to file a certification with Congress each year stating whether or not the "national security enterprise [can] meet the requirements under subsection (a) [the plutonium pit production requirements]." If the Secretary certifies that the nuclear security enterprise cannot meet the plutonium pit production requirements, she must "submit to the congressional defense committees a plan to enable the nuclear security enterprise to meet the requirements under subsection (a)." *Id.*, § 2538a(c). Following a detailed review of completed conceptual design and cost schedule range estimates (and after the SRS EIS ROD was issued in November 2020), it became evident that all required design, construction, commissioning, pit quality certification and production ramp-up to 50 pits per year at Savannah River by the end of 2030 is not currently achievable due to a number of technical, supply chain, construction execution, and funding related issues. The Secretary will make the required § 2538a(b) certification and then it will be up to Congress whether to allocate additional resources to try to achieve its 2030 deadline.

necessary to service the United States' aging nuclear arsenal and to provide plutonium pits for the enduring stockpile. *See* 50 U.S.C. §2538a, as amended.

NNSA's current pit production capacity cannot meet Congress' production mandate. Therefore, NNSA has studied how best to implement §2538a to ensure the country's national security needs are met. Ultimately, NNSA decided that the best way to realize §2538a production and timing requirements was to implement a two-site strategy, which also had the additional benefits of (i) improving the resiliency, flexibility, and redundancy of the nuclear security enterprise by reducing reliance on a single production site; (ii) enabling the capability to allow for enhanced warhead safety and security to meet Department of Defense ("DoD") and NNSA requirements; (iii) allowing for the deliberate, methodical replacement of older existing plutonium pits with newly manufactured pits as risk mitigation against plutonium aging; and (iv) responding to changes in deterrent requirements driven by renewed competition between the great powers. *See* 85 Fed. Reg. 70598 (Nov. 5, 2020). Ultimately, the two site strategy involves expanding existing plutonium pit production at Los Alamos and re-purposing the government's Mixed-Oxide Fuel Fabrication Facility ("MOX Facility") at Savannah River to produce additional plutonium pits. To comply with NEPA, NNSA studied the two-site strategy in the *Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement* (hereinafter the "2019 SPEIS SA") (cited as DOE/EIS-0236-S4-SA-02) in 2019,[3] and then undertook two site-specific NEPA analyses that were tiered to the original programmatic NEPA

[3] DOE's implementing procedures allow the agency to prepare supplemental analyses to determine whether "(i) [a]n existing EIS should be supplemented; (ii) [a] new EIS should be prepared; or (iii) [n]o further NEPA documentation is required." *See* 10 C.F.R. § 1021.314(c)(2).

documents and that studied the cumulative impacts of producing plutonium pits at two locations. *See* https://www.energy.gov/nepa/downloads/doeeis-0236-s4-sa-02-final-supplement-analysis.

Specifically, the 2019 SPEIS SA reviewed numerous prior NEPA analyses spanning nearly three decades – including two programmatic EISs and multiple site-specific EISs and EAs –[4] and evaluated the potential complex-wide environmental impacts of producing up to 80 pits per year at both Savannah River and Los Alamos. In the 2019 SPEIS SA, NNSA, in compliance with DOE's NEPA regulations, determined that a new or supplemental programmatic environmental

[4] The first programmatic EIS in the post-Cold War era was the *Stockpile Stewardship and Management Programmatic Environmental Impact Statement* ("1996 SSM PEIS"). Am. Compl. ¶ 104; https://www.energy.gov/nepa/downloads/eis-0236-final-programmatic-environmental-impact-statement. The 1996 SSM PEIS evaluated reasonable alternatives for reestablishing interim pit production capability on a small scale. *Id.* It analyzed a production level of 80 pits per year at Savannah River and Los Alamos at a programmatic level and associated impacts across the Complex. *Id.*

In 2008, NNSA prepared the Final Complex Transformation Supplemental Programmatic Environmental Impact Statement ("2008 SPEIS"), which supplemented the 1996 SSM PEIS, and further surveyed the nationwide environmental impacts of the plutonium pit production program, as well as other aspects of the Complex. Am. Compl. ¶ 107; https://www.energy.gov/nepa/downloads/doeeis-0236-s4-final-supplemental-programmatic-environmental-impact-statement. Among other things, the 2008 SPEIS evaluated the potential environmental impacts (under two alternatives) of producing between 125 and 200 pits per year at Los Alamos or Savannah River, among other sites. *Id.*

In addition to these programmatic environmental studies, NNSA also conducted numerous site-specific studies as part of its ongoing and robust effort to ensure full analysis of all potential environmental impacts arising from NNSA's management of the nuclear weapons complex, including the production of nuclear pits. These site-specific studies, all of which were referenced by Plaintiffs' Amended Complaint, included: (i) the *Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico* ("1999 Los Alamos SWEIS"), *see* Am. Compl. ¶ 41; the 2008 *Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico* ("2008 Los Alamos SWEIS"), *id.* ¶¶ 130, 140; the 2020 *Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory* ("2020 Los Alamos SA"), *id.*; and the 2020 *Final Environmental Impact Statement for Plutonium Pit Production at the Savannah River Site in South Carolina* ("2020 Savannah River EIS"), *id.*, ¶ 122.

impact statement ("PEIS") was unnecessary because all of its prior NEPA work had adequately evaluated the environmental impacts of plutonium pit production at levels similar to those of the impacts of pit production at Savannah River and Los Alamos.[5]

Nonetheless, NNSA *still* prepared site-specific environmental analyses addressing implementation of the program at both Los Alamos and Savannah River and tiered those site-specific documents to the 1996 SSM PEIS and 2008 SPEIS. Following completion of the 2020 Los Alamos SA and 2020 Savannah River EIS, both of which comprehensively addressed the potential site-specific environmental impacts of plutonium pit production at those two sites, NNSA published two programmatic Amended Records of Decision ("RODs") and two site-specific RODs to implement its program-wide plan for plutonium pit production at the two facilities on September 2, 2020 and November 5, 2020. *See* Amended Record of Decision for the Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory, Los Alamos, NM, 85 Fed. Reg. 54544 (Sept. 2, 2020); Amended Record of Decision for the Complex Transformation Supplemental Programmatic Environmental Impact Statement, 85 Fed. Reg. 54550 (Sept. 2, 2020); Amended Record of Decision for the Complex Transformation Supplemental Programmatic Environmental Impact Statement, 85 Fed. Reg. 70598 (Nov. 5, 2020); Record of Decision for Final Environmental Impact Statement (EIS) for Plutonium Pit Production at the Savannah River Site (SRS) in South Carolina, 85 Fed. Reg. 70601 (Nov. 5, 2020).

