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

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

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs in this action have brought federal claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370, and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. As explained herein, this Court possesses jurisdiction over each of these claims, and Defendants' motion to dismiss Plaintiffs' Amended Complaint under FRCP Rule 12(b)(1) and 12(b)(6) must be denied.

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INTRODUCTION

Defendants seek dismissal on two grounds: lack of Article III constitutional standing and, pursuant to Rule 12(b)(6), that Plaintiffs have failed to state a claim under NEPA. In their Memorandum in Support, Defendants attempt to side-step and oversimplify many of the issues raised in the Complaint. The plan being implemented by the Defendants and challenged through the filing of this lawsuit involves more than a mere increase in the number of pits and the production at two locations contemporaneously, although these are actions that warranted a new or supplemental Programmatic Environmental Impact Statement ("PEIS"). The additional concerns about plutonium storage capacity**,** plutonium processing methodologies and processing rateswaste processing, waste disposal, environmental justice, and safety issues at the Savannah River Site ("SRS") and the Los Alamos Nuclear Laboratory ("LANL"), as well as the impacts to sites in California and New Mexico and other locations throughout the country, were glossed over by the Defendants and the clear environmental risk of these aspects of the plan have never been evaluated. Further, Plaintiffs have clearly stated the significant changes in circumstances and new information available in its Amended Complaint.

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

LEGAL FRAMEWORK

I. Subject Matter Jurisdiction, Rule 12(b)(1), FRCP

"A defendant may challenge subject-matter jurisdiction in one of two ways: facially or factually. In a facial challenge, the defendant contends 'that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based.'" *Beck v. McDonald,* 848 F.3d 262,

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

A. Standing

A party may move to dismiss under FRCP 12(b)(1) by challenging Article III standing. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The elements include (1) injury in fact, (2) causation, and (3) redressability. *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Id*. (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). When considering a motion to dismiss based on standing, the court must assume that the plaintiffs will prevail on the merits. The question before the court is whether, presuming the plaintiffs are correct in their theory of the case, they will sustain a sufficient cognizable injury to have standing. *See, e.g., LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011)("[I]n assessing plaintiffs' standing, we must assume they will prevail on the merits"); *Muir v. Navy Federal Credit Union*, 529 F.3d 1100, 1105 (D.C.

Cir. 2008) ("In reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims."). Furthermore, this Court need only identify one plaintiff with standing and need look no further than one to hear the case. *See e.g. Outdoor Amusement Business Ass'n. v. Dep't. of Homeland Sec.*, 983 F.3d 671, 681 (4th Cir. 2020) ("[O]nly one plaintiff needs to have standing for a court to hear the case.").

II. Failure to State a Claim, Rule 12(b)(6) FRCP

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

To survive a motion to dismiss, the complaint must contain a facially plausible claim. *Id.* at 570. A claim is plausible on its face when the plaintiff asserts sufficient factual content, allowing the court to reasonably infer the defendant's liability for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The pleadings are construed in a light most favorable to the nonmoving party. *Frye v. Brunswick Cnty. Bd. of Educ.*, 612 F. Supp. 2d 694, 701 (E.D.N.C. 2009) (citing *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967 (4th Cir. 1992)). Overall, when a party brings forth a claim, the issue is whether the party "is entitled to offer evidence to support the claims." *Diaz v. Int'l Longshore and*

Warehouse Union, Local 13, 474 F.3d 1202, 1205 (9th Cir. 2007). A motion to dismiss should not be granted solely because there are doubts whether a plaintiff would prevail. *Toussaint v. Ham*, 292 S.C. 415, 415 (1987). "'A complaint should only be dismissed if it is clear to the court that 'no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Herhold v. Green Tree Serv., LLC*, 608 F.App'x 328, 331 (6th Cir. 2015) (internal citations omitted). District courts must address jurisdictional challenges before reaching the sufficiency of a complaint. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). Therefore, Plaintiffs address Defendants' motion to dismiss under SCRCP 12(b)(1) initially.

ARGUMENT

I. Plaintiffs have established a concrete injury caused directly by Defendants' failure to prepare a new PEIS pursuant to NEPA, and a ruling by this Court will redress the harm.

This Court should reject Defendants' motion to dismiss for lack of standing because it misconstrues Plaintiffs' allegations and ignores clear precedent. Defendants' motion reflects their misinterpretation of both Plaintiffs' causes of actions and the law underlying violations of NEPA. Because Plaintiffs have sufficiently alleged standing, this Court has jurisdiction and should reject Defendants' motion to dismiss.

The "irreducible constitutional minimum" of Article III standing is satisfied when the plaintiff shows (1) the existence of a "concrete and particularized" and "actual or imminent" injury-in-fact; (2) that is "fairly . . . traceable to the challenged action of the defendant" and (3) likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] 'presume[s] that general

allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 561 (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 889 (1990)).

The Supreme Court has recognized that standing requirements for the enforcement of procedural rights are different. *See id.* at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). Describing the quintessential example, the Court noted that

> one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. To enforce a procedural right, a plaintiff must nonetheless show that "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," and the interest is "within the zone of interests to be protected" by the statute allegedly violated. *Id.* n.8; *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

The National Environmental Policy Act (NEPA) created one such procedural right. Congress enacted NEPA to protect and promote the quality of the environment. 42 U.S.C. § 4331. To accomplish this goal, NEPA imposed its "action forcing" requirement on federal agencies to prepare "a detailed statement . . . on the environmental impact of the proposed [agency] action." *Id.* This requirement ensures that federal agencies, "in reaching [their] decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). In addition, it "guarantees that the relevant information will be made available to the

larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.*

Although NEPA does not provide a private cause of action, the Administrative Procedures Act (APA) grants judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. "[T]o be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Nat'l Wildlife Fed.*, 497 U.S. at 883. Congress enacted NEPA "to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable unintended consequences" and "to promote efforts which prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. §§ 4321, 4331(b)(3). Therefore, claims alleging injury to the environment and to the plaintiffs' "'recreational use and aesthetic enjoyment' [of the environment] are among the *sorts* of interests [NEPA was] specifically designed to protect." *National Wildlife Fed.*, 497 U.S. at 886; *see also Hodges v. Abraham*, 300 F.3d 432, 444-45 (4th Cir. 2002) (finding Governor of South Carolina's concrete interest in protecting streams and wildlife habitat located near SRS was the type of interest "NEPA was designed to protect").

