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

SAVANNAH RIVER SITE WATCH, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action Number: 1:21-cv-01942-MGL
vs.	)	
	)	
UNITED STATES DEPARTMENT OF ENERGY, et al.,	)	
Defendants.	)	

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

Plaintiffs' Amended Complaint alleges a single violation of the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") and is limited to challenging the Department of Energy's ("DOE") and the National Nuclear Security Administration's ("NNSA") decision not to prepare a standalone, supplemental programmatic environmental impact statement ("PEIS") before implementing a two-site plutonium pit production strategy at the Savannah River Site ("Savannah River") and Los Alamos National Laboratory ("Los Alamos"). Despite being granted leave to amend their legally deficient Original Complaint, Plaintiffs have still failed to allege facts sufficient to establish standing or to state a NEPA claim. Accordingly, the Court should grant Defendants' Motion and dismiss Plaintiffs' claims with prejudice and without further leave to amend.[1]

[1] Whether to "'grant or den[y] [] an opportunity to amend is within the discretion of the district court.'" *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 121 (4th Cir. 2013). Denying leave to amend is appropriate when "(1) 'the amendment would be prejudicial to the opposing party;' (2) 'there has been bad faith on the part of the moving party;' or (3) 'the amendment would have been futile.'" *Id.* at 121. An amendment is prejudicial when a plaintiff has already had multiple bites at the apple. See *Confederate Mem'l Ass'n, Inc. v. Hines,* 995 F.2d 295, 299 (D.C. Cir. 1993). Here, Plaintiffs have already been granted leave to amend and made only minor changes to their pleading. Moreover, amendment would be futile because the NEPA documents Plaintiffs

I. Plaintiffs have not established Article III standing and their NEPA claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1)

In response to Defendants' Memorandum in Support of their Motion to Dismiss, which fully explains why Plaintiffs have not established standing, *see* ECF No. 23-1 at 14–28, Plaintiffs argue they do have standing because: (i) they benefit from a lower standard to establish Article III standing, ECF No. 27 at 5; (ii) their injury-in-fact is not the "risk of [] accidents, attacks, or natural disasters," but instead "Defendants' imminent plan to initiate and expand production of plutonium pits at two sites when the existing NEPA analyses fail to address – and Defendants refuse to prepare a new or supplemental PEIS that addresses – the effects on the environment from such risks created by Defendants' plan," *id.* at 7; (iii) the organizational plaintiffs have been deprived of information that precludes them from carrying out their missions and the individual plaintiffs have been deprived of information that allows them to make decisions regarding their health and safety, *id.* at 14–15; and (iv) the Defendants' decision not to supplement the 1996 Stockpile Stewardship and Management Programmatic Environmental Impact Statement ("1996 SSM PEIS") and the 2008 Final Complex Transformation Supplemental Programmatic Environmental Impact Statement ("2008 SPEIS") causes harm to Plaintiffs because of the alleged uncertainties surrounding the environmental impacts of the two-site production strategy. Defendants will address each of Plaintiffs' arguments in turn.

A. Plaintiffs do not benefit from a lower Article III standard

As Defendants established in their opening brief, Plaintiffs bear the burden of establishing Article III standing by showing: (1) a concrete and particularized injury in fact,

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rely upon in their Amended Complaint show that Defendants already supplemented the programmatic analyses for plutonium pit production, making it impossible for them to allege that NNSA did not supplement its programmatic work.

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 v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992). In their opposition brief, Plaintiffs continue to recite the irrelevant legal proposition that "standing requirements for the enforcement of procedural rights are different." ECF No. 27 at 5. The fact that Article III's standards for redressability and immediacy may be somewhat relaxed in procedural injury cases does not matter here. Defendants are not arguing that Plaintiffs' injuries are too temporally remote or that the agency will not change its mind following a remand.[2] Instead, Defendants are challenging whether Plaintiffs have adequately pleaded injuries-in-fact and, if so, whether those harms are connected at all with the challenged agency inaction.