[5] The 2019 SPEIS SA specifically stated that "NNSA has determined that the proposed action does not constitute a substantial change from actions analyzed previously and there are no significant new circumstances or information relevant to environmental concerns." *See* DOE/EIS-0236-S4-SA-02 at A-12.

B. Plaintiffs' Amended Complaint

In response to those two programmatic Amended RODs, one site-specific Amended ROD for Los Alamos, and one site-specific ROD for Savannah River, Plaintiffs—an individual and environmental groups from South Carolina, an environmental group from New Mexico, and an environmental group from California—filed this lawsuit alleging that DOE; Jennifer Granholm, the Secretary of Energy; NNSA; and Jill Hruby, Administrator of NNSA, (together "Federal Defendants") violated NEPA by initiating new plutonium pit production at Savannah River and expanding pit production at Los Alamos without completing a new or supplemental programmatic environmental impact statement. Am. Compl. ¶ 1. Plaintiffs, as alleged, are comprised of "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." *Id.* ¶ 10.

Savannah River Site Watch ("SRS Watch") is a non-profit organization based in Columbia, South Carolina. *Id.* ¶ 11. SRS Watch's mission is to "monitor programs and policies being pursued by the DOE, with a focus on activities at the Savannah River Site." *Id.* It performs its mission by research, public outreach, filing FOIA requests, and advocacy and education. *Id.* SRS Watch claims that its interests "are impacted or harmed by the plutonium storage, processing, and management and nuclear waste disposal caused by Defendants' decision to implement the plan to produce plutonium pits at [Savannah River], and to do so without completing a PEIS." *Id.* It further alleges that it is harmed by the "failure to prepare a PEIS because it constitutes the deprivation of environmental information and analysis to which it is legally entitled and directly

frustrates its mission by preventing it from adequately educating the public and monitoring DOE activities and programs." *Id.* ¶ 13.

Tom Clements is the director of SRS Watch. *Id.* ¶ 15. Clements lives approximately 50 miles from Savannah River and also claims he recreates in certain "natural areas adjacent to or near [Savannah River.]" *Id.* Clements also alleges that he "regularly travels on Interstate 20 between Columbia, [SC] and Atlanta, [GA]," which he claims is a segment of the "transport corridor" on which plutonium will be shipped from Los Alamos (in New Mexico) and "the Pantex site in Texas" where plutonium pits will be stored prior to shipment to Savannah River for processing and after production at Savannah River. *Id.* ¶ 22. Clements does not allege beyond his own speculation, which includes potential terrorist attacks, how the shipment of nuclear materials on this stretch of highway presents a specific, imminent risk to him. *Id.* ¶¶ 22–23. Clements also alleges there is a "risk of a catastrophic failure of the repurposed and overhauled MOX" from hypothetical earthquakes or plutonium fires and that these risks will frustrate his recreational and professional activities near Savannah River. *Id.* ¶¶ 20, 24.

Gullah/Geechee Sea Island Coalition ("Gullah/Geechee") is a "non-profit organization that operates in accordance with the mission of the Gullah/Geechee Nation to preserve, protect, and promote its people's history, culture, language, and homeland." *Id.* ¶ 27. The Gullah/Geechee alleges there is a "risk of a catastrophic failure of the repurposed and overhauled MOX Facility," *id.* ¶ 38, which in turn could imperil the Gullah/Geechee's spiritual, fishing, and recreational uses of the Savannah River. *Id.* ¶¶ 28–32. The Amended Complaint alleges that Gullah/Geechee members work and reside from North Carolina to Florida and that some members "reside downstream of [Savannah River.]" *Id.* ¶¶ 27, 39. But beyond offering this broad geographic description of its membership, which spans half of the eastern seaboard, the Amended Complaint

offers no specific allegations about how close the Gullah/Geechee's members are to Savannah River or how they will be harmed from pit production. And although Plaintiffs claim the Gullah/Geechee are "underserved communities of color"[6] near the Savannah River plutonium proceeding facility project, they do not identify these communities or their proximity to the project. *See* Am. Compl. ¶ 39. Finally, the Gullah/Geechee alleges it could have more easily advanced its interests in preserving its members' culture and recreational activities if it had not been deprived of information that would have been made available in a programmatic EIS, but it does not allege how this "lack of information" concretely harmed it. *See id.* ¶¶ 34–36.

Nuclear Watch New Mexico ("NukeWatch") is a nonprofit organization based in Albuquerque, New Mexico, with a mission "to use research, public education, and effective citizen action to promote safety, environmental protection, and cleanup at nuclear facilities, including [Los Alamos], and to advocate for U.S. leadership toward a world free of nuclear weapons." *Id.* ¶ 40. NukeWatch alleges that its Executive Director Jay Coghlan "regularly recreates just outside the boundaries of [Los Alamos]," and that he travels near Los Alamos for business around three times per year. *See generally id.* ¶¶ 42–43. The Amended Complaint alleges that plutonium has migrated from Los Alamos "through the streambed to the Rio Grande," and that there "have been measurable detections of plutonium up to 17 miles downstream, in Cochiti Lake." *Id.* ¶ 42. NukeWatch claims that the absence of a new or supplemental PEIS thwarts its mission of "monitoring DOE and NNSA programs and policies, specifically at [Los Alamos], educating the public, and engaging in advocacy to elected officials." *Id.* ¶¶ 44–46. NukeWatch also claims that

[6] Plaintiffs' Amended Complaint references President Biden's Executive Order on Environmental Justice. *See*, *e.g.*, Am. Compl. ¶ 7. Section 301 of the Executive Order makes clear that it "does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Exec. Order No. 14008, 86 Fed. Reg. 7619, 7633 (Jan. 27, 2021).

its theoretical harms from nuclear exposures are real because a "radioactive waste drum [burst] in February of 2014 at the W[aste] I[solation] P[ilot] P[lant] ["WIPP"]" and "there are approximately 100 incompatibly mixed radioactive waste drums at [Los Alamo's] area G, which is located approximately three miles from where Mr. Coghlan frequently climbs." *Id.* ¶¶ 47–48. Finally, NukeWatch alleges that the likelihood of a catastrophic accident at Los Alamos has increased because of climate change and the increased occurrence of wild fires in New Mexico. *Id.* ¶ 51.

