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' MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPLETE OR SUPPLEMENT THE ADMINISTRATIVE RECORD

Plaintiffs file this Memorandum 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. Alternatively, the documents identified herein meet the requirements for supplementation of the AR.

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I. BACKGROUND

This action seeks declaratory and injunctive relief pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, challenging the Defendants' failure to prepare a new or supplemental Programmatic Environmental Impact Statement ("PEIS") for the U.S. plutonium pit production program. As the history of pit production is important to understand the importance of some of the documents at issue, Plaintiffs will provide some background.

A. Brief History of Plutonium Pit Production in the U.S.

Defendants manufactured almost the entirety of existing plutonium pits (the combustible component of a nuclear weapon) for the U.S. nuclear weapons stockpile solely at the Rocky Flats Plant near Denver, Colorado. The vast majority were produced between 1978 and 1989. Am. Compl. ¶ 100, 102 (ECF No. 21). Since the Rocky Flats Plant was shut down in 1992 after an FBI investigation into environmental crimes, the United States has produced no more than 20 pits per year and, since 2003, only produced plutonium pits at one facility, the Los Alamos Nuclear Laboratory ("LANL") in New Mexico. Am. Compl. ¶¶ 101, 103, 112. No pits have been produced for the purpose of maintaining the extant nuclear stockpile since 2012; the only production that has occurred since then relates to speculative new designs for nuclear weapons. Am. Compl. ¶ 103.

Over the years since the early 1990s, Defendants have conducted certain NEPA reviews on specific components of the U.S. plutonium program and have consistently concluded that plutonium pit production should be conducted on a small scale and at only one facility. *See DOE, Record of Decision Programmatic Environmental Impact Statement for Stockpile Stewardship and Management*, 61 Fed. Reg. 68014 (Dec. 26, 1996) ("DOE's decision is to reestablish the pit fabrication facility, at a small capacity, at LANL"); *DOE Final Complex Transformational*

Supplemental Programmatic Environmental Impact Statement, 73 Fed. Reg. 63460 (Oct. 24, 2008) ("2008 CT SPEIS") ("transfer of production to another site 'poses unacceptable programmatic risks'… would take years to achieve and might be unsuccessful"). Am. Compl. ¶¶ 105, 110. Another example of this consistent approach over time is NNSA's *Final Report for the Plutonium Pit Production Analysis of Alternatives* (Oct. 2017), recommending that production at more than one facility be "eliminated from consideration." Am. Compl. ¶ 36. It was not until 2018 that the Trump administration issued its Nuclear Posture Review, calling for the expansion of pit production and nuclear weapons, that Defendants changed their well-documented approach. Am. Compl. ¶ 116. Prior to this, Defendants rejected a dual site production approach. Am. Compl. ¶ 115.

Consistent with the Defendants' fragmented NEPA actions, Defendants produced an EIS for only the Savannah River Site ("SRS") pit production component of the program, which was noticed in the Federal Register in April of 2020 (Am. Compl. ¶ 121), and announced "its programmatic decision to implement elements of a Modified Distributed Centers of Excellence (DCE) Alternative whereby NNSA would produce a minimum of 50 war pits per year at a repurposed MOX at the Savannah River Site (SRS) during 2030 for the national pit production mission and implement surge efforts to exceed 80 pits per year up to the analyzed limit as necessary beginning during 2030 for the nuclear weapons stockpile." Am. Compl. ¶ 126.

Following the announcement of this significant increase in production, NNSA issued an Amended Record of Decision ("ROD") on September 2, 2020, relating to the 2008 Complex Transformation Supplemental Programmatic EIS ("CT SPEIS"), which had considered "alternatives for transforming the nuclear weapons complex into a smaller, more efficient enterprise." Am. Compl. ¶ 107. The Amended ROD detailed the increase in pit production at

LANL and only stated that "[p]it production alternatives were previously analyzed in the Complex Transformation SPEIS." Am. Compl. ¶ 125. NNSA issued a second Amended ROD on November 5, 2020 for the 2008 CT SPEIS and concluded, "NNSA has determined that no further NEPA analysis is needed at a programmatic level prior to issuing this Amended ROD…" Am. Compl. ¶ 126. NNSA also concluded, "NNSA has determined that the proposed action does not constitute a substantial change from actions analyzed previously and there are no new significant new circumstances or information relevant to environmental concerns." Am. Compl. ¶ 127. A record of decision regarding the SRS EIS was issued on November 5, 2020.