Plaintiffs cannot dispute that even in procedural injury cases "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)). The Supreme Court and the Fourth Circuit have consistently applied an injury-in-fact requirement with "teeth." *See Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007); *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019). In fact, the Fourth Circuit has clearly stated that any alleged injury-in-fact must be "concrete in both a qualitative and temporal sense," – *i.e.* the alleged harm must be "palpable and imminent." *South Carolina*,

[2] Footnote 7 in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992) stands for the simple proposition that standing only exists if a plaintiff's concrete interest is affected by the violation of a procedural right. The *Lujan* Court made clear that the redressability and immediacy requirements are only relaxed to an extent. For example, a plaintiff need not show that the agency will likely adopt plaintiff's position on remand to satisfy Article III's redressability requirement. Likewise, a plaintiff need not show that an injury will occur immediately because some federal projects take years to complete. But even though a concrete injury may be temporally remote, it must still be actual and certain, not purely hypothetical.

912 F.3d at 726; *see also Pye v. United States*, 269 F.3d 459, 467 (4th Cir. 2001) (alleged injuries cannot be "conjectural or hypothetical"). Likewise, NEPA cannot reduce Article III's causation requirement. As noted by the D.C. Circuit in *WildEarth Guardians v. Jewell*, "an adequate causal chain 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." 738 F.3d 298, 306 (D.C. Cir. 2013); *see also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664–65 (D.C. Cir. 1996) ("[I]t [must be] substantially probable that [an omitted EIS] will cause the essential injury to the plaintiff's own interest.").

Because it is clear that Article III's injury-in-fact and causation requirements are not lowered in procedural injury cases, the Court should reject any argument to the contrary.

B. Plaintiffs' allegations do not establish plausible injury-in-fact

Plaintiffs' purported injuries fall into two categories: alleged injuries to the environment (and by extension their recreational, safety, and health interests) and alleged procedural injuries (*i.e.*, deprivation of information). Defendants will address each.

1. Alleged environmental harms

Plaintiffs correctly recite that "claims alleging injury to the environment and to the plaintiffs' 'recreational use and aesthetic enjoyment' of the environment" are sufficient to confer standing under NEPA. ECF No. 27 at 6 (citations omitted). But an alleged NEPA violation by itself does not necessarily result in a concrete injury to Plaintiffs; instead, they must plead facts showing that they will individually suffer from *real* environmental harm. *See South Carolina*, 912 F.3d at 726. Here, the only alleged environmental harm Plaintiffs have identified in their Amended Complaint is the risk of exposure to radioactive materials from nuclear mishaps

resulting from industrial accidents, terrorist attacks, or severe weather events. In their Opposition Brief, Plaintiffs appear to disclaim that they are relying upon these allegations to establish Article III standing. ECF No. 27 at 7 ("[T]he injury is not the risk of such accidents, attacks, or natural disasters."). Instead, Plaintiffs argue their injury-in-fact is "Defendants' imminent plan to initiate and expand production of plutonium pits at two sites when the existing NEPA analyses fail to address—and Defendants refuse to prepare a new or supplemental PEIS that addresses—the effects on the environment from such risks created by Defendants' plan."[3] *Id.*

Plaintiffs attempt to connect Defendants' decision to not prepare a standalone supplemental PEIS to increased risks to the environment, arguing that there are "significantly new circumstances" that "require a new or supplemental PEIS." Plaintiffs only identify three substantive "new circumstances" to support their claim: "the status of the capacity at WIPP and the impending expiration of its state RCRA permit, the need to completely repurpose the never-

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[3] Although Plaintiffs do not cite them, they appear to be relying on the reasoning of a string of Ninth Circuit cases that provide that a procedural violation of NEPA results in substantive harm to the environment because of "the. . . added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment." *Citizens for Better Forestry v. U.S. Dep't. of Agriculture*, 341 F.3d 961, 971 (9th Cir. 2003). The Ninth Circuit's position on Article III standing for NEPA cases is incongruent with subsequent Supreme Court and Fourth Circuit precedent, including *Spokeo, Inc. v. Robins*, where the Court held that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." 578 U.S. 330, 341 (2016). Moreover, these Ninth Circuit cases directly conflict with clear Fourth Circuit precedent, which provides that NEPA plaintiffs must plead an imminent, concrete harm to their own interests. *See South Carolina*, 912 F.3d at 726 (holding plaintiffs in NEPA cases must establish a "realistic danger of sustaining a direct injury" to satisfy Article III's standing requirements).