Finally, Tri-Valley Communities Against a Radioactive Environment ("Tri-Valley CARES") is a nonprofit organization "with a mission to educate its members and other stakeholders, including decision-makers and the public, about U.S. nuclear weapons and their associated toxic and radioactive wastes with a focus on environmental and health risks at [Lawrence Livermore National Laboratory ("Livermore")] and throughout the nuclear weapons complex." *Id.* ¶ 57. Plaintiffs allege that the majority of Tri-Valley CARES' 6,000 members "reside . . . or recreate within 50 miles" of Livermore. *Id.* ¶ 54. They also allege that Tri-Valley CARES' Executive Director Marylia Kelly lives within six miles of Livermore. *Id.* ¶ 55. Plaintiffs claim that Tri-Valley CARES Executive Directors, members, and staff regularly attend meetings at Livermore. *Id.* ¶ 56. Like the other Plaintiff organizations, Tri-Valley CARES alleges harms to its educational and policy missions due to alleged inadequacies in the NEPA process. *Id.* ¶¶ 62–67. Although Plaintiffs effectively concede that pit production does not take place at Livermore and that plutonium pits will not be installed in the warheads at Livermore,[7] they allege that activities at Livermore should have been studied as part of a pit production programmatic EIS because expanded pit production will involve Livermore receiving shipments of plutonium from

[7] Plaintiffs admit that Livermore is only involved in the "development and testing of a new warhead design." Am. Compl. ¶ 68.

Los Alamos and they will be harmed by accidents or mishaps with plutonium. *Id.* ¶¶ 70-71. They claim that the weapons program poses harm to Tri-Valley CARES and its members, so that naturally the shipment and use of plutonium causes them harm. *Id.*

II. LEGAL STANDARDS

A. Rule 12(b)(1) Motion

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Plaintiffs bear the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768–69 (4th Cir. 1991). Where, as here, "standing is challenged on the pleadings, [courts] accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party." *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). However, courts need not accept factual allegations "that constitute nothing more than 'legal conclusions' or 'naked assertions.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Courts are "powerless to create [their] own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990). Moreover, courts can consider documents that are (i) explicitly incorporated into the complaint by reference; (ii) attached to the complaint as exhibits; and (iii) submitted by the movant and are integral to the complaint and clearly authentic. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016); *Lydick v. Erie Ins. Prop. & Cas. Co.*, 778 F. App'x 271, 272 (4th Cir. 2019).

B. Rule 12(b)(6) Motion

When evaluating a Rule 12(b)(6) motion, courts "accept as true the facts stated in [plaintiffs'] complaint and draw all reasonable inferences in [plaintiffs'] favor." *Bender v. Elmore & Throop, P.C.*, 963 F.3d 403, 405 (4th Cir. 2020). Courts, however, are not required to accept

legal conclusions as true. *Prynne v. Settle*, 848 F. App'x 93, 99 (4th Cir. 2021) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). When deciding whether the pleading standard has been met, courts must "separate[e] the legal conclusions from the factual allegations . . . and then determin[e] whether [the factual] allegations allow the court to reasonably infer that the plaintiff is entitled to the legal remedy sought." *Id.* (citing *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 346 (4th. Cir. 2011)).

III. ARGUMENT

Congress has determined it is necessary to produce 80 plutonium pits per year to maintain nuclear capabilities and ensure the defense of the United States. Plaintiffs ask this Court to halt the implementation of this vital national security decision to order a duplicative programmatic environmental impact study that will reveal nothing that the Federal Defendants do not already know and nothing that the Federal Defendants have not already made known to Plaintiffs and the public through its appropriate NEPA compliance efforts. But the Court should decline Plaintiffs' invitation to interrupt this national security initiative because: (i) Plaintiffs have failed to establish that this Court has jurisdiction to grant their far-reaching requests, and (ii) Plaintiffs have failed to plead a NEPA claim because NNSA complied with DOE's implementing procedures to evaluate whether the two-site production plan required a new or supplemental programmatic EIS and Plaintiffs have not alleged facts showing otherwise.

A. Plaintiffs' Failure to Demonstrate Standing Deprives this Court of Jurisdiction

The doctrine of constitutional standing—an essential aspect of the case-or-controversy requirement of Article III, § 2—demands that a plaintiff have "'a personal stake in the outcome of the controversy' [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). At its "irreducible

constitutional minimum," the doctrine requires satisfaction of three elements: (1) a concrete and particularized injury in fact, either actual or imminent, (2) a causal connection between the injury and defendant's challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560. To allege a concrete and particularized injury in fact, a plaintiff must show more than a "possible future injury;" he must show that harm has actually occurred or is "certainly impending." *See Whitmore*, 495 U.S. at 158. Neither conjectural future injuries nor alleged fear of such injuries are sufficient to confer standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 107, n.8 (1983).

Plaintiffs' factual allegations fail to establish standing. First, Plaintiff Clements, and the organizational plaintiffs (to the extent they rely on representational standing), fail to allege any actual, imminent injury to themselves or the environment. Rather, they rely on vague allegations of speculative accidents that they believe *could* happen at one of three locations spread across the country. Second, Plaintiffs fail to establish a causal connection between their alleged injuries and the agencies' decision to forgo additional programmatic NEPA work. Third, Plaintiffs fail to establish a concrete injury arising from their alleged informational harms. And finally, the organizational plaintiffs fail to allege facts that could support a finding of direct injury to themselves as organizations. They make no allegations demonstrating that Federal Defendants' decision to implement the plutonium pit production plan impeded their organizational mission or caused them to expend organizational resources to combat the alleged harm. Accordingly, Plaintiffs' claim should be dismissed for lack of standing.

1. Plaintiffs Have Only Alleged Speculative Injury from "Mishaps," not Imminent Injury to Themselves and Have Therefore Failed to Plead an Injury-in-Fact

Plaintiffs have only alleged speculative, hypothetical harms – including hypothetical harms that fall outside of geographic areas where they or their members live and/or recreate.[8] Their allegations have not established a case or controversy as required by Article III of the Constitution.