A. Defendants' failure to prepare a new PEIS has caused and will continue to cause a concrete, imminent injury to Plaintiffs.

i. Defendants incorrectly claim that Plaintiffs' allegations depend on allegations of speculative injuries, and Plaintiffs sufficiently allege concrete, imminent injuries to their recreational, aesthetic, and environmental interests in areas with a geographical nexus to the sites central to Defendants' proposed action.

Defendants' central argument contends that Plaintiffs "rely on vague allegations of possible injury based on their imaginings of future accidents or 'mishaps' at one of the three facilities they identify—including hypothetical terrorist attacks, earthquakes, and wildfires." *Defendants' Motion to Dismiss Amended Complaint*, at 14-15. This argument misconstrues the nature of Plaintiffs' claims: the injury is not the risk of such accidents, attacks, or natural disasters—mockingly downplayed by Defendants despite the indisputable recent increase in frequency and severity of such natural disasters and the well-documented history of accidents throughout the nuclear weapons complex. Instead, the injury 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.

Defendants claim the complaint's allegations are "speculative and rely on an attenuated chain of causation," analogous to the circumstances present in *South Carolina v. United States*, 912 F.3d 720 (4th Cir. 2019). In reality, Plaintiffs sufficiently allege imminent, concrete injury to satisfy the standing requirement, and Defendants' reliance on *South Carolina* is categorically misplaced. There, South Carolina alleged that DOE violated NEPA when it failed to prepare a supplemental PEIS analyzing the potential environmental consequences associated with long-term storage of weapons grade plutonium and highly enriched uranium for longer than the 50-year term already analyzed under an existing EIS. *Id.* at 723, 725. The suit was triggered by DOE's decision to terminate construction of the MOX Facility, which South Carolina alleged would result in the State becoming a *permanent* repository for nuclear waste without first complying with NEPA. *Id.* at 725-27.

The Fourth Circuit rejected this argument, finding the alleged injury was "too speculative" and relied on a "highly attenuated set of circumstances" to establish a concrete

injury-in-fact to satisfy the standing requirement. *Id.* at 728. Contrary to Defendants' interpretation[1] of *South Carolina*, the Fourth Circuit focused *not* on the uncertainty of "increased radiation exposure to the public, increased risks of nuclear-related accidents, [or] an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium" alleged by the State but instead on the allegation that South Carolina would become the *permanent* repository for nuclear material.[2] *Id.* The Court of Appeals found the alleged injury too speculative to establish standing because: (1) the existing EIS evaluated the storage of plutonium at SRS for fifty years, and that *unchallenged* analysis would not expire for another 28 years, providing DOE adequate time for identifying an alternative method for disposing or otherwise removing the nuclear material from South Carolina; (2) "Congress ha[d] put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina"; and (3) South Carolina had *already* "successfully brought suit pursuant to the Administrative Procedures Act to enforce these congressionally mandated deadlines via a mandatory injunction." *Id.* (citing *South Carolina v. United States*, 907 F.3d 742 (4th Cir. 2018) (ordering DOE to remove one metric ton of plutonium within two years)).

Significantly, South Carolina did not argue that its injury, as a neighboring landowner, [was] attributable to the *current* storage of nuclear material . . . or the inadequacy of the [EIS]

[1] Defendants claim *South Carolina* stands for the proposition that the plaintiff lacked standing because the "State's claims of harm to its citizens from radioactive waste were remote and speculative." *Defendants' Motion to Dismiss Amended Complaint* at 15. This is not an accurate reading of *South Carolina*, as Defendants mistakenly focus on the risks of accidents, attacks, or natural disasters, instead of the appropriate inquiry into whether the injury from the *insufficient evaluation* of such risks was imminent and concrete.

[2] Indeed, Defendants' argument would eviscerate the purpose of NEPA by eliminating any claim that a federal agency inadequately evaluated impacts of its action on the environment because a plaintiff could never predict with absolute certainty that the environmental impact not evaluated in an EIS would actually occur.

pursuant to which the nuclear material is *currently* stored." *Id.* at 729. Instead, its "injury [would] mature" only in 2046, when the existing EIS expired—twenty-eight years in the future and only if multiple contingent events occurred. *Id.* at 728-29 (describing the contingent scenarios necessary for South Carolina's injury to materialize twenty-eight years in the future). Because "numerous contingencies" existed before plutonium would remain in South Carolina after 2046, when the existing analysis expired, the Court of Appeals concluded the State's alleged theory of injury was too speculative to support Article III standing. *Id.* at 729-30.

In contrast, Plaintiffs' injuries are analogous to the type of injuries the Fourth Circuit found sufficiently concrete and imminent in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002). In *Hodges*, the Governor of South Carolina sought to enjoin DOE from *immediately* shipping plutonium to SRS, alleging inadequacies in the NEPA analysis. *Id.* at 441. Governor Hodges argued he had suffered an injury to his procedural right for an EIS that complies with NEPA based on his "proprietary interest and control, as Governor, over vast swaths of land and natural resources owned by South Carolina, including the State's highways, its streams, and its woodlands"; his "official responsibility for preserving the State's groundwater"; and his "similar duty to preserve and protect public drinking water." *Id.*at 444-45. The Court of Appeals concluded that Governor Hodges had a "concrete interest that NEPA was designed to protect" in his role as "essentially a neighboring landowner, whose property is at risk of environmental damage from the DOE's activities at SRS" given that "at least one state highway runs through SRS, and that several streams and wildlife habitats are located near SRS." *Id.* at 445.

Notably, the plaintiffs in both *South Carolina* and *Hodges* alleged similar uncertain environmental impacts, but it was not the uncertainty or speculative nature of those impacts that served as the determining factor for standing. *See Hodges*, 300 F.3d at 441 (alleging "DOE's uninformed shipment of plutonium into South Carolina and its proposed storage of such

plutonium at SRS" threatened his proprietary interest and control in the State's streams and woodlands and his responsibility to preserve the State's groundwater and public drinking water); *South Carolina*, 912 F.3d at 727 (alleging "increased radiation exposure to the public [and] increased risks of nuclear-related accidents"). Instead, the Fourth Circuit, in both cases, focused on whether the alleged DOE action—the current as opposed to the "decades in the future" storage of plutonium at SRS without adequate evaluation of environmental risks—was concrete and imminent; in contrast, Defendants here misread *South Carolina* and erroneously focus their standing argument on the uncertain environmental impacts that Plaintiffs allege were insufficiently evaluated under NEPA. *See South Carolina*, 912 F.3d at 729 (distinguishing the "decades in the future" storage at issue to *Hodges* where plutonium storage was imminent).