completed MOX Facility to produce plutonium pits at SRS, an activity never before conducted at SRS, and safety issues at LANL." ECF No. 27 at 26, 30 n. 7.[4] And presumably Plaintiffs believe these new circumstances are connected to their alleged individual harms, which are increased risk of radiation exposure based on nuclear mishaps (*i.e.* industrial accidents, shipping accidents, terrorist attacks, and weather events). But Plaintiffs' claim stumbles out of the gate because any increased risks to the environment from the WIPP or from plutonium pit production at SRS or Los Alamos that could lead to concrete harms to Plaintiffs are purely hypothetical and highly attenuated. For example, according to Plaintiffs' own allegations the WIPP's state-issued permit for TRU waste storage does not expire until 2024. *See* ECF No. 21 ¶ 129. Between now and 2024, many things can happen – including the State of New Mexico extending the WIPP's permit, as well as technological advancements that increase the WIPP's storage capacity. Simply-put, Plaintiffs' allegations about the WIPP rely on the same "attenuated chain of possibilities" that the Fourth Circuit found were insufficient to establish standing in *South Carolina*, 912 F.3d at 730. Likewise, Plaintiffs' imaginative allegations that nuclear mishaps (a) will occur at either Savannah River or Los Alamos, and (b) will affect them, are too remote and speculative to establish Article III standing. In sum, the alleged government omission – failing to consider three new circumstances – cannot support Plaintiff's NEPA claim because the increased risk of individualized harm allegedly caused by Defendants' purported omission are themselves uncertain and speculative.

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[4] Plaintiffs' Amended Complaint references President Biden's Executive Order on Environmental Justice. *See*, *e.g.*, ECF No. 21 at ¶ 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).

Plaintiffs continue to lean heavily on the Fourth Circuit's decision in *Hodges v. Abraham*, 300 F.3d 432, 445 (4th Cir. 2002), which they claim is more apposite than the *South Carolina* decision.[5] *See* ECF No. 27 at 9. But Plaintiffs' reliance on *Hodges* is misplaced. First, the *Hodges* Court did not directly consider the issue presented here – whether plaintiffs may establish a concrete injury-in-fact simply by alleging that potential nuclear mishaps could increase Plaintiffs' exposure to radiation and negatively affect their health, safety, and recreational interests. Rather, in *Hodges*, the United States raised standing for the first time on appeal and argued that Governor Hodges lacked standing to represent the interests of the people of South Carolina under the *parens patriae* doctrine. 300 F.3d at 437, 444. The Fourth Circuit rejected the federal defendants' *parens patriae* argument, holding that "the Governor, in his official capacity, is essentially a *neighboring landowner*, whose property is at risk of environmental damage from the DOE's activities at SRS," and that he had therefore alleged individualized harm to himself. *Id.* at 445 (emphasis added).

To be sure, in rejecting the United States' *parens patriae* argument, the Fourth Circuit recognized an implicit injury-in-fact by likening the Governor to the neighboring landowner described in *Lujan* and finding that storing nuclear waste adjacent to someone's property is a cognizable injury-in-fact. *Id.* But as noted above, this specific issue was not litigated by the parties in *Hodges*. Moreover, the facts in *Hodges* show a much closer geographical nexus based

[5] Plaintiffs criticize Defendants' reading of the *South Carolina* decision. But *South Carolina* clearly holds that allegations that are hypothetical, contingent, and attenuated cannot constitute a real, imminent injury-in-fact. 912 F.3d 720, 731 ("In sum, the only theory of injury advanced by South Carolina—that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site—rests upon a 'highly attenuated chain of possibilities,' and 'contingent future events that may not occur as anticipated, or indeed may not occur at all' . . . . In such circumstances, we must conclude that South Carolina lacks Article III standing.") (internal citations omitted). And that holding disposes of Plaintiffs' attenuated and contingent claims of harm.