As noted above, to establish standing, a plaintiff (whether an organization or an individual) must establish, among other things, "a concrete and particularized injury in fact, either actual or imminent." *Lujan*, 504 U.S. at 560; *see also S. Walk at Broadlands,* 713 F.3d at 182. The requirement "'of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.'" *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)). Moreover, where an organization relies upon a theory of representational standing, it must still meet the injury-in-fact requirement, in part, by relying upon alleged injury to its members. *See S. Walk at Broadlands,* 713 F.3d at 182. To show that its members would have standing, an organization must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id.* (quoting *Summers,* 555 U.S. at 498). Neither Clements nor the organizational plaintiffs (even assuming they can rely on alleged injury to their executive officers rather than to members) allege a concrete injury that is actual or imminent. Rather, they rely on vague allegations of possible injury based

[8] Plaintiffs rely on alleged harms that have no geographic proximity to where they live, work, and recreate, including the alleged oversubscription of nuclear waste at the WIPP. Plaintiffs lack standing to challenge any agency action or inaction based on geographically remote harms. *Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n.*, 457 F.3d 941, 950 (9th Cir. 2006) (quoting *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005)) (to establish a concrete interest sufficient for Article III standing, there must be "a geographic nexus between the individual asserting the claim and the location suffering an environmental impact."). Therefore, the Court should only consider harms that are geographically proximate to Plaintiffs and their members.

on their imaginings of future accidents or "mishaps" at one of the three facilities they identify – including hypothetical terrorist attacks, earthquakes, and wildfires. *See, e.g.,* Am. Compl. ¶ 22 ("While in-transit accident risks, or attacks due to terrorist attack seeking to obtain weapons plutonium, to Mr. Clements and the traveling public may be small, they nonetheless exist . . . .").

"To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019), cert. denied, 140 S. Ct. 392 (2019) (quoting *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007)); *see also Am. Humanist Ass'n v. S.C. Dep't of Educ.*, No. CIV.A. 6:13-2471-BHH, 2015 WL 2201714, at *2 (D.S.C. May 11, 2015) ("The Court cannot bootstrap standing with imaginative speculation or the mere chance that it could happen."). The Fourth Circuit has emphasized that plaintiffs relying on an increased risk of harm must demonstrate that such risk is substantial enough to demonstrate imminence and show that any threatened injury is not remote or speculative. *See South Carolina*, 912 F.3d at 726 (affirming dismissal for lack of standing where the State of South Carolina claimed the termination of the "MOX process" at Savannah River would make the State the permanent repository of nuclear waste because the State's claims of harm to its citizens from radioactive waste were remote and speculative).[9] Many other courts have dismissed claims, like the ones here, which rely on speculative increased risks of harm without showing a "substantial probability" that the plaintiff will be injured by the alleged

[9] *See also Beck v. McDonald*, 848 F.3d 262, 274 (4th Cir. 2017) (affirming dismissal for lack of standing because Plaintiffs who sued over data breach failed to "push the threatened injury of future identity theft beyond the speculative to the sufficiently imminent."); *Holland v. Consol Energy, Inc.*, 781 F. App'x 209, 211 (4th Cir. 2019) (holding that the United Mine Workers of America 1992 Benefit Plan lacked standing to sue coalminers' former employer for changing its health coverage because even though the Plan may ultimately have to provide additional coverage for retired coal workers, there were no allegations that any healthcare claims against the Plan were imminent).

increased risk. *See*, *e.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) ("Increased-risk-of-harm cases implicate the requirement that an injury be actual or imminent because '[w]ere all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, nonimminent injuries could be dressed up as increased risk of future injury.'") (citation omitted).

Applying these principles in a case that is strikingly similar to this one, the Fourth Circuit found that the State of South Carolina could not establish standing for its NEPA claim by alleging conjectural future harms from the presence of plutonium at Savannah River. *South Carolina*, 912 F.3d at 728. In that case, South Carolina alleged that the "MOX process" to address nuclear waste would result in the state becoming a permanent repository for plutonium, causing "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 727. The Fourth Circuit rejected South Carolina's contention, finding that it rested on a "highly attenuated chain of possibilities." *Id.* at 728 (quoting *Clapper*, 568 U.S. at 410).

Application of the Fourth Circuit's analysis—where the court found that the State of South Carolina lacked standing to protect its citizens from conjectural future environmental harms related to the use of nuclear materials at Savannah River—makes clear that Plaintiffs fall short of alleging a non-speculative injury. For example, Plaintiffs allege "[t]here is a risk of a catastrophic failure of the repurposed and overhauled MOX Facility," caused by "earthquakes." Am. Compl. ¶ 24. Similarly, they plead there is a risk of failure at Los Alamos posed by climate change and increased wildfires. *Id.* ¶ 51. These conjectural acts of God are but a few of Plaintiffs' allegations that show there is no imminent risk of harm, only harms that live exclusively in Plaintiffs' creative imaginations. Such allegations are precisely the type of allegations that the *South Carolina* Court

found to be insufficient. 912 F. 3d at 728; *see also Clapper*, 568 U.S. at 409 ("'threatened injury must be certainly impending to constitute injury in fact,'" and that "'[a]llegations of possible future injury' are not sufficient'") (quoting *Whitmore*, 495 U.S. at 158).

Moreover, Plaintiffs' allegations are even less sufficient than those in the *South Carolina* case, because they fail to allege any factual basis that could support a chain of causation at all. Plaintiffs fail to allege any detail whatsoever regarding the nature of the "release of radioactive and hazardous material[]" they fear will happen or how they will be harmed. Am. Compl. ¶ 23. For instance, they make no allegation describing how any potential "release" would actually threaten Mr. Clements—who lives "approximately 50 miles from the northeastern boundary" of Savannah River. *Id.* ¶ 15. *See also id.* ¶ 54 (alleging that majority of Tri-Valley CARES' members "reside, work and/or recreate within 50-miles of [Livermore]"). Similarly, Gullah/Geechee SIC fails to identify *any* associated individual who might be at risk—but more generally, they fail to make any allegation providing a factual basis for an alleged increased risk of harm. *See id.* ¶¶ 29, 39 (noting that unidentified members recreate and reside "*downstream* of [Savannah River]" (emphasis added)). Ultimately, the Plaintiffs ask the Court to assume that because their challenge involves plutonium production, any individual who "live[s], travel[s], and/or recreate[s]" in some undefined "vicinity" of Savannah River is subject to an increased risk of harm sufficient to establish a "realistic danger of sustaining a direct injury." *South Carolina*, 912 F.3d at 726. But as *South Carolina* makes clear, that is simply not the case. *Id.* at 727.