B. Waste Storage at WIPP

Plaintiffs have also alleged that Defendants have not evaluated the environmental impacts relating to transportation and storage of the nuclear waste to be generated by the dual site pit production plan sufficiently or appropriately. Some waste produced as a by-product of pit production is known as Transuranic Waste ("TRU"). The Waste Isolation Pilot Plant ("WIPP") owned by DOE's Office of Environmental Management and located in southern New Mexico, is the only repository in the country for TRU wastes. Am. Compl. ¶ 128. WIPP is already oversubscribed according to the National Academies of Sciences ("NAS"). Am. Compl. ¶ 6. WIPP operates under a state Resource Conservation and Recovery Act ("RCRA") permit issued by the State of New Mexico. Am. Compl. ¶ 129, which the State of New Mexico has recognized will require multiple permit modifications. Am. Compl. ¶ 130. Further, the Waste Isolation Pilot Plant Withdrawal Act of 1992 places a cap on the total amount of radioactive wastes that WIPP can receive. Am. Compl. ¶ 131.

Plaintiffs allege Defendants have failed to take the necessary "hard look" in part at the "uncertainty of future disposal of radioactive transuranic ("TRU") wastes." Am. Compl. ¶ 6. The

Complaint identifies specific environmental impacts that are significantly different with a dual site approach to plutonium pit production, including but limited to: problems with capacity at the WIPP facility, which is oversubscribed (Am. Compl. ¶¶ 128–140, 151) and lack of evaluation about the dangers of generating and transporting additional TRU waste among many facilities, beyond simply LANL and SRS across multiple states. This Memorandum identifies specific documents that must be included in the AR in order for this Court to adequately consider the sufficiency of Defendants' evaluation of this highly problematic scheme in the NEPA context.

II. ARGUMENT

A. Legal Standards

The purposes of the National Environmental Policy Act (NEPA) are extensive and statutorily defined:

> (1) to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331 (2018). Congress mandated that these purposes of the statute would be met through the agency-forcing requirement of "a detailed statement," or environmental impact statement (EIS), whenever an agency undertakes "major Federal actions significantly affecting the quality of the human environment. *Id.* at § 4332(C); *see also* 40 C.F.R. §§ 1500.1 *et seq*. (2023) (implementing regulations of NEPA).

1. The Full Administrative Record

When a court reviews agency action under the APA, Congress mandates that "the court shall review *the whole record* or those parts of it cited by a party." 5 U.S.C. § 706 (emphasis added). The Supreme Court has interpreted this language to mean that a court's review must "be based on the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980 (1977).

Therefore, an agency that faces judicial review of its regulatory action must first "identify and produce the complete administrative record" and present it to the court. *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 6 (D.D.C. 2018) (citing *NRDC v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975)). A *complete* administrative record "consists of all documents and materials directly or indirectly considered by the agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quoting *Exxon Corp. v. Dept. of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981)); *S.C. Coastal Conservation League v. United States Army Corps of Engineers, Charleston Dist.*, 611 F. Supp. 3d 136, 141 (D.S.C. 2020).

An agency "may not skew the record by excluding unfavorable information but must produce the full record that was before the agency at the time the decision was made." *Blue Ocean Institute v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007). Instead, "a complete administrative record should include all materials that might have influenced the agency's decision, and not merely those on which the agency relied in its final decision." *Amfac Resorts, LLC v. U.S. Dept. of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (citations and internal quotes omitted); *see also James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The administrative

record includes all materials 'compiled' by the agency … that were before the agency at the time the decision was made.") (internal quotation marks and citations omitted); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 (D.D.C. 2005) ("agency [may not] exclude information on the grounds that it did not 'rely' on the excluded information in its final decision").