on obvious proprietary interests the governor had in South Carolina's lands and natural resources, factors that are entirely missing here. Indeed, the Governor (as representative of the State) was not just a "neighboring landowner" to SRS—but in fact, the court emphasized, "at least one state highway runs through SRS." *Id.* Here, Plaintiffs do not have a proprietary interest in land or resources with such a nexus, which is presumably why they rely on allegations of nuclear mishaps (*i.e.* it would take a catastrophic accident for environmental harm to reach Plaintiffs' recreational, aesthetic, and safety interests). None of the Plaintiffs in this case allege a proprietary interest in property directly neighboring SRS, Los Alamos, the WIPP, or Livermore (let alone on the sites themselves). The closest geographical nexus identified by Plaintiffs is the fact that Marylia Kelley, executive director of Tri-Valley CAREs, lives at least six miles away from the Lawrence Livermore National Laboratory ("Livermore")—which is not a site of activities authorized under Defendants' plutonium pit production plan. *See* ECF No. 21 ¶55. Because *Hodges*' facts and procedural posture are different from this case, it cannot rescue Plaintiffs' otherwise deficient pleadings.

For these reasons and the reasons more fully discussed in Defendants' Memorandum in Support of their Motion to Dismiss, the Court should find that Plaintiffs have failed to allege real, concrete harms sufficient to establish an injury-in-fact under Article III.

2. Alleged informational harms

In addition to raising their unavailing claims that they will suffer individualized, concrete injuries from environmental harm, the organizational plaintiffs and Tom Clements also argue they have suffered informational injuries as a result of Defendants' decision not to prepare a new standalone PEIS for the pit production program. In their opposition brief, Plaintiffs criticize Defendants for citing *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991),

which they claim was essentially overruled by *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998). Plaintiffs suggest that the Fourth Circuit's recent decision in *National Veterans Legal Services Program v. United States Department of Defense*, 990 F.3d 834 (4th Cir. 2021) is more apposite and demonstrates that they have established standing based on informational injuries. Plaintiffs are wrong about *Lyng*, *Akins*, and *National Veterans Legal Services Program*.

In its recent *Spokeo* decision, the Supreme Court adopted the general rule that a statutory violation, standing alone, cannot establish Article III standing. 578 U.S. at 341. *Spokeo* did, however, recognize "some circumstances" (*i.e.* limited exceptions) where a "violation of a procedural right granted by statute can be sufficient . . . to constitute injury in fact . . . [and] a plaintiff need not allege any additional harm beyond the one Congress has identified." The Supreme Court only cited one circumstance where a statutory violation, standing alone, constitutes any injury-in-fact: when an agency possesses information, Congress has directed the agency to make the information public, and the agency refuses. *Id.* at 342 (citing *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998) (confirming that a group of voters' "inability to obtain information" that Congress had decided to make public is a sufficient injury in fact to satisfy Article III) and *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). (Emphasis added.) Neither the Supreme Court nor the Fourth Circuit have held that a NEPA violation is a circumstance where a procedural violation, standing alone, is sufficient to confer standing. *See*, *e.g.*, *Wild Virginia v. Council on Env't Quality*, 544 F. Supp. 3d 620, 641–42 (W.D. Va. 2021) (noting the difference between the narrow application of the statute at issue in *Akins* and "NEPA's broad application").

Since *Spokeo*, the Fourth Circuit has confirmed that an informational injury "requires that a person lack access to information to which he is legally entitled and that the denial of that information creates a 'real' harm with an adverse effect." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1548). To hold otherwise, "would mean that environmental organizations would virtually always have standing with respect to NEPA violations because any perceived failure in the NEPA process could arguably result in a loss of information to the environmental groups. . . . Surely Article III requires a greater showing to invoke the federal courts' jurisdiction. . ." *Wild Virginia*, 544 F. Supp. 3d at 641–42 (citing *Lyng*, 943 F.2d 79, 84–85 (D.C. Cir 1991)). As the *Wild Virginia* Court correctly points out, the reasoning (whether dicta or not) in the D.C. Circuit's *Lyng* decision still applies in NEPA cases; whereas, the reasoning of *Akins* is clearly limited to the narrow statute at issue in that case.