Finally, to the extent Plaintiffs rely on the possibility of catastrophic accidents or terrorist attacks relating to the transportation of nuclear materials, their allegations are equally inadequate. *See* Am. Compl. ¶ 22. They provide no factual allegations demonstrating that the speculative risk of an accident or attack will occur at some point along the "main DOE transport corridor between

[Savannah River in South Carolina] and [Los Alamos in New Mexico]" at a time that would render it "plausible on its face" that any Plaintiff might be harmed. *See id.*; *Beck*, 848 F.3d at 270 (quoting *Ashcroft*, 556 U.S. at 678). At most, they allege that one Plaintiff—Mr. Clements—"regularly travels on Interstate 20 between Columbia, [SC] and Atlanta, [GA.]" Am. Compl. ¶ 22. The fact that Mr. Clements sometimes travels on a small segment of the same route that some materials related to the plutonium pit production program may be transported is facially inadequate to allege a future, particularized injury that is certainly impending." *See Clapper*, 568 U.S. at 409 (finding that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible 'future injury' are not sufficient"). Indeed, to rule otherwise would be to find that the hundreds of thousands of individuals who occasionally travel on the interstate highway system between South Carolina and New Mexico would all have standing in this case. But that is not the law. *Cf. Lujan*, 504 U.S. at 565–566 (holding that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly in the vicinity of it.").

In sum, Plaintiffs' parade of conjectural, non-imminent, speculative harms rely on—at most—an attenuated chain of causation that is unsupported by specific factual allegations. These allegations are insufficient to confer Article III standing and Plaintiffs' claims should be dismissed.

2. Plaintiffs Have Also Failed To Establish that the Challenged Agency Inaction Could Cause Their Alleged Injuries Or That a Court Order Requiring a New or Supplemental Programmatic Analysis Could Remedy Their Alleged Harms

To have standing to bring a NEPA claim, a plaintiff must plead "an adequate causal chain" which must "contain at least two links: one connecting the omitted EIS to some substantive government decision that may have been wrongly decided because of the lack of an EIS and one connecting that substantive decision to the plaintiff's particularized injury." *WildEarth Guardians*,

738 F.3d at 306; *see also Fla. Audubon Soc'y*, 94 F.3d at 664–65 ("[I]t [must be] substantially probable that [an omitted EIS] will cause the essential injury to the plaintiff's own interest."). Plaintiffs must also show that their alleged injuries "are likely to be ameliorated by a judicial ruling directing the agency to prepare an EA or an EIS." *Fund for Animals v. Babbitt*, 89 F.3d 128, 134 (2d Cir. 1996).

Plaintiffs have failed to establish a causal link because the majority of their (albeit hypothetical and speculative) harms are unconnected to the alleged NEPA violation – DOE and NNSA's decision not to prepare a new or supplemental nationwide, programmatic environmental study of pit production. Because Plaintiffs' alleged harms are unrelated to a programmatic analysis, a court order requiring programmatic work would not remedy these harms.

Plaintiffs' tangential allegations relating to the nuclear warhead program at Livermore have nothing to do with the pit production program they are challenging, instead potential harms at Livermore relate exclusively to the receipt of shipments of plutonium from Los Alamos for testing and design purposes. Am. Compl. ¶¶ 68–71. And even if the shipment of plutonium to assist with design and testing of a separate warhead program implicates the pit production program, Plaintiffs have not alleged that the existing programmatic NEPA analyses failed to adequately consider the potential impacts of transporting plutonium to Livermore and other sites. Therefore, Plaintiffs have completely failed to show that potential harms arising from the weapons program at Livermore is connected to the plutonium pit production plan – the agency action (or inaction) Plaintiffs are challenging. *See id.*

Additionally, the vast majority of Plaintiffs' allegations relate to potential site-specific injuries to people who live, recreate, and work near Savannah River, Los Alamos, the WIPP, and Livermore. *See*, *e.g.*, Am. Compl. ¶ 42 (where Plaintiffs allege that plutonium has migrated from

Los Alamos "through the streambed to the Rio Grande," and that there "have been measurable detections of plutonium up to 17 miles downstream, in Cochiti Lake."). A programmatic EIS, by its nature, is intended to address broad, high-level issues – not granular, geographically-specific issues. Thus, even if the Court were to order a new or supplemental programmatic NEPA analysis, that analysis would not address the harms alleged in Plaintiffs' Amended Complaint.

Plaintiffs' failure to connect the alleged NEPA violation (*i.e.,* failure to prepare a new or supplemental PEIS) to its alleged harms is perfectly demonstrated by a series of its allegations relating to pit-production at Savannah River:

- "With every visit [Mr. Clements] makes to SRS and the nearby areas, he considers the risks associated with being present on or near the site. Should the Defendants fail to comply with NEPA and conduct a new or supplemental PEIS, he will be dissuaded from conducting the professional and recreational activities he currently undertakes." Am. Compl. ¶ 21.

- "In the event of a serious accident at the pit facilities at SRS, offsite populations, including individuals who live, travel, and/or recreate in the vicinity of SRS such as Mr. Clements, would be at risk of exposure to the negative health and safety impacts of the release of radioactive and hazardous materials inherent in the production of plutonium pits." *Id.* ¶ 23.

- "There is a risk of a catastrophic failure of the repurposed and overhauled MOX Facility, a facility that was never designed to support plutonium pit production. The SRS pit production EIS from 2020 downplays the risk of earthquakes . . . ." *Id.* ¶ 24.

- "While existing waste at SRS poses environmental and health risks, it is the creation and handling of newly created plutonium waste (TRU waste) and dumping of low-level waste from pit production in unlined trenches at SRS that will exacerbate environmental and health concerns. . . ." ¶ 26.

With regard to the narrow, geographically discrete issues identified above, DOE/NNSA addressed the potential human health risks, earthquake risks, MOX Facility accident risks, and risks from wastes at SRS in its site specific NEPA analysis. Because these types of site-specific concerns have been thoroughly considered in the 2020 Savannah River EIS and were also considered in the

2019 SPEIS SA, Plaintiffs have not and cannot allege that NNSA's decision to forgo additional programmatic NEPA work caused the alleged site-specific harms.

Plaintiffs concede that DOE and NNSA have *already* undertaken robust evaluations of the potential site-specific and programmatic environmental impacts of the two-site strategy and that Plaintiffs actively engaged in the NEPA process. *See* Am. Compl. ¶ 41 ("NukeWatch has submitted extensive public comment on the DOE/NNSA NEPA documents since 1999, including but not limited to the 2008 Complex Transformation Supplemental PEIS, **the 2019 Complex Transformation SPEIS Supplement Analysis**, **the 2020 [Los Alamos] SWEIS Supplement Analysis**, and **the 2020 Draft [Savannah River] EIS**" (emphasis added)); *see also id.* ¶¶ 121–127, 133, 135. Notably, Plaintiffs have not challenged the 2020 Los Alamos SA or the 2020 Savannah River EIS, which evaluated the very type of site-specific environmental harms upon which Plaintiffs largely base their allegations of potential injury. Because a new or supplemental PEIS was not necessary to analyze site-specific environmental harms arising from operations at Savannah River or Los Alamos, Plaintiffs cannot rationally claim that any cognizable harm could have resulted from the failure to prepare such a PEIS. *See Summers*, 555 U.S. at 496 ("deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing"). Therefore, the Court should disregard Plaintiffs' claim that the government is uninformed about the site-specific environmental impacts of plutonium pit production at Savannah River and Los Alamos, TRU waste storage at the WIPP, and the W87-1 program at Livermore.