Like the Governor in *Hodges*, Plaintiffs allege an imminently threatened, concrete interest: the damage to recreational, aesthetic, and environmental interests in sites with a geographical nexus to Defendants' proposed actions. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167,181 (2000) ("Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972))). Specifically, Plaintiffs alleged these interests are "threatened by [Defendants'] uninformed" plan to initiate the first-time production of plutonium pits at SRS and to expand production at LANL without adequately evaluating the environmental risks on a programmatic basis. *Hodges*, 300 F.3d at 444. Defendants' plan for dual-site plutonium pit production is imminent, with production of "qualification plutonium pits" congressionally authorized to begin already. 50 U.S.C. § 2538a(1) (providing that "production of qualification plutonium pits" shall begin during 2021). Although Plaintiffs cannot identify the precise moment that expanded, dual-site plutonium pit production will commence, Defendants

are in full control of the time frame and may immediately begin the implementation of its proposed action, if it has not already done so, including the shipment of plutonium and production of pits at SRS and LANL. *See Hodges*, 300 F.3d at 442 (finding standing existed when DOE announced it would "*immediately* begin shipment of the Rocky Flats plutonium to SRS" (emphasis added)); *cf. South Carolina*, 912 F.3d at 728 (finding alleged injury speculative when it would only "mature" twenty-eight years later and only if a speculative "chain of possibilities" materialized). To demonstrate their concrete, imminent injuries from Defendants' proposed action, Plaintiffs alleged the following:

1. **Nuclear Watch New Mexico ("NukeWatch")**, a nonprofit organizational plaintiff, seeks to "use research, public education, and effective citizen action to promote safety, environmental protection, and cleanup at nuclear facilities, including LANL, and to advocate for U.S. leadership toward a world free of nuclear weapons." Am. Comp. ¶ 40. NukeWatch's Executive Director, Jay Coghlan, "regularly recreates just outside the boundaries of LANL, and specifically has been rock climbing on nearby crags for nearly 50 years," including an "area contiguous and immediately downstream of LANL and along the Los Alamos Canyon's narrow streambed," where "measurable detections of plutonium" have been discovered up to 17 miles downstream. *Id.* ¶ 42. Defendants' failure to adequately consider numerous environmental risks from the decision to expand plutonium pit production at LANL and initiate dual site production detrimentally affects Mr. Coghlan's recreational, environmental, and aesthetic interests because of the unanalyzed increased risk of accidents and resultant injury, "in particular to Mr. Coghlan who spends a substantial amount of his free time nearby." *Id.* ¶¶ 49-50. Through Mr. Coghlan, NukeWatch is harmed by Defendants' failure to analyze these risks in a

supplemental PEIS, whose interests in environmental contamination and safety from nuclear-related activities is directly related to its mission.

2. **Tri-Valley CAREs**, a nonprofit organizational plaintiff, consists of 6,000 members that reside, work, and recreate within 50 miles of Lawrence Livermore National Laboratory ("LLNL"), including many who reside within 10 miles of LLNL's main site or its Site 300 high explosive testing range. *Id.* at ¶ 54. Tri-Valley CAREs focuses on environmental and health risks at LLNL and throughout the nuclear weapons complex caused by U.S. nuclear weapons storage and processing and their associated toxic and radioactive wastes. *Id.* at ¶¶ 54, 57. Tri-Valley CAREs alleged that the organization, its executive director, and its members are "harmed by operations at LLNL sites" that include "dangerous activities related to [Defendants'] plan to expand pit production." *Id.* at ¶¶ 68-69. The complaint specifically cited the "development and testing of a new warhead design *into which the pits produced at the LANL and SRS will ultimately be placed*," the increased handling of and experimenting with hazardous materials and high explosive tests, with the associated potential for releases of chemicals, metal, and radioactivity into the air, soils, and groundwater aquifers in the area surrounding LLNL." *Id.* (emphasis added). The unanalyzed risk of environmental "contamination harms Tri-Valley CAREs and its members by exposing them to toxic and hazardous substances in the air they breathe and potentially to the water they drink. The Defendants' proposed plan stands to significantly increase the environmental and health hazards already experienced by these members." *Id.*at ¶ 69. Through its members, Tri-Valley CAREs is harmed by Defendants' failure to analyze these risks in a supplemental PEIS and its members' interests in environmental contamination and safety issues from nuclear-related activities are directly related to its mission.

3. **Tom Clements**, an individual plaintiff, "recreates in natural areas adjacent to or near SRS, including the Crackerneck Wildlife Management Area and Ecological Reserve, located within the boundary of SRS," and "regularly visits Audubon's Silver Bluff Sanctuary located nearby on the Savannah River." Am. Comp., ¶¶ 15-17. Furthermore, he alleged that "Defendants' decision to initiate plutonium pit production at SRS will detrimentally affect Mr. Clements' recreational enjoyment of both Crackerneck and the Audubon Sanctuary because of health and safety concerns triggered by pit production." *Id.*

4. **SRS Watch**, a nonprofit organizational plaintiff, engages in "research, public outreach and education, and effective citizen advocacy on SRS matters" and accomplishes its mission by "promoting the public's advocacy of nuclear nonproliferation, as well as safety and environmental protection in any nuclear programs." *Id.* at ¶¶ 12-13. As noted above, its Director, Tom Clements, engages in recreational and aesthetic enjoyment of areas adjacent to SRS, and those interests are detrimentally affected because of his health and environmental safety concerns triggered by pit production, precisely the interests SRS Watch seeks to promote and protect. *Id.* at ¶¶ 15-17.

5. **Gullah/Geechee SIC**, a nonprofit organizational plaintiff, alleges that its mission is to "preserve, protect, and promote [the Gullah/Geechee Nation] people's history, culture, language, and homeland." Am. Comp., ¶ 27. The Gullah/Geechee SIC's members "rely heavily on the Savannah River as a sacred area that served as transport for many of their ancestors in addition to this being one of the inlets from which native Gullah/Geechee have lived and practiced subsistence fishing," and its members "consider fishing and other water activities an important aspect of their cultural customs and traditions," in which they engaged in the Savannah River downstream of SRS. *Id.* at ¶¶ 28-29. Its

members are "negatively affected by the Defendants' decision to initiate plutonium pit production at SRS, an activity never before conducted at SRS" because they are dissuaded from engaging in such cultural and recreational activities in the River if Defendants proceed with their plan without fully evaluating the program-wide and cumulative impacts to the environment. *Id.* at ¶¶ 30-32. Finally, through the injuries to its members' interests in engaging in these cultural and recreational activities, Gullah/Geechee SIC's germane interest in preserving and promoting the Gullah/Geechee culture is harmed.