Simply put, NEPA Plaintiffs are not relieved of their obligation to identify a non-conjectural, personalized injury even when they claim to be deprived of information that they believe was guaranteed by statute. Here, the organizational Plaintiffs claim that the alleged deprivation of environmental information impedes their missions to educate and inform their members and the public about the "nuclear weapons complex." ECF No. 27 at 20–21. But none of their factual allegations support that conclusion. An organization's mission is only impeded when the challenged agency action or inaction "perceptibly impair[s] the organization's ability to provide services," or "inhibit[s] the organization's daily operations." *Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 37 (D.D.C. 2018) (internal citations omitted).[6] Here, the

[6] "The doors to the federal courts are open' to "organizations that allege that their activities have been impeded," but those "doors swing shut" for organization that "merely allege that their

organizational Plaintiffs have not alleged any facts showing that Defendants' decision not to prepare a PEIS inhibits their daily operations, rather than merely frustrating their efforts. Similarly, the organizational Plaintiffs have not alleged any facts showing they expended resources to counteract the alleged harm caused by agency inaction.[7] Therefore, the organizational Plaintiffs have failed to allege any real, adverse harm arising from the alleged deprivation of information.

Similarly, the individual Plaintiff, Tom Clements, has also failed to allege an injury-in-fact arising from the alleged deprivation of information. Mr. Clements argues that Defendants' decision not to prepare a new, standalone PEIS impedes his ability to make informed decisions relating to the safety of living and recreating near SRS.[8] ECF No. 27 at 21. However, Mr. Clements ignores that his own allegations reveal that any threat to Plaintiffs' safety is purely hypothetical, and depends on a speculative nuclear mishap. Because any threat to Plaintiffs'

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mission has been compromised." *Gottlieb*, 346 F. Supp. 3d at 37 (citations and marks omitted). "[F]rustrating [the organization's] mission" is not enough. *Id.* at 38.

[7] 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.

[8] Plaintiffs also argue that the Gullah/Geechee SIC cannot properly assess safety for its members; however, the Gullah/Geechee SIC cannot establish representational standing for its members because establishing representational standing must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013).

safety or recreational interests is conjectural, Plaintiffs have not pleaded that the denial of information has created a 'real' harm with an adverse effect. *Dreher*, 856 F.3d at 344.

Moreover, Plaintiffs' claim that they have been deprived of information is completely undercut by their own Amended Complaint, which repeatedly references and relies upon the *1996 SSM PEIS, the 2008 SPEIS*, *the 2019 Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement* ("2019 SPEIS SA"), *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") and *the 2020 Final Environmental Impact Statement for Plutonium Pit Production at the Savannah River Site in South Carolina* ("2020 Savannah River EIS").[9] *See Waters v. Bass*, 304 F. Supp. 2d 802, 806 (E.D. Va. 2004) ([A] complaint includes any document which is incorporated into it by reference.") (citing *Robinson v. Ladd Furniture, Inc.*, 995 F.2d 1064 (4th Cir. 1993)); *see also Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) ("a court may consider [an extrinsic document] in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity."). Specifically, Sections 1.6 of the 2008 SPEIS, 2020 Los Alamos SA, and the 2020 Savannah River EIS and Section 1.5 of the 2019 SPEIS SA all detail the extensive information

[9] The full and authentic versions of the 1996 SSM PEIS, 2008 SPEIS, 2019 SPEIS SA, 2020 Los Alamos SA, and the 2020 Savannah River EIS can be found on DOE's public website at:

- https://www.energy.gov/sites/default/files/EIS-0236-FEIS-1996.pdf
- https://www.energy.gov/nepa/downloads/eis-0236-s4-final-supplemental-programmatic-environmental-impact-statement
- https://www.energy.gov/nepa/downloads/doeeis-0236-s4-sa-02-final-supplement-analysis
- https://www.energy.gov/nepa/downloads/doeeis-0380-sa-06-final-supplement-analysis
- https://www.energy.gov/nepa/downloads/doeeis-0541-final-environmental-impact-statement