Disregarding Plaintiffs' allegations of site-specific harm, all that remains are allegations of speculative harm arising from: (i) potential accidents transporting nuclear materials between production and storage sites, and (ii) potential environmental harm from the alleged limited storage

for nuclear waste.[10] Am. Compl. ¶¶ 6, 23, 128–140, 180–181. Consistent with the discussions above, Plaintiffs have failed to make the requisite factual allegations demonstrating a "realistic danger of sustaining a direct [and geographically proximate] injury" arising from transportation or storage. *South Carolina*, 912 F.3d at 726; *see also Ctr. for Biological Diversity*, 937 F.3d at 537 (finding plaintiffs' claimed injury depended upon "at least four conditions," namely that operators would discharge pollution; that it would reach areas impacting plaintiffs' members' interests; at a time relevant to those interests; and that the discharges would negatively affect those interests).

Plaintiffs' failure to connect the omission of a new or supplemental pit production PEIS to a concrete injury they will likely suffer dooms their Amended Complaint. In light of this failure of causation (and redressability), combined with Plaintiffs' failure to establish a non-speculative injury-in-fact discussed above, the Court should dismiss Plaintiffs' claim for failure to establish standing.

3. Plaintiffs Cannot Establish Standing by Asserting Purely Procedural Harms

In addition to alleging a risk of harm due to speculative "mishaps," Plaintiffs claim that they were deprived "of environmental information and analysis to which [they are] legally entitled and directly frustrates [their] mission by preventing [them] from adequately educating the public and monitoring DOE activities and programs. . . ." Am. Compl. ¶¶ 13, 45, 53, 63. Such bald allegations of procedural harm are insufficient to establish standing for their claims.

The Supreme Court has repeatedly rejected the idea that pure procedural violations, absent a concrete injury, can confer standing. *See Lujan*, 504 U.S. at 575; *see also Summers*, 555 U.S. at

[10] The 2019 CT SPEIS SA reviewed previous programmatic studies and found that DOE and NNSA had already analyzed the environmental impacts associated with the levels of transportation and waste storage that are expected from the expanded pit production program at Savannah River and Los Alamos.

496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). In *Lujan* the Court expressly rejected the idea that a plaintiff has standing based on "his interest in having [a] procedure observed." *Id.* at 573, n. 8. The *Lujan* Court made clear that "an individual [can] enforce procedural rights," but only if "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Id.*; *see also Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 344 (4th Cir. 2017) ("One cannot allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement.").

Here, as discussed at length above, Plaintiffs have failed to allege any factual basis for a concrete injury to themselves or their members. As such, Plaintiffs' claim to be harmed by Federal Defendants' decision not to prepare a programmatic EIS is a prototypical claim of a deprivation of a "procedural right in vacuo," and is insufficient. *See Summers*, 555 U.S. at 496.

Plaintiffs may argue that the deprivation of information that must be disclosed by statute may cause an actual injury sufficient to establish Article III standing in certain circumstances. *See Dreher*, 856 F.3d at 345. While true, an alleged "statutory violation *alone* does not create a concrete informational injury sufficient to support standing." *Id.* 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*." *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1550 (2016)). As the Supreme Court recognized in *Spokeo*, procedural violations can often happen without any consequent injury:

> A violation of one of the FCRA's [Federal Credit Reporting Act] procedural requirements may result in no harm. For example, even

> if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

136 S. Ct. 1540, 1550.

Again, here Plaintiffs have not alleged any concrete harm that arose from the asserted NEPA violations. Nor can an alleged NEPA violation itself be deemed sufficient to cause actual injury for purposes of Article III. Indeed, were an alleged NEPA violation sufficient to allege cognizable "informational'" harm, then every NEPA claim would automatically confer standing. *See Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 84–85 (D.C. Cir. 1991) (explaining that "sustain[ing] an organization's standing in a NEPA case solely on the basis of 'informational injury' ... would potentially eliminate any standing requirement in NEPA cases"); *Wild Va. v. Council on Envtl. Quality*, Case No. 3:20-cv-00045, 2021 WL 2521561, at *13 (W.D. Va. June 21, 2021), appeal docketed, No. 21-1839 (4th Cir. Aug. 2, 2021) (noting that relying on pure alleged informational injury would result that such plaintiffs asserting environmental interest "would virtually always have standing with respect to NEPA violations"). Therefore, the type of informational harm Plaintiffs allege cannot constitute an independent basis for constitutional standing.

4. The Organizational Plaintiffs Cannot Establish Organizational Standing

Finally, the organizational plaintiffs do not adequately allege direct injury to themselves, and thus cannot assert organizational standing as an alternative means of invoking the Court's jurisdiction. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005).

Courts employ a two-step test to determine if an entity has organizational standing: "(1) '[did] a defendant's actions impede [the organization's] efforts to carry out its mission,' and (2) [did the defendant's actions] force the organization to divert its resources in order to address the defendant's actions." *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 182 (M.D.N.C. 2020) (quoting *Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012); *see also Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 362 (4th Cir. 2020), *cert. denied*, No. 20-855, 2021 WL 1725174 (May 3, 2021) (finding no organizational standing where plaintiff "did not allege that it had expended resources as a result of [the challenged action], nor did it explain a way in which [the challenged action] 'perceptibly impaired' its activities.") quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). An agency's conduct "impedes an organization's efforts to carry out its mission" when the challenged action or inaction "perceptibly impairs the organization's ability to provide services," or "inhibits the organization's daily operations." *Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 37 (D.D.C. 2018). When considering the first prong of the injury-in-fact requirement for organizations, courts must "differentiate between organizations that allege that their activities have been impeded — for whom the doors to the federal courts are open — from those that merely allege that their mission has been compromised — against whom the doors swing shut." *Id.* (citations and marks omitted). Simply-put, "frustrating [the organization's] mission" is not enough. *Id.* at 38.

