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*, NATIONAL NUCLEAR SECURITY ADMINISTRATION, and JILL HRUBY, *in her official capacity as Administrator*, Defendants.	)	No. 1:21-cv-01942-MGL

PLAINTIFFS' REPLY IN SUPPORT OF THEIR TO COMPLETE OR SUPPLEMENT THE ADMINISTRATIVE RECORD

Plaintiffs file this Reply in Support of their motion to complete or supplement the administrative record ("AR") produced by the Defendants in this case. Plaintiffs have identified certain documents relating to the Defendants' National Environmental Policy Act ("NEPA") review of the U.S. plutonium pit production program, which were before the agencies at the relevant time, and which should be included in the AR.

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I. ARGUMENT

A. The Documents at Issue Were Required to be Considered by Defendants Because of Their Subject Matter and Because NEPA Requires Defendants to Consider and Assess Public Comments in Good Faith.

Plaintiffs demonstrated that they provided several documents to Defendants as attachments to their comment letters and that, despite this, these documents were not included in or recognized as residing within the Administrative Record. NEPA requires Defendants to "assess, consider, and respond to all comments[.]" *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 537 (8th Cir. 2003) (citing 40 C.F.R. § 1503.4(a)); *see also Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492–93 (9th Cir. 2011) (agency "required to 'assess and consider … both individually and collectively' the public comments received during the NEPA process and to respond") (citations omitted); *Olmstead Citizens for a Better Community v. U.S.*, 606 F. Supp. 964, 979 (D. Minn. 1985) (citing *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)) ("Comments from responsible experts that cause concern that a project and its alternatives have not been fully explored require a good faith reasoned analysis by the agency in response.").

The regulations likewise make consideration of substantive public comments mandatory. 40 C.F.R. § 1503.4(a) ("[a]n agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period").

Defendants misapprehend Plaintiffs' argument as either "'consideration by citation' or 'consideration by hyperlinked citation'" but Plaintiffs have argued neither position. Plaintiffs have shown that these documents were included as attachments via hyperlink to their comments and that Defendants must consider the documents and respond to them. Defendants are obligated to include comment letters and their attachments in the administrative record because these

documents are required to be considered. *Envtl. Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016, 1029 (E.D. Cal. 2000).

Of course, Defendants would rather the argument center on citations in comment letters as this allows Defendants to cite a few unpublished opinions for the proposition that citation alone is insufficient. But the rationale of these courts doesn't apply here because when knowledgeable commenters go so far as to attach documents to comment letters, Defendants are obligated to provide the relevant personnel with those comments and the materials included with them for consideration. This process is how NEPA implements its public engagement requirement. Attachments are different from citations because by providing attachments to the agency, authors of comments provide the agency with the documents most heavily relied upon. If a document is merely cited, the recipient may not be able to review or consider the cited material further because it is not in the agency's possession or the agency may not have the ability to locate the document for whatever reason. Courts have recognized this distinction. *See, e.g.*, *Knight v. U.S. Army Corps of Engineers*, No. 4:18-cv-352, 2019 WL 3413423, at *2 (E.D. Tex. July 29, 2019) (recognizing a distinction between attachments which are included in administrative record as opposed to citations which were "likely not important to the comment letters").

Defendants are mistaken when they claim that Plaintiffs have not cited a case in support of the fact that hyperlinks are distinct from citations in public comments. Plaintiffs cited *Friends of the Mahoning River v. U.S. Army Corps of Engineers* because the court in that case noted that materials that are included in hyperlinks found in documents in the administrative record are "already part of the administrative record" and the record need not be supplemented. 487 F. Supp. 3d 638, 640 n.1 (N.D. Ohio 2020). Defendants also incorrectly state that the Army Corps of Engineers "agreed it had clicked on and considered the hyperlinked materials." There is no

indication in either the footnote or anywhere else in the case that the Corps had clicked on or considered the materials. The Corps agreed that "the substance of these materials are already part of the administrative record, because the web pages are hyperlinked within the record." *Id*. Unlike the Corps, Defendants have refused to recognize this fact.