Defendants provided to the public about the pit production program (including the two-site strategy), the numerous public meetings the Defendants held, and the voluminous public comments Defendants received and considered. For example, NNSA published the draft of the 2019 SPEIS SA for public review and comment, even though DOE's regulations do not require publication of draft SAs, and held public meetings where 44 people, including Plaintiff Tom Clements, offered verbal comments in addition to 162 written comments. *See* Sections A.1 and A.2 of the 2019 SPEIS SA. NNSA followed the same process for 2008 SPEIS, 2020 Los Alamos SA and the 2020 Savannah River EIS, where it published the drafts of those NEPA documents, held public meetings, and received and considered numerous public comments. *See* Sections A.1 and A.2 of the 2020 Los Alamos SA and Section S.1.3 of the 2020 Savannah River EIS. In light of NNSA's extensive public process – which included sharing all of the pertinent environmental information relating to plutonium pit production at Savannah River and Los Alamos – Plaintiffs' claims of informational harm are demonstrably false. And the Court need look no further than the documents Plaintiffs repeatedly reference and rely upon in their own Amended Complaint to dispense with Plaintiffs' claims that they were deprived of information.

C. **Plaintiffs' allegations do not establish Article III causation**

In addition to pleading an injury-in-fact, Article III also requires a plaintiff to plead "an adequate causal chain" that "contain[s] 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.").[10] 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). As noted at length in Defendants' briefing, 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. ECF No. 23-1 at 18–22. More specifically, Plaintiffs' alleged harms are site-specific in nature – *i.e.* potential nuclear accidents at Savannah River, Los Alamos, or the WIPP – and are unconnected to the government's decision not to prepare a standalone, supplemental PEIS for plutonium pit production.

Recognizing that almost all of their allegations are site-specific in nature, Plaintiffs argue that their Amended Complaint "thoroughly alleges that the existing NEPA analysis, including the SRS site-specific EIS and the LANL site-specific SA inadequately address the numerous environmental impacts and risks caused by Defendants' proposed actions." ECF No. 27 at 24. Not so. No one can fairly read Plaintiffs' Amended Complaint as challenging the adequacy of the Savannah River site-specific EIS or the Los Alamos SA. If Plaintiffs believe those tiered, site-specific environmental documents failed to comply with NEPA, they should have included a

[10] Plaintiffs appear to criticize Defendants' citation to *WildEarth Guardians* and *Fla. Audubon Soc'y* for the causation standard, and suggest that the correct causation standard was articulated in *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 318 (4th Cir. 2002). *See* ECF No. 27 at 25–26, n. 5. Plaintiffs are correct that *WildEarth Guardians* and *Fla. Audubon Soc'y* are D.C. Circuit cases; however, Defendants cited to them because Defendants are unaware of a Fourth Circuit case that directly addresses how to apply causation when a plaintiff alleges an agency failed to act under NEPA. Notably, *Friends for Ferrell Parkway* does not discuss what causation standard applies in these circumstances. *See generally* 282 F. 3d 315. Instead, *Friends for Ferrell Parkway* stands for the simple and uncontroversial proposition that there is no causation between the agency's action and a plaintiff's alleged harm when the alleged harm was actually caused by a third party, not the agency. *Id.* at 324.

claim (supported by facts) showing that the agency acted arbitrarily and capriciously when it studied the impacts of pit production at Savannah River and Los Alamos. But Plaintiffs' Amended Complaint is noticeably silent on the adequacy of the 2020 Los Alamos SA and the 2020 Savannah River EIS, likely because of how comprehensive those documents are.

II. Plaintiffs have not adequately pleaded a NEPA claim pursuant to Fed. R. Civ. P. 12(b)(6)

Plaintiffs' claim is limited to their belief that NEPA required DOE and NNSA to supplement the 1996 SSM PEIS and the 2008 SPEIS. This claim fails as a matter of law. The CEQ regulations only require supplementation 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); *see also* 10 C.F.R. § 1021.314(a). Supplementation is not required every time there is a change or new information, s*ee Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989); rather, supplementation is only required if the change or new information will significantly affect the quality of the human environment in a manner or to an extent not already considered by existing NEPA analyses. *Id.* at 374; *see also Trout Unlimited v. U.S. Dep't of Agric.*, 320 F. Supp. 2d 1090, 1111 (D. Colo. 2004).