If an agency's action or inaction did impede the organization's mission, courts must then ask "whether the organization used its resources to counteract that harm." *Id.* Importantly, though, any diversion of resources must be directly caused by the defendant's actions, not by the plaintiff's voluntary choice to expend resources. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (noting that the *Havens Realty* standard is not met simply because an

organization makes a "'unilateral and uncompelled' choice to shift its resources away from its primary objective to address a government action") (internal citation omitted). The following actions fall short of counteracting direct agency harm: (i) spending resources "educating the public or the organization's members cannot establish Article III injury unless doing so subjects the organization to 'operational costs beyond those normally expended,'" (ii) devoting resources "to advocacy for the organization's preferred policy — whether that advocacy is directed at Congress, the courts, or an administrative agency," and (iii) spending resources "in anticipation of, litigation." *Gottlieb*, 346 F. Supp. 3d 29, 37–38. As discussed more fully below, Plaintiffs have not alleged expending any resources to counteract the alleged harm caused by agency inaction.

Finally, if an organization satisfies both prongs of the injury-in-fact requirement, it must still meet the tests for causation and redressability. Just like an ordinary standing analysis, an organization must show that its injury is "fairly traceable to the defendant's allegedly unlawful conduct," and that it is "likely" that the injury would be "redressed by a favorable court decision." *Id.*

Here, all of the organizational plaintiffs define their missions as "monitoring DOE and NNSA programs and policies, educating the public, and engaging in advocacy to elected officials" and state that a "key component" to carrying out their missions "is the availability of information regarding such programs and activities." Am. Compl. ¶¶ 13, 45, 53, 63. But they have failed to allege in any non-conclusory way how the Federal Defendants' decision to adopt a two-site production plan, without providing a new or supplemental PEIS, impeded their mission. The only harm they identify is "the deprivation of environmental information and analysis to which [they are] legally entitled, [which] directly frustrates [their] mission by preventing [them] from adequately educating the public and monitoring DOE activities and programs. . . ." *Id.* . This type

of non-specific, conclusory allegation could be made by any organizational plaintiff in any NEPA case and does not inform the Court how DOE and NNSA's decision not to prepare a new or supplemental PEIS directly impeded these Plaintiffs' mission rather than simply frustrating it.

Moreover, Plaintiffs have not alleged they have taken any remedial actions to address the alleged informational harm. Instead, they allege that "[t]he absence of the PEIS evaluating the program-wide and cumulative effects on the environment and the public's health and safety from plutonium pit production at both [Savannah River] and [Los Alamos] *will necessitate* the diversion of SRS Watch's, NukeWatch's, and TriValley CARES' resources to obtain such information and disseminate it to the public." *Id.* ¶ 14, 46, 64 (emphasis added). Notably, Plaintiffs frame their allegations in the future tense, meaning that they have not diverted any organizational resources to date and may never will. This alone precludes the organizational plaintiffs from satisfying the requirements of organizational standing. Moreover, Plaintiffs' conclusory claim that they have been deprived of environmental information relating to the transition from a one-site production strategy to a two-site production strategy is belied by their own Amended Complaint. Plaintiffs admit that NNSA produced the 2020 Los Alamos SA and the 2020 Savannah River EIS, which collectively addressed the site-specific environmental impacts and the transportation and waste impacts of plutonium pit production at both Los Alamos and Savannah River, and that Plaintiffs engaged in the public comment process for the site-specific SA and EIS.[11] Therefore, Plaintiffs have all of the environmental information they need to compare the collective impacts studied in

[11] In Paragraph 53 of their Amended Complaint, Plaintiffs admit that they engaged with NNSA on the environmental impacts of the two-site pit production plan. In that Paragraph, Plaintiffs reveal that their true grievance is not that they were deprived environmental information, but that NNSA disagreed with Plaintiffs' desired outcome: "The NNSA's rejection of SRS Watch's, Tri-Valley CARES', and NukeWatch's petitions and its refusal to consider the information and issues raised in those petitions harm [Plaintiffs'] interests." Am. Compl. ¶ 53.

the 2020 Los Alamos SA and the 2020 Savannah River EIS to the impacts that were studied programmatically by the 1996 SSM PEIS and the 2008 SPEIS. That is exactly what NNSA did when it prepared the 2019 SPEIS SA and determined that the collective impacts of the two-site strategy "would not be different, or would not be significantly different, than" the programmatic impacts previously studied. *See* DOE/EIS-0236-S4-SA-02 at 67.

Finally, the organizational plaintiffs have not pled any facts establishing that DOE and NNSA's decision not to produce a new or supplemental PEIS for plutonium pit production caused harm to Plaintiffs' organizational missions or that this Court could redress their alleged harms. That is because, as noted above, almost all of Plaintiffs allegations relate to site-specific information as opposed to program-wide information. Because the organizational plaintiffs have not satisfied the injury-in-fact, causation, or redressability prongs for organizational standing, their claims should be dismissed.

B. Plaintiffs Have Failed to Adequately Plead a NEPA Claim

In addition to lacking standing to pursue their NEPA claim, Plaintiffs have also failed to adequately allege that NEPA and its implementing regulations require supplementation of the 1996 SSM PEIS and the 2008 SPEIS under these circumstances. The CEQ regulations impose a duty on all federal agencies to prepare supplements to either draft or final EISs when: "(i) [t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(d)(1). Likewise, DOE's own NEPA implementing regulations require supplementation if "there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 CFR 1502.9(d)(1)." 10 C.F.R. § 1021.314(a). This supplementation

requirement does not mean that a new or supplemental EIS must be done every time an agency is presented with new information. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). Instead, a supplemental EIS is only required if the new information shows the proposed action will affect the quality of the human environment in a significant manner or to a significant extent not already considered. *Id.* at 374; *see also Trout Unlimited v. U.S. Dep't of Agric.*, 320 F. Supp. 2d 1090, 1111 (D. Colo. 2004). This construction of NEPA is supported by the implementing regulations, which allow the agency to "find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement." 40 C.F.R. § 1502.9(d)(4); *see also* 10 C.F.R. § 1021.314(c)(2)(iii) ("The Supplement Analysis shall contain sufficient information for DOE to determine whether . . . [n]o further NEPA documentation is required.").