Accordingly, Plaintiffs' injuries do not depend on an "attenuated series of events" because the injury alleged is not the potential nuclear accident or catastrophic failure as inaccurately asserted by Defendants. Instead, Plaintiffs seek to enforce their procedural rights under NEPA to protect their concrete recreational, aesthetic, cultural, and environmental interests from irreparable damage caused by Defendants' imminent plutonium pit production without the proper and legally required programmatic evaluation of the plan's environmental impacts. *See South Carolina Wildlife Fed. v. Limehouse*, 549 F.3d 324, 329 (4th Cir. 2008) (finding plaintiff alleged facts sufficient to survive a motion to dismiss in a NEPA case where they asserted that "construction of the Connector would harm its members' ability to use and enjoy the relevant area for a variety of educational, scientific, recreational, and aesthetic purposes, and that one or more members *currently use the land* for such purposes" (emphasis added)). Plaintiffs therefore sufficiently allege a concrete, imminent injury to satisfy the requirements for standing.

ii. Plaintiffs additionally suffer a concrete injury from the deprivation of information and sufficiently establish informational standing.

Each Plaintiff is unlawfully deprived of information required by NEPA. The deprivation of information causes a direct injury to the nuclear advocacy organizational plaintiffs by

impeding their ability to carry out their missions and forcing the diversion of resources. In addition, it causes a direct injury to Tom Clements and to Gullah/Geechee SIC through its members by impeding their ability to make choices regarding the safety of visiting and recreating in the Savannah River downstream of SRS and in recreational areas adjacent to SRS. Such informational injury establishes the actual or imminent and concrete and particularized injury necessary to satisfy Article III standing, and this Court should reject the motion to dismiss.

"[A] plaintiff suffers a concrete informational injury where he is denied access to information required to be disclosed by statute, *and* he 'suffers, by being denied access to that information, the type of harm *Congress sought to prevent* by requiring disclosure.'" *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345-46 (4th Cir. 2017) (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). Congress enacted NEPA to protect and promote the quality of the environment. 42 U.S.C § 4331. To accomplish this goal, NEPA imposed its EIS requirement, which ensures that federal agencies, "in reaching [their] decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson*, 490 U.S. at 349.

Indisputably, NEPA is a statute that requires disclosure of this "detailed information" to the public: "Copies of such [environmental impact statements] . . . *shall* be made available to the President, the Council on Environmental Quality and *to the public* . . . ." 42 U.S.C. § 4332(C) (emphases added). Not only does NEPA mandate this information, the statute was enacted to inform and assure the "larger audience[3]" that "important environmental effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349 (emphasis added) (noting NEPA intends that

"the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"). As a result, the deprivation to the "larger audience" of the requisite evaluation of environmental impacts that would be conducted and published in a PEIS like the one missing here and the resulting inability to effectively make decisions or advocate about the proposed action and its environmental impacts are precisely "the type[s] of harm *Congress sought to prevent* by requiring disclosure.'" *Dreher*, 856 F.3d at 345-46. Moreover, NEPA's requirement for public notice and participation and its goal of assuring and informing the public that all environmental impacts are considered are served by the public's ability to comment on the wider scope of analysis inherent in a new or supplemental PEIS.

Plaintiffs are and continue to be deprived of information by the complete absence of a programmatic review assessing the environmental impacts from Defendants' plan to initiate dual-site plutonium pit production. This deprivation of information causes precisely the type of harm Congress sought to prevent in enacting NEPA's requirement for the preparation and disclosure of environmental impact statements. The following set of allegations demonstrates the injuries suffered by each Plaintiff from this deprivation of information required by NEPA:

1. **NukeWatch** "use[s] research, public education, and effective citizen action to promote safety, environmental protection, and cleanup at Nuclear Facilities, including LANL, and to advocate for U.S. leadership toward a world free of nuclear weapons." *Amended Complaint*, p. 15, ¶ 40. NukeWatch accomplishes its mission by collecting critical information contained in NEPA analyses, including PEIS, "disseminating it to educate members of the public, and promoting the public's advocacy of nuclear nonproliferation,

[3] *Sierra Club v. Watkins*, 808 F.Supp. 852, 858 (D. D.C. 1991) (including the public, "the President, who is responsible for the agency's policy, *and Congress, which has authorized the*

as well as safety and environmental protection in any nuclear programs." *Id.* at 15-16, ¶ 41. A "key component" of effectively carrying out NukeWatch's "mission of monitoring DOE and NNSA programs and policies, specifically at LANL, educating the public, and engaging in advocacy to elected officials is the availability of information" about programs and activities across the DOE nuclear weapons complex that would typically be contained in a PEIS. *Id.* at 17, ¶ 45. NukeWatch further alleged that the absence of this information "on environmental and human health impacts—the precise type of information NEPA was enacted to ensure was developed and shared with decision-makers, including the public"—impedes NukeWatch from carrying out its mission by preventing it from adequately educating the public and monitoring DOE activities and programs and it will necessitate a diversion of resources in order to obtain such information and disseminate to the public. *Id.* at 17, ¶¶ 45-46.

2. **Tri-Valley CAREs** educates 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 LLNL and throughout the nuclear weapons complex. *Id.* at 20, ¶¶ 54, 57. In order to carry out its mission, "Tri-Valley CAREs utilizes and depends on environmental statutes and the analyses that DOE and NNSA produce according to those statutes, including [PEIS] conducted pursuant to NEPA." *Id.*at 21, ¶ 58. Tri-Valley CAREs alleged that Defendants failed to conduct a PEIS or any NEPA analysis of the effects on LLNL of Defendants' plan to initiate dual-site and expanded plutonium pit production, which include the "development and testing of a new warhead design into which the pits produced at the LANL and SRS will ultimately be placed," the increased handling of and experimenting

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agency's actions" as within the "larger audience" (emphasis added)).

with hazardous materials and high explosive tests, with the associated potential for releases of chemicals, metal, and radioactivity into the air, soils, and groundwater aquifers in the area surrounding LLNL. *Id.* at 21, ¶¶ 68-69. This deprivation of information on environmental and health risks that would be contained in a PEIS thwarts Tri-Valley CAREs' mission of educating the public and engaging in advocacy regarding environmental and health risks at LLNL caused by DOE and NNSA programs and activities, and the deprivation of this information will "necessitate the diversion of Tri-Valley CAREs resources to obtain such information and disseminate it to the public." *Id.* at 21, ¶¶ 62-64.