A. Plaintiffs have not alleged facts showing that the change from a one-site manufacturing strategy to a two-site manufacturing strategy constitutes a significant change under NEPA

Because their Amended Complaint is devoid of allegations showing the change from a one-site to a two-site strategy may result in significant, unstudied environmental effects, Plaintiffs must be relying on an inference to that effect. But given how extensively DOE and NNSA have studied the plutonium pit production program, no such inference is appropriate. Plaintiffs' Amended Complaint does not contain 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, unsupported by any specific facts, that there have been substantial changes that Defendants failed to consider. ECF No. 21 at ¶ 141–143, 145–148. To state a NEPA claim for failing to supplement under 40 C.F.R. § 1502.9(d)(1), Plaintiffs need to do more; namely, they need to allege facts showing that the collective environmental impacts of producing 80 pits at two locations are greater than the impacts previously studied by the 1996 SSM PEIS and the 2008 SPEIS. 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.[11] Accordingly, Plaintiffs' § 1502.9(d)(1) supplementation claim fails as a matter of law.

B. Plaintiffs' claim that the increased number of nuclear pits to be manufactured, as mandated by Congress, triggers a new or supplemental NEPA analysis must be rejected

Although Plaintiffs claim they "are not challenging the Congressional mandate," they nonetheless argue that "Congress' decision to drastically increase the number of pits. . . is without question 'a substantial change to the proposed action' warranting a NEPA analysis." ECF No. 27 at 28–29. Plaintiffs' argument must be rejected for at least three reasons.

First, a decision by Congress, rather than a final agency action, cannot lead to judicial review under the APA. *See Natl. Veterans Leg. Services Program v. U.S. Dept. of Def.*, 990 F.3d

[11] Interestingly, this is the exact result the *Hodges* Court reached on the merits. *Hodges*, 300 F.3d at 447–449 (finding that DOE's supplemental analysis was not arbitrary and capricious when it found that there were no significant new impacts or information that had not previously been studied by existing NEPA analyses).

834, 839 (4th Cir. 2021) (a final agency action is a jurisdictional requirement for APA review). Plaintiffs cannot backdoor this Court's APA jurisdiction by re-branding a challenge to an Act of Congress as a NEPA claim, which is precisely what they have done. Second, and relatedly, Congress' mandate to produce at least 80 plutonium pits did not trigger 40 C.F.R. § 1502.9(d)(1)'s and 10 C.F.R. § 1021.314(a)'s supplementation requirement because no NEPA analysis is required when the agency lacks discretion to alter its course based on the results of NEPA work. *See Alaska Wilderness League v. Jewell,* 788 F.3d 1212, 1225 (9th Cir. 2015); *Sugarloaf Citizens Ass'n v. F.E.R.C.*, 959 F.2d 508 (4th Cir.1992); *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir.1988); *Minnesota v. Block*, 660 F.2d 1240, 1259 (8th Cir. 1981). It would violate NEPA's "rule of reason" to "require an agency to prepare a full [Environmental Impact Statement] due to the environmental impact of an action it could not refuse to perform." *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004). And third, even if Congress' decision to increase the pit production requirement could qualify as a substantial change requiring supplementation under NEPA, Plaintiffs have not alleged (and cannot allege)[12] that the 1996 SSM PEIS and the 2008 SPEIS did not already consider pit production of 80 plutonium pits or more at one or more sites. Thus, the Court should reject Plaintiffs' argument (and misguided contention) that Congress' decision to mandate pit production of 80 pits per year constituted a significant change affecting the environment that had not already been studied by previous EISs.

[12] Both the 1996 SSM PEIS and the 2008 SPEIS considered the impacts of producing up to 200 pits per year.

C. Plaintiffs have not shown any other significant change or new information that compels a new or supplemental PEIS

As noted above, Plaintiffs identify three "significantly new circumstances" that they believe "require a new or supplemental PEIS" – (1) "the status of the capacity at WIPP and the impending expiration of its state RCRA permit," (2) "the need to completely repurpose the never-completed MOX Facility to produce plutonium pits at SRS, an activity never before conducted at SRS," and (3) "safety issues at LANL." ECF No. 27 at 26, 30 n. 7. They claim Defendants have never studied these issues on the programmatic level. However, Plaintiffs fail to plausibly allege that such circumstances are actually "new;" *i.e.*, they fail to allege that Defendants did not possess and consider information about the WIPP's storage capacity when Defendants completed the 2019 SPEIS SA, the 2020 Los Alamos SA and the 2020 Savannah River EIS. Moreover, the sole purpose of the 2020 Los Alamos SA and the 2020 Savannah River EIS was to study pit production at those two sites. Therefore, both the 2020 Los Alamos SA and the 2020 Savannah River EIS took into account safety concerns, along with a host of other issues.[13]