This statement also ignores the decision in *American Wild Horse Preservation Campaign v. Salazar* that Plaintiffs also cited. In that case, the court determined that there was no need to even include certain documents with comments because the defendant was already "on notice, and in possession," of the documents in question. 859 F. Supp. 2d 33, 46 (D.D.C. 2012). Instead, the court reasoned that because the defendant already possessed the documents and the plaintiffs' comment letters, which were part of the administrative record, and which had directed the defendant to the declarations and extensively relied upon the declarations in the comments, there was a sufficient basis to conclude that the expert declarations were "before the decision-makers and considered." *Id*. Thus, the court ruled the expert declarations "should have been considered as part of the AR." *Id*.

These cases, in addition to the others cited by Plaintiffs previously, show that to comply with NEPA, an agency cannot ignore information in its possession that is called to its attention in public comments. Here, Defendants were in possession of these documents because they both authored several and because Plaintiffs and other governmental authorities provided them to Defendants. Moreover, Plaintiffs' comments called these documents that they provided and which Defendants possessed to their attention. Defendants were obligated to consider, assess and respond to Plaintiffs' comments. They are also obligated to include those documents in the administrative record.

Defendants failed to even address the fact that pages of one document, *W78 Replacement Program (W87-1): Cost Estimates and Use of Insensitive High Explosives Report to Congress* (December 2018), Exhibit 3, ECF 160-4, are in the administrative record and were therefore presumably considered by Defendant, while other pages from the document were left out despite Plaintiffs furnishing the document to Defendants. Defendants also did not bother to explain why another document, *Plutonium Pit Production Engineering Assessment (EA) Results* (May 2018), Exhibit 4, ECF 160-5, a summary of the engineering assessment that is already in the administrative record and which would have been before the relevant personnel, was excluded.

Defendants have also not addressed the fact that certain links to these documents, Exhibits 3 and 4, ECF 160-4, 160-5, are active in the administrative record and that, consequently, the documents should be viewed as residing in the administrative record presently. Nor did Defendants address the fact that Plaintiffs provided *Potential Energetic Chemical Reaction Events Involving Transuranic Waste at Los Alamos National Laboratory* (September 2020), Exhibit 8, ECF 160-9, not just as a hyperlink but as an attached document with their comments.

While NEPA may not mandate a particular result, it does require that agencies "ensure citizens and officials are informed and allowed to comment on agency action before decisions are made." *Biodiversity Assocs. v. U.S. Forest Serv. Dept. of Agric.*, 226 F. Supp. 2d 1270, 1279 (D. Wyo. 2002) (citing *Envtl. Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1374–78 (10th Cir. 1980)). This requirement is necessary to realize the purpose of NEPA: "to foster better decision-making and **to permit informed public participation** for actions affecting humans and nature." *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1268 (D. Or. 2002) (citing 42 U.S.C. § 4321; 40 C.F.R. § 1501.1(c)) (emphasis added).

Under Defendants' theory, an agency could create a document, have that document also provided to its decision-makers as attachments to public comments, be under an obligation to "assess, consider and respond" to public comments, and still claim that the document was not "considered" by the relevant agency personnel. If the public submits the information as directed, the public is entitled to rely upon the agency to provide that information and documentation to the appropriate personnel for review, evaluation, and consideration. If an agency does not provide public comments and documentation to the appropriate personnel, then it is not fulfilling its obligation to assess, consider, and respond to public comments in good faith. Nor is it honoring the purpose of NEPA which is to foster public participation in decision-making about government actions which affect the environment. The documents identified by Plaintiffs should be included in the administrative record.