2. Motions to Complete the Record & Supplement the Record

When a plaintiff contends that the administrative record submitted by the agency for the court's review is incomplete or lacking, recourse is found through a motion to complete and/or supplement the record. *See, e.g.*, *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73 (D.D.C. 2018) (memorandum opinion issued to resolve Plaintiff's motion to compel defendant agency to complete or supplement the administrative record). Although it is not always clear from the case law, these "two distinct, yet often confused" motion-types serve separate purposes. *WildEarth Guardians v. United States Forest Serv.*, 713 F. Supp. 2d 1243, 1252–53 (D. Colo. 2010).

A motion to complete the record "entails ensuring the entire record is before the court—the addition of those documents that influenced the agency in its decisionmaking." *Fort Sill Apache Tribe*, 345 F. Supp. 3d at 9; *see also WildEarth Guardians*, 713 F. Supp. 2d at 1253 (motion to complete the record entails plaintiff submitting "materials which were actually considered by the agency, yet omitted from the administrative record").

In contrast, a motion to supplement the record "involves the addition of newly created evidence or documents that were not before the agency when the decision was made, but should have been." *Fort Sill Apache Tribe*, 345 F. Supp. 3d at 9; *see also WildEarth Guardians*, 713 F. Supp. 2d at 1253 (motion to supplement the record entails plaintiff submitting "materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry").

a. Completion of the Administrative Record

While a plaintiff must overcome a presumption that the agency properly designated the administrative record, *Sanitary Bd. of Charleston v. Wheeler*, 918 F.3d 324, 334–35 (4th Cir. 2019), to do so a plaintiff need only:

> (1) identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record, and (2) identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents or data that are likely to exist as a result of other documents that are included in the administrative record.

S.C. Coastal Conservation League v. Ross, 431 F. Supp. 3d 719, 723 (D.S.C. 2020) (internal quotations and citations omitted) (quoting *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, No. CV ELH–16–1015, 2017 WL 3189446, at *7 (D. Md. July 27, 2017)).

b. Supplementation of the Administrative Record

In 1985, the Supreme Court of the United States first articulated the circumstances in which supplementation of the record may be necessary: "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 1607 (1985). Since the Supreme Court issued this guidance, the federal circuits and district courts within them have detailed further under what circumstances supplementation of the administrative record is proper. *See generally* DANIEL R. MANDELKER ET AL., NEPA LAW & LITIG. § 4:46 (2d ed. 2022). In the Fourth Circuit, district courts have allowed supplementation of the record when the evidence:

> (1) explains technical information or agency action not adequately explained in the record; (2) shows an agency failed to consider relevant evidence; or (3) shows an agency, in bad faith, failed to include information it considered in the record. *See Hodges v. Abraham*, 253 F. Supp. 2d 846, 855 (D.S.C. 2002), *aff'd*, 300 F.3d 432 (4th Cir. 2002). Stated another way, courts have allowed the record to be supplemented with outside documents (1) if it appears that the agency relied upon

> documents not in the record, (2) to illustrate factors that the agency should have considered but did not, (3) to provide background information helpful to an understanding of unclear or technical portions of the record, or (4) if the plaintiff alleges bad faith and provides a reasonable basis in fact for such contention. *Piedmont Envtl. Council v. United States Dep't of Transp.*, 159 F. Supp. 2d 260, 270 (W.D. Va. 2001), *aff'd in part, remanded in part*, 58 F. App'x 20 (4th Cir. 2003).

S.C. Coastal Conservation League v. USACE, 611 F. Supp. 3d at 147–48.