Because the 2020 Los Alamos SA and the 2020 Savannah River EIS were tiered to the 1996 SSM PEIS and 2008 SPEIS, Plaintiffs' § 1502.9(d)(1) supplementation claim collapses. ECF No. 23-1 at 30–31. Plaintiffs could have attempted to allege that the NEPA analyses Defendants performed was legally deficient for one reason or another; but instead, they claimed

[13] Sections 3.3.1 and 3.3.2 of the 2020 Los Alamos SA consider and evaluate safety concerns raised by the Defense Nuclear Facility Safety Board (DNFSB) related to seismic analysis and human health and safety, respectively. Likewise, Sections 4.10 and 4.11 of the 2020 Savannah River EIS Savannah River Pit EIS consider and evaluate human health and safety and earthquakes.

that Defendants did not supplement the 1996 SSM PEIS and the 2008 SPEIS, a fact that is belied by the documents they extensively cite and rely upon in their Amended Complaint.

In an attempt to save their claim from the obvious conclusion that the 1996 SSM PEIS and the 2008 SPEIS were actually supplemented, Plaintiffs make two arguments: (i) that Defendants did not tier site-specific analyses of the WIPP, Livermore, or NNSA's Pantex Plant to the 1996 SSM PEIS and the 2008 SPEIS, and (ii) the Court should wait until summary judgment to address the tiering issue.[14] Neither argument is availing. To begin with, Plaintiffs do not allege that the 2019 SPEIS SA, the 2020 Los Alamos SA and the 2020 Savannah River EIS failed to consider waste storage (including the WIPP's capacity), only that a supplemental PEIS was necessary. *See generally* ECF No. 21. Additionally, the program at issue studies the environmental impacts of manufacturing plutonium pits, and Plaintiffs have not alleged that either Livermore or Pantex manufacture plutonium pits. *Id.* And finally, the Court can rule on the tiering argument at the motion to dismiss stage because: (1) Plaintiffs' sole claim is that Defendants failed to supplement the 1996 SSM PEIS and the 2008 SPEIS, (2) Plaintiffs' Amended Complaint incorporates and/or relies upon the 2019 SPEIS SA, the 2020 Los Alamos SA and the 2020 Savannah River EIS, and (3) the 2019 SPEIS SA, the 2020 Los Alamos SA and

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[14] Plaintiffs state that "the motion to dismiss cannot be granted on the basis of Defendants' citation to a distinguishable case such as *Native Ecosystems Council v. Dombeck*," ECF No. 27 at 32, but Plaintiffs' statement greatly overstates Defendants' reliance on the case. Indeed, Defendants cite to *Dombeck* as merely an "e.g." along with two other cases for the simple proposition that tiering NEPA documents is a wholly permissible practice – a practice that Plaintiffs do not dispute or otherwise take issue. The fact that *Dombeck* was decided at summary judgment does not mean that this Court cannot decide the tiering issue at the motion to dismiss stage when all of the necessary facts are either in or are incorporated by reference into Plaintiffs' Amended Complaint. Moreover, *Protect Our Aquifer v. Tennessee Valley Auth.*, 554 F. Supp. 3d 940, 958 (W.D. Tenn. 2021), is distinguishable because in that case the agency had performed no NEPA work; whereas, in this case Defendants prepared extensive NEPA documents, all of which were incorporated into the Amended Complaint by reference.

the 2020 Savannah River EIS are all supplements to, or tiers from, the 1996 SSM PEIS and the 2008 SPEIS.

III. Conclusion

Because Plaintiffs have already been granted leave to amend and because their Amended Complaint still fails to plead Article III standing or state a NEPA claim, the Court should dismiss Plaintiffs' Complaint with prejudice and without leave to amend.

Respectfully submitted,

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August 29, 2022