Here, Plaintiffs' sole claim is that DOE and NNSA violated NEPA by failing to prepare a new or supplemental PEIS when it substituted a one-site production strategy for a two-site production strategy. To state a valid NEPA claim, Plaintiffs cannot simply allege there was a change from a one-site to a two-site production plan. Plaintiffs must describe why the change will "'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374 (citation omitted). Plaintiffs do not have a single allegation comparing the environmental impacts "already considered" in the 1996 SSM PEIS and the 2008 SPEIS to the environmental impacts of a two-site production plan discussed in the 2019 SPEIS SA, 2020 Los Alamos SA, and the 2020 Savannah River EIS. Instead, they rely on a series of conclusory allegations that say, without any specific factual basis, that there has been a substantial change. Am. Compl. ¶ 141–143, 145–148. They also rely on an allegation that the

two-site strategy will cost more. *Id.* ¶ 144. Plaintiffs' conclusory allegations and claims of economic harm are insufficient to state a NEPA claim.

To state a NEPA claim for failing to supplement under 40 C.F.R. § 1502.9(d)(1), Plaintiffs needed to allege facts showing that the collective environmental impacts studied in the 2019 SPEIS SA, 2020 Los Alamos SA, and the 2020 Savannah River EIS are greater than the impacts contemplated by the 1996 SSM PEIS and the 2008 SPEIS. And Plaintiffs have not (and could not) plead such facts because the impacts of the two-site strategy are well within the bounds of environmental impacts considered by the original programmatic work. Accordingly, supplementation is not required by law and Plaintiff's claim that NEPA requires supplementation fails.

Alternatively, Plaintiffs' NEPA claim that additional programmatic analysis was necessary can only survive a motion to dismiss if Plaintiffs allege facts showing that pit production at Los Alamos and Savannah River were improperly segmented to avoid a holistic environmental review. *See*, *e.g.*, *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002) (discussing that programmatic EISs are appropriate when an agency segments EISs to avoid studying the full environmental impacts of a plan). However, Plaintiffs' Amended Complaint fundamentally misunderstands NEPA's requirements and what DOE and NNSA actually did here. DOE and NNSA did not improperly segment environmental review. To the contrary, DOE and NNSA tiered the 2020 Los Alamos SA and 2020 Savannah River EIS to the 1996 SSM PEIS and the 2008 SPEIS, meaning that those site-specific works were incorporated by reference into the earlier programmatic documents.[12] Courts view tiered analyses as a whole – not as distinct, segmented

[12] "Tiering refers to the incorporation by reference in subsequent EISs or EAs, which concentrate on issues specific to the current proposal, of previous broader EISs that cover matters more general in nature." *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1090 (9th

documents. *See*, *e.g.*, *Cascadia Wildlands v. Bureau of Land Mgmt.*, 410 F. Supp. 3d 1146, 1157 (D. Or. 2019); *Native Ecosystem Council v. Judice*, No. CV 18-55-BLG-SPW, 2019 WL 1131231, at *4 (D. Mont. Mar. 12, 2019); *W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1098 (D. Nev. 2011), *aff'd*, 443 F. App'x 278 (9th Cir. 2011). "Only where neither the general nor the site-specific documents address significant issues is environmental review rejected." *W. Watersheds Project*, 774 F. Supp. 2d at 1098 (citation omitted).

Here, Plaintiffs' Amended Complaint fails to allege that, when viewed collectively, the 1996 SSM PEIS, the 2008 SPEIS, the 2019 SPEIS SA, the 2020 Los Alamos SA, and the 2020 Savannah River EIS overlooked any environmental information necessary to fully inform the public or agency decision-makers. Instead, they allege in a conclusory fashion that because various activities are "connected" they should have been studied in a single programmatic document. *See* Am. Compl. ¶ 151. But this ignores that by tiering the 2020 Los Alamos SA and the 2020 Savannah River EIS to earlier programmatic work, all of the impacts were considered together in a single, fully incorporated document. Thus, DOE and NNSA complied with NEPA by thoroughly and conclusively studying the environmental impacts of the pit production program. Because Plaintiffs' Amended Complaint fails to allege otherwise, Plaintiffs' NEPA claim should be dismissed.

Finally, Plaintiffs' NEPA claim depends on being able to state a violation of the APA. *See Town of Stratford, Connecticut v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002) ("Since NEPA does not

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Cir. 2020) (citing 40 C.F.R. § 1508.28). "Tiering, or avoiding detailed discussion by referring to another document containing the required discussion, is expressly permitted" and encouraged under NEPA, so long as the tiered-to document has been subject to NEPA review. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002).

create a private right of action, [plaintiffs must] rel[y] on the APA."). Congress limited judicial review under the APA to "[a] person suffering legal wrong because of agency action." 5 U.S.C. § 702. Whether a statute, like the APA, allows a plaintiff "to avail [itself] of that right of action," is often referred to as statutory standing. *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (citation omitted). Unlike constitutional standing, which is evaluated under Fed. R. Civ. P. 12(b)(1), statutory standing is evaluated under Rule 12(b)(6) because it "is effectively the same as a dismissal for failure to state a claim." *Id.* (quoting *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69, 73 (3d Cir. 2011)). To establish a claim under the APA, a plaintiff must allege "(1) that there has been final agency action adversely affecting the plaintiff, and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provision the plaintiff claims was violated." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003) (citation omitted). In this case, Plaintiffs have failed to satisfy the first prong of that test.

Plaintiffs have identified one agency inaction for which they seek judicial review – the decision not to prepare a new or supplemental EIS when implementing a two-site production strategy. They are not challenging any other agency actions or inactions. As discussed *supra*, Section III(A)(2), most of Plaintiffs' alleged injuries are narrow and geographically specific or are the result of things outside the agency's control.[13] Because Plaintiffs' alleged adverse effects have

[13] The following paragraphs allege narrow, geographical specific harms that would ordinarily be studied by a site-specific NEPA document. Am. Compl. ¶¶ 9, 15, 21–32, 38–39, 42–44, 47–51, 54–56, 60, 68–71, 138–139, 172–176. The following paragraphs allege harms that fall entirely outside of the agency's control. *Id.* ¶¶ 6, 7, 133, 135–137, 168, 177–178. The following paragraphs allege harms that fall outside of NEPA's scope because they are economic, not environmental. *Id.* ¶¶ 144, 156, 164–167. And the following paragraphs allege harms that have nothing to do with the pit production program. *Id.* ¶ 149, 152–154.

nothing to do with the agency action (or inaction) for which they seek judicial review, they have failed to state an APA/NEPA claim.

IV. CONCLUSION

For the reasons stated above, the Court should dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) because they have failed to plead facts sufficient to establish Article III standing. The Court should also dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. 12(b)(6) because Plaintiffs' allegations fall short of establishing an APA/NEPA violation.

Respectfully submitted,

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