In addition to articulating the circumstances when supplementation is appropriate, many circuits, including the Fourth Circuit, have explicitly found that supplementation of the administrative record is especially appropriate in the context of deciding a NEPA challenge. *See Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009) ("We acknowledge the importance of extra-record evidence in NEPA cases to inform the court about environmental factors that the agency may not have considered."). Nonetheless, the decision to allow supplementation of the administrative record is a matter of the district court's discretion. *See, e.g., Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 460 (1st Cir. 1989) ("However desirable this kind of evidentiary supplementation as an aid to understanding highly technical, environmental matters, its use is discretionary with the reviewing court.") (citing *Love v. Thomas*, 858 F.2d 1347 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989)).

B. Documents at Issue

Defendants have already conceded that the administrative record is incomplete. Both in a conference on July 19, 2023 and in correspondence dated July 20, 2023, Exhibit 1, Defendants stated that certain documents identified by Plaintiffs previously were "considered by the agency and agree they should be included in an administrative record in this case[.]" These documents are comprised of the following:

> DOE, Memo: Need to Consider Intentional Destructive Acts in NEPA Documents, DOE Office of NEPA Policy and Compliance, (December 1, 2006) (7);

DOE/NNSA, Stockpile Stewardship and Management Programmatic Environmental Impact Statement (1996) and Record of Decision (10);

National Nuclear Security Administration (NNSA)'s Defense Programs Advisory Committee (DPAC) report on pit aging, (2018) (11);

National Academies of Sciences, Engineering, and Medicine (NAS), Review of the Department of Energy's Plans for Disposal of Surplus Plutonium in the Waste Isolation Pilot Plant. (2020) (21);

JASON Plutonium Pit Lifetime Report, (November 28, 2006) (28); and

Lawrence Livermore National Laboratory report, Plutonium at 150 years, (2012) (29).

Exhibit 2 (SCELP initial letter); Exhibit 1 (DOJ response letter). Despite agreeing that these documents should be included in the AR, Defendants still have not supplemented the AR with these documents. There is no dispute among the parties that these documents should be included and an AR without their inclusion is necessarily incomplete.[1]

The parties negotiated in good faith over many weeks but despite these efforts, Defendants did not agree to include any additional documents in the AR. Among the documents Plaintiffs insist should be included, if they are not already accessible in and thus a part of the AR, are those identified as follows.

Defendant, NNSA, drafted *W78 Replacement Program (W87-1): Cost Estimates and Use of Insensitive High Explosives Report to Congress,* (December 2018). Exhibit 3. The document was provided to Defendants via hyperlink and quoted from at SRS_00000520 in Nuclear Watch New Mexico's comment letter dated July 25, 2019 at SRS_00000514–00000531, ECF no. 106-1. This document was also provided via a hyperlink attachment to Defendants as shown in the AR at SRS_00000494 in a Natural Resources Defense Council comment letter dated August 9, 2019

[1] As Defendants do not dispute these documents should be added, Plaintiffs have not included a copy herein. If this Court directs, however, Plaintiffs will file a supplemental pleading that includes each of these documents as exhibits.

which is located in the current AR at SRS_00000493–00000496, ECF no. 106-1. The link included in that letter is still active and the document is accessible via the page included in the AR. Nuclear Watch New Mexico again quoted from and provided the document to Defendants via hyperlink at SRS_00001980 in a comment letter dated August 12, 2019 and found in the AR at SRS_00001970–00001991, ECF no. 106-3. Finally, excerpts from the document currently reside in the AR at SRS_00000805–00000807, ECF no. 106-2. The purpose of the increased pit production plant is for the purpose of a new warhead known as W87-1. Am. Compl. ¶ 4. "The plans for increased dual site pit production at LANL and SRS for the purpose of the W87-1 warhead program involve actions that are inextricably connected, cumulative and similar." Am. Compl. ¶ 46.

Defendant, NNSA, also drafted *Plutonium Pit Production Engineering Assessment (EA) Results*, (May 2018). Exhibit 4. This document summarizes the results of the Engineering Assessment that is included in the AR at SRS_00084403–00084695, ECF nos. 139-2, 139-3