B. Supplementation is Appropriate in This NEPA Case.

Plaintiffs recognize that this Court has stated that it will address these documents in the context of considering summary judgment. Therefore, Plaintiffs will not spend additional time recounting how the documents meet the supplementation exceptions as that will be apparent in the context of summary judgment briefing. Plaintiffs will reply, briefly, to certain contentions made by Defendants concerning how supplementation of the administrative record is to be evaluated.

Defendants try to avoid the considerable weight of the Fourth Circuit's admonition in *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009), regarding the importance of extra-record evidence in NEPA cases, by claiming both that it is dicta and that it is "not binding." Instead, Defendants cite a Ninth Circuit case. Def. Brief at p. 16, n.9. The Ninth Circuit case is, of course, not controlling on this Court, nor is its reasoning persuasive when the case it relied on in assessing whether to allow supplementation of an administrative record was not

a NEPA case. *Blue Mountains Biodiversity Project v. Jeffries*, 72 F.4th 991, 998 (9th Cir. 2023) (citing *Goffney v. Becerra*, 995 F.3d 737, 747–48 (9th Cir. 2021) (case involving review of a Department of Health and Human Services decision not to reimburse a Medicare claim)).

Defendants also fail to acknowledge that the Fourth Circuit in *Ohio Valley* cited yet another Fourth Circuit decision, *Webb v. Gorsuch*, 699 F.2d 157, 159 n.2 (4th Cir. 1983), for the proposition that courts should be willing to look outside the administrative record in NEPA cases in which a determination was made, as it was here, that no EIS was necessary. 556 F.3d at 201. In *Webb*, the Fourth Circuit considered several "affidavits and reports . . . which were not placed before the Agency in determining whether the Agency's action was arbitrary." 699 F.2d at 159 n.2. The Fourth Circuit concluded that it could consider this evidence because "courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary." *Id*. (citing *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1238, 55 L.Ed.2d 764 (1978)). Such a determination is both binding and especially relevant to this matter.

The "relevant factors" inquiry extends beyond asking whether the agency considered the general subject matter at issue such as "waste storage" or "safety." Instead, the inquiry takes into account the "complicated, scientific analysis, [and what] consideration of the intermediary evidentiary factors which lead to the ultimate conclusion . . . and, generally speaking, any of them can be a 'relevant factor' justifying supplementation of the administrative record if ignored." *Southwest Ctr. for Biological Diversity v. Babbitt*, 131 F. Supp. 2d 1, 8 (D.D.C. 2001). And, again, this must be considered in the context of a NEPA case in which a reviewing court is trying to ascertain whether an agency considered the appropriate "relevant factors." *See, e.g., Asarco, Inc. v. U.S. Env't Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("It will often be impossible,

especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not."). In order to assess whether there were any gaps in an agency's NEPA analysis, courts have supplemented administrative records with supporting documentation under the "relevant factors" exception if they were relied upon and cited in comment letters such that the documents were "incorporated by reference in the administrative record[,]" even if the documents were not provided as attachments. *Ctr. for Biological Diversity v. Spellmon*, No. CV-21-47-GF-BMM, 2022 WL 1734152, at *4 (D. Mont. February 2, 2022).

Finally, Defendants are mistaken when they claim that Plaintiffs had not identified "any data in the 2020 [TRU] waste report that diverges from the 2018 or 2019 reports in any significant way." Def. Brief at p. 18. In fact, Plaintiffs took care to note that the 2020 TRU report, Exhibit 10, ECF 160-11, projected transuranic waste for pit production at SRS. This is the first instance where the TRU had included projections for pit waste at SRS, which is a departure from prior reports, including those for 2018 and 2019. This is a significant relevant fact as it relates to projections for new pit waste at dual sites during the same time period and should have been considered by Defendants in their analyses regardless of whether Plaintiff provided the document to Defendants.

II. CONCLUSION

Plaintiffs respectfully request that this Court grant their motion and that this Court order Defendants to complete or, in the alternative, to supplement the administrative record with the documents identified previously.

Respectfully submitted this 17th day of October, 2023.

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