3. **SRS Watch** seeks to "monitor programs and policies being pursued by the DOE, with a focus on activities" at SRS. SRS Watch engages in research, public outreach and education, and effective citizen advocacy on SRS matters, including programs concerning plutonium management and pit production. Am. Comp., ¶ 11. SRS Watch accomplishes its mission by collecting critical information contained in NEPA analyses, including PEIS, "disseminating it to educate members of the public, and promoting the public's advocacy of nuclear nonproliferation, as well as safety and environmental protection in any nuclear programs." *Id.* at 7, ¶¶ 12-13. SRS Watch alleged that a "key component" of effectively carrying out its mission is the "availability of information" about programs and activities across the DOE nuclear weapons complex that would typically be contained in a PEIS. *Id.* at 17, ¶ 45. SRS Watch further alleged that the absence of this information "on environmental and human health impacts—the precise type of information NEPA was enacted to ensure was developed and shared with decision-makers, including the public" impedes SRS Watch from carrying out its mission by preventing it from adequately educating the public and monitoring DOE activities and

programs and it will necessitate a diversion of resources in order to obtain such information and disseminate to the public. *Id.* at 7, ¶¶ 13-14.

4. **Tom Clements** lives approximately 50 miles from the northeastern boundary of SRS, has visited SRS on numerous occasions for professional reasons in his role as Director of SRS Watch, "recreates in natural areas adjacent to or near SRS, including the Crackerneck Wildlife Management Area and Ecological Reserve, located within the boundary of SRS," and "regularly visits Audubon's Silver Bluff Sanctuary located nearby on the Savannah River." Am. Comp., ¶¶ 15-17. Furthermore, he alleged that Defendants' "failure to prepare a PEIS" for its plan to initiate first-time production of plutonium pits at SRS "will deprive Mr. Clements of the ability to make choices regarding the safety of visiting and recreating in both Crackerneck and the Audubon Sanctuary." *Id.* He further alleged that "he considers the risks associated with being present on or near" SRS, and Defendants' failure to prepare a supplemental PEIS will dissuade him from conducting the professional and recreational activities he currently undertakes. Am. Comp. ¶ 21.

5. **Gullah/Geechee SIC** seeks to "preserve, protect, and promote [the Gullah/Geechee Nation] people's history, culture, language, and homeland." Am. Comp. ¶ 27. The Gullah/Geechee SIC's members "rely heavily on the Savannah River as a sacred area that served as transport for many of their ancestors in addition to this being one of the inlets from which native Gullah/Geechee have lived and practiced subsistence fishing," and its members "consider fishing and other water activities an important aspect of their cultural customs and traditions," in which they engaged in the Savannah River downstream of SRS. *Id.* at ¶¶ 28-29. Its members are "negatively affected by the Defendants' decision to initiate plutonium pit production at SRS, an activity never before conducted at SRS" because the risks inherent in such production processes to water quality of the Savannah

River "harms their interests in promoting and preserving their cultural interests" by dissuading its members from engaging in such cultural and recreational activities in the River if Defendants proceed with their plan without fully evaluating the program-wide and cumulative impacts to the environment. *Id.* at ¶¶ 30-32. The deprivation of information that would be contained in a PEIS diminishes the members' interests in promoting their culture because it inhibits their ability to evaluate the safety of fishing and other activities central to their culture in the Savannah River. *Id.* at ¶ 34-35. Finally, through the injuries to its members, the deprivation of such information harms the Gullah/Geechee SIC because it damages its germane interest in preserving and promoting the Gullah/Geechee culture, and its members' interests in these activities are directly related to the purpose of the Gullah/Geechee SIC.

These allegations demonstrate the type of injury to a concrete interest sufficient to establish informational standing beyond the mere procedural violation. *See Summers v. Earth Island Institute*, 555 U.S. 488, 490 (2009). Organizations have standing to challenge actions that cause them direct injury. Direct organizational injury is typically established by the (a) diversion of organizational resources to identify or counteract the allegedly unlawful action, and (b) frustration of the organization's mission. *See Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) (stating an organization "may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission"); *see also Southern Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 (4th Cir. 2013) (noting "impairment of an organization's ability to advance its purposes combined" with a "consequent drain on the organization's resources" establishes standing).

The nuclear advocacy organizations collectively seek to monitor nuclear facilities involved in the underlying agencies' plans, utilize information regarding nuclear programs to

educate the public, and advocate for public health and safety and environmental protection in the nuclear weapons complex to elected officials. The analysis contained in a PEIS regarding the underlying plan to produce at least eighty plutonium pits per year at two separate facilities is essential to these organizations' ability to effectively carry out their missions, and the deprivation of the information will force the diversion of resources in obtaining and disseminating this currently-unavailable information to the public. Given Congress's goal in guaranteeing informed decision-making when it enacted NEPA, the failure of the agencies to prepare a PEIS causes the nuclear safety organizational plaintiffs precisely the type of harm Congress sought to prevent. *See Dreher*, 856 F.3d at 345-46. The injury to each organization is not the mere *procedural violation*, but the direct injury each organization suffers as a result of the procedural violation to their ability to effectively operate and carry out their missions, as well as the diversion of resources caused by the additional effort to obtain this information that would be available through a PEIS and disseminate it to the public to advance their underlying missions.

In addition, Tom Clements and Gullah/Geechee SIC each sufficiently allege informational injury from the absence of a PEIS evaluating the environmental and human health impacts that impedes their ability to make choices regarding the safety of recreating in the area near SRS and, for the Gullah/Geechee SIC members, engaging in activities central to their tradition and culture, the promotion of which is the primary mission of the Gullah/Geechee SIC. SRS Watch, Tri-Valley CAREs, and NukeWatch also establish associational standing through its members and directors' informational injuries. *See Laidlaw*, 528 U.S. at 181 (stating an association has standing when its members would otherwise have standing to sue in their own right, the interests are germane to the organization's purpose, and neither the claims nor relief requested require participation of individual members).

Plaintiffs' injuries are analogous to the types of injuries suffered by the plaintiff in *National Veterans Legal Services Program v. United States Department of Defense*, 990 F.3d 834 (4th Cir. 2021), in which the Fourth Circuit recently concluded the allegations established the requisite "injury in fact" through informational standing when DOD failed to publish military board decisions, as mandated by statute. The Fourth Circuit reversed the District Court's dismissal of the lawsuit, finding the organization (NVLSP) sufficiently alleged informational injury when the complaint alleged the organization "accomplishes its mission" of assisting veterans in applying to military boards to "correct errors or injustices in their records by screening the merit of veterans' cases" and relies on access to board decisions for its daily operations because "the effectiveness of [its] services depends on understanding the reasoning behind the Boards' decisions." *Id.* at 838. The Court emphasized the following allegation in the complaint:

> Without access to previous Board decisions, NVLSP cannot evaluate the potential success of appeals or develop strategies to assist veterans in filing their applications to the Boards. This lack of information prevents NVLSP from effectively carrying out its mission of advocating for veterans so that they may receive the benefits they deserve.

Id. The Court noted "that the informational injury alleged by NVLSP is just the kind of injury found to have established standing in [*Federal Election Commission v.*] *Akins*." *Id.*; *see Akins*, 524 U.S. 11, 13-14, 21 (1998) (finding voters had standing to sue the Federal Election Commission to require it to disclose contributions made to an organization under its jurisdiction and distributions made by that organization to candidates for office because the voters suffered an "injury in fact" consisting of "their inability to obtain information" and the information would "help them . . . evaluate candidates for public office").

The injuries suffered by Plaintiffs here from Defendants' failure to prepare a PEIS, as mandated by NEPA, are precisely the types of harm Congress intended to prevent in imposing the EIS requirement and the mandate to share them with the public—to ensure *informed* decision making by the "larger audience." Plaintiffs here rely on these analyses to engage in activities core to their missions like monitoring Defendants' programs and policies and effectively participating in the process, in addition to educating the public and promoting effective advocacy to elected officials, and to engage in recreational and cultural activities in the area adjacent to the sites central to Defendants' planned action.[4]

Defendants assert that informational standing cannot serve as a basis for a NEPA claim, citing the D.C. Circuit Court of Appeals' decision in *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991). Defendants' citation and proposition for *Lyng* is misleading. First, although the D.C. Circuit expressed concern regarding the workability of informational standing in NEPA cases, the court's commentary was dicta as it ultimately assumed that the plaintiff adequately alleged injury under informational standing, and *Lyng*'s dicta nonetheless did not completely foreclose the doctrine in NEPA cases. Second, *Lyng* was decided prior to the Supreme Court's decision in *Akins*, which clearly established the basis for informational standing. Finally, permitting informational standing under NEPA is no different than permitting

[4] S*ee Public Citizen v. United States Dep't 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" given the organizations intended to "monitor [the Justice Department's] works and participate more effectively in the judicial selection process"); *American Canoe Association, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d. 536, 542-44 (6th Cir. 2004) (finding organization had associational standing to sue for informational injuries from the defendant's violation of monitoring and reporting requirements under the Clean Water Act based on claim that the "lack of information deprived [a member of the organization] of the ability to make choices about whether it was 'safe to fish, paddle, and recreate in this waterway'" and *also* had direct organizational standing based on the allegation that the absence of the information "stymied"

informational standing under any other statute mandating the disclosure of information, like those at issue in *Akins*, *National Veterans*, *Public Citizen*, and *American Canoe*. A plaintiff seeking vindication of its procedural right under NEPA will nonetheless have to establish—as Plaintiffs have done here—that the deprivation of information causes an injury to them specifically.

Because Plaintiffs sufficiently allege an informational injury that harms each of them directly, and not merely a procedural violation alone, Plaintiffs satisfy the injury-in-fact requirement to satisfy standing, and this Court should deny Defendants' motion to dismiss.

iii. Plaintiffs satisfy the prudential standing requirement that the injuries alleged fall within the "zone of interests" protected by NEPA.

Plaintiffs indisputably allege injuries arising out of recreational, aesthetic, environmental, informational, and health and safety interests, all of which are well within the "zone of interests" protected by NEPA's environmental impact statement requirement. "[T]o be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Nat'l Wildlife Fed.*, 497 U.S. at 883. Plaintiffs' 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—all of which fall within NEPA's "zone of interests"—and demonstrates the necessity of a programmatic EIS.

Plaintiffs' claims alleging injury to the environment and to the plaintiffs' "'recreational use and aesthetic enjoyment' [of the environment] are among the *sorts* of interests [NEPA was] specifically designed to protect." *National Wildlife Fed.*, 497 U.S. at 886. In addition, Plaintiffs'

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their daily operations of monitoring and reporting violations to their own members, proposing

informational injuries—the deprivation of information on environmental impacts that cause direct concrete injuries as described above—are within the zone of interests NEPA was designed to protect, given NEPA's primary goal of informing and assuring the "larger audience" that "important environmental effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349.

Accordingly, Plaintiffs satisfy the prudential standing requirement that its injuries fall within NEPA's zone of interests.

B. Plaintiffs sufficiently allege that Defendants' failure to prepare a PEIS causes the injuries alleged in the complaint, and this Court indisputably can remedy the injuries Plaintiffs by ordering Defendants to prepare a PEIS.

Defendants improperly elevate the burden for establishing causation and redressability, and Plaintiffs have sufficiently alleged Defendants' failure to analyze numerous environmental effects of its decision to initiate dual-site plutonium production causes the injuries it thoroughly alleged. In addition, Plaintiffs have shown an order of this Court requiring Defendants to perform a PEIS will remedy the injuries alleged in the complaint. Because Plaintiffs satisfy each element of standing, this Court should deny Defendants' motion to dismiss.

The causation requirement for standing requires that the injury "is fairly . . . traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560. "The traceability requirement ensures that it is likely the plaintiff's injury was caused by the challenged conduct of the defendant, and not by the independent actions of third parties not before the court. *Friends for Ferrell Pkwy., LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002). "[T]he 'fairly traceable'

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legislation, and bringing litigation based upon the information collected by the defendants).

standard is 'not equivalent' to a requirement of tort causation." *Id.* at 324 (quoting *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.8 (4th Cir. 1992)).[5]

Plaintiffs alleged "significantly new circumstances" that require a new or supplemental PEIS, including "the status of the capacity at WIPP and the impending expiration of its state RCRA permit," the need to completely repurpose the never-completed MOX Facility to produce plutonium pits at SRS, an activity never before conducted at SRS, and safety issues at LANL, including the safety concerns that shut down major operations at the Lab's plutonium facility for over three years. Am. Comp. ¶ 181. Plaintiffs alleged Defendants failed to consider alternatives to the proposed action and failed to explain its decision to shift from a "cost-effective and streamlined enterprise to a significantly costlier and more redundant plan" by splitting pit production across two separate facilities and the inherently increased environmental consequences from this shift. *Id.* ¶ 144. The complete dearth of analysis at a programmatic level of these issues causes the Plaintiffs' injuries to their environmental, aesthetic, recreational, health and safety, and informational interests outlined above. Plaintiffs' injuries are fairly traceable to Defendants' failure to address in a new or supplemental PEIS the numerous examples outlined throughout the complaint of unanalyzed environmental impacts of its proposed dual site plutonium pit production plan, which involve sites with a geographical nexus to Plaintiffs' injured interests. Plaintiffs therefore sufficiently alleged Defendants' actions have caused their injuries to satisfy the standing requirement.

Second, Plaintiffs sufficiently allege that its injuries would be redressable by an order of this Court. "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the

[5] Defendants cite to the causation standard adopted by the District of Columbia Circuit in *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996). However, the Fourth Circuit

decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). "[T]he redressability prong requires that it be likely, and not merely speculative, that a favorable decision from the court will remedy the plaintiff's injury." *Friends for Ferrell Pkwy.*, 282 F.3d at 320.

The relief Plaintiffs request from this Court is an order requiring Defendants to prepare a new or supplemental PEIS that addresses the environmental and health and safety risks raised by Plaintiffs in the complaint and the numerous letters submitted to Defendants prior to this litigation. Because Plaintiffs' recreational, aesthetic, cultural, environmental, health and safety, and informational injuries arise out of the unanalyzed impacts of Defendants' proposed dual site plutonium pit production, an order of this Court requiring the preparation and publication of a PEIS would redress the injuries alleged by Plaintiffs. *See Rocky Mountain Peace & Justice Center v. United States Fish & Wildlife Serv.*, 40 F.4th 1133, 1154, (10th Cir. 2022) (stating that in the NEPA context, a plaintiff must show only "that its injury would be redressed by a favorable decision requiring compliance with NEPA procedures").

Accordingly, Plaintiffs sufficiently alleged concrete injuries caused directly by Defendants' failure to prepare a new PEIS pursuant to NEPA, and a ruling by this Court will redress the harm.

II. Plaintiffs have alleged facts sufficient to state a claim under NEPA.

A review of Plaintiffs' Amended Complaint plainly shows it is much more than "a formulaic recitation of the elements of a cause of action," as is required under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs have alleged the Defendants have not complied with 40 C.F.R. § 1502.9(d)(1), which requires there be a supplement to an EIS where "(i) the agency makes substantial changes to the proposed action that are relevant to environmental

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has never adopted this standard.

concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Further, Plaintiffs have alleged that Defendants have violated 10 C.F.R. § 1021.314(a) because "there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns . . . ." *Id*.

Defendants argue that "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." *Defendants' Motion to Dismiss Amended Complaint* at p. 29. It is unclear what conclusion Defendants intend the Court to draw from this statement—perhaps that going from one production site to two production sites is, by definition, not a substantial change or does not involve significant changes in circumstances? Regardless, Plaintiffs have done significantly more in their Complaint than merely alleging splitting production between two sites requires a new or supplemental PEIS. Even a cursory review of Plaintiff's cause of action for relief reveals Plaintiffs pled the facts (which must be assumed to be true) supporting a substantial change warranting the relief requested.[6]

Plaintiffs cite to the 2018 Nuclear Posture Review in their Amended Complaint, which announced the significant change of expanded pit production. Am Comp. ¶ 141. Lest the Defendants again misconstrue this statement, Plaintiffs are not challenging the Congressional

[6] "The Defendants' current plan is a substantial change from NNSA's 2008 Complex Transformation Supplemental PEIS, including its stated purpose and need, to have a dual-site method of production of the mandated increased number of pits. Shifting from pit production at one site to pit production at two sites, with the attendant increased waste and transportation issues, is a substantial change in the proposed action. By declining to prepare a new or supplemental EIS based on this substantial change, Defendants violated NEPA and its implementing regulations and acted arbitrarily, capriciously, not in accordance with law, and have also abused their discretion and failed to comply with procedure required by law, violating the APA, 5 U.S.C. § 706(2)." Am. Comp. ¶ 180.

mandate. While Plaintiffs do not seek relief related to Congress' decision to drastically increase the number of pits, the fact that Congress, only in 2014, required the U.S. Government to produce at least 80 pits per year to increase pit production is without question "a substantial change to the proposed action" warranting a NEPA analysis. 40 C.F.R. § 1502.9(d)(1).

The Amended Complaint alleges that up until 2018, each NEPA document produced by the Defendants emphasized that there would be a small capacity:

a. 1996 SSM PEIS ROD 61 Fed. Reg. 68,014 (Dec. 26, 1996) Am. Comp. ¶ 105;
b. The 2008 CT SPEIS ROD stated that "NNSA does not see an imminent need to produce more than 20 pits per hear to meet national security requirements." 2008 CT SPEIS ROD 73 Fed. Reg. 77644, 77648 (Oct. 24, 2008) Am. Comp. ¶ 111;
c. NNSA's own conclusion that producing pits at more than one location would "add long-term production risk and surveillance costs due to multiple production lines." National Nuclear Security Administration, Final Report for the Plutonium Pit Production Analysis of Alternatives, at 46 (Oct. 2017), http://www.lasg.org/MPF2/documents/NNSA_PuPitAoA_Oct2017_redacted.pdf Am Am. Comp. ¶ 114.

It is clear that the alterations to the plan, including not only the increase in number but also the decision to split production between two facilities, are proper grounds to allege a violation of NEPA. Further, once the massive undertaking of repurposing the MOX facility is completed, SRS will send Transuranic waste to Waste Isolation Pilot Plant ("WIPP") and this is a substantial change given the apparent capacity limitations at the WIPP outlined in the Amended Complaint. Am. Comp. ¶ 137.

Plaintiffs also have connected the substantial changes to the Defendants' plan to its environmental impacts, including but not limited to the storage issues at the WIPP facility and the dangers of accidents resulting in a release of nuclear waste at both facilities due to already existing safety and performance issues at both sites. These issues also constitute significant changes in circumstances also discussed below. See Am. Comp. ¶¶ 6, 24, ¶¶ 155-156; 172-177; 181.

Additionally, Plaintiffs filed a detailed pleading describing with specificity the significantly new circumstances requiring a new or supplemental PEIS.[7] The sudden switch from the Defendants' plan to produce pits only at one location to producing the majority of the Congressionally mandated increase at a second location—that has never produced plutonium pits before—is impacted by numerous significant changes "that are relevant to environmental concerns," and the Plaintiffs have described those changes with specificity. 40 C.F.R. § 1502.9(d)(1).

The component of Defendants' plan to be conducted at SRS requires "the 'repurposing' of the defunct Mixed Oxide Fuel Fabrication Facility ("MOX") on-site." Am. Comp. ¶ 2. "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." Am. Comp. ¶ 24. The Plaintiffs set forth facts outlining the failures of the MOX facility at SRS, including tremendous cost overruns and delays and the Defendants' decision to shut down the project in 2018. Am. Comp. ¶¶ 155-159. The fact that the MOX contract was not cancelled until 2018, following the project's gross cost overruns and delays, constitutes significant new circumstances that occurred well after the 2008 CT SPEIS and these facts are clearly alleged in the Amended Complaint. Plaintiffs allege "the problems with the MOX facility have clear bearing on the programmatic alternative of

[7] "Significantly new circumstances exist which require either a new or supplemental PEIS, including: the status of radioactive waste disposal capacity at the WIPP and the impending expiration of its state RCRA permit; the never-completed MOX Facility at SRS intended to be repurposed for pit production; the safety issues at LANL, including the circumstances that shut down LANL's plutonium facility for over three years; and the President's Executive Order emphasizing the need for an increased consideration of environmental justice issues. By declining to prepare a new or supplemental PEIS to consider these substantial changes, Defendants violated NEPA and its implementing regulations and acted arbitrarily, capriciously, not in accordance with law, and have also abused their discretion and failed to comply with procedure required by law, violating the APA, 5 U.S.C. § 706(2)." Am. Comp. ¶ 181.

selecting SRS as one of the sites for pit production, especially when plutonium pits have *never* been produced at SRS." Am. Comp. ¶159.

The storage and capacity issues at the WIPP have only recently become apparent. The WIPP is the only repository for Transuranic ("TRU") waste in the country and it has been plagued with capacity issues and state permit restrictions on future operations. Am. Comp. ¶¶ 6, 128-136. Assuming the allegations to be true, Plaintiff specifically alleges "the issues raised by the [New Mexico Environmental Department] to DOE/NNSA regarding the lack of analysis of the impacts of the waste disposal and storage issues at WIPP contradict the Defendants' conclusion in the Final SA that there are no significant new circumstances or information relevant to environmental concerns and demonstrate the necessity for DOE and NNSA to prepare a new or supplemental PEIS addressing these issues." Am. Comp. ¶136.

Plaintiffs have alleged an increase in the number of earthquakes in South Carolina since the completion of the EIS for SRS, and an increase in wildfires near the LANL site, both of which constitute a significant change in circumstances that have not been considered adequately. Am. Comp. ¶ 24, 51.

Whether or not the Defendants' conclusion is correct 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" would be for this Court to decide as a matter of fact and law and does not have to be proved beyond the allegations in the Amended Complaint. A motion to dismiss must not be granted merely because there may be doubts about whether a Plaintiff may prevail. *Toussaint*, 292 S.C. at 415 (1987). Defendants argue that "Plaintiff's 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." *Defendants' Motion to Dismiss Amended Complaint*, p. 30.

Notably, Defendants mention only tiered NEPA analysis for SRS and LANL, but not LLNL, WIPP, or NNSA's Pantex Plant (where newly manufactured plutonium pits will be sent to for final nuclear weapons assembly) because Defendants have performed zero analysis of the effects its proposed expanded, dual-site plutonium pit production will have on those undeniably related sites. Defendants' disregard of these sites in its NEPA analyses reflects a clear disregard for the impacts of its proposed action on those sites and demonstrates Defendants' arbitrary and capricious decision to forgo a PEIS to address these connected and cumulative environmental impacts created by the proposed expanded, dual-site production.

Defendants assert that the motion to dismiss should be granted because "DOE and NNSA tiered the 2020 Los Alamos SA and 2020 Savannah River EIS to the 1996 SSM PEIS and the 2008 SPEIS . . . ." *Defendants' Motion to Dismiss Amended Complaint*, p. 30. This may be a defense to Plaintiffs' claims and certainly is an argument for this Court to rule on eventually; however, the motion to dismiss cannot be granted on the basis of Defendants' citation to a distinguishable case such as *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (2002). The procedural posture of *Dombeck* was a *de novo* review of a grant of summary judgment where the case had progressed well beyond the pleading stage and did not mention in any way the requirements for surviving a motion to dismiss.

Protect our Aquifer v. Tennessee Valley Authority, 554 F.Supp.3d 940 (2021) emphasizes the level of proof required at the pleading stage. "Congress adopted NEPA in part to ensure that a wider, public audience had access to environmental information and could participate in the decision-making and implementation process." *Id.* at 958 (citing *Robertson*, 490 U.S. at 349). "Because the Court must take Plaintiffs' allegations as true at this stage, that TVA may later

argue and show that it did not have to conduct an EIS in this situation is immaterial at the motion to dismiss stage. Plaintiffs have alleged that TVA violated NEPA and that TVA deprived them of information that NEPA required it to provide." *Id.* at 958.

CONCLUSION

Based on the foregoing, Plaintiffs have a justiciable case that has alleged concrete, imminent injuries caused by Defendants' actions, and alleged that a new or supplemental PEIS should be produced by the Defendants and the federal steps being taken in furtherance of the pit production plan should be stopped until this necessary NEPA analysis is conducted. Therefore, Plaintiffs request this Court deny the Federal Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

Respectfully submitted this 15th day of August, 2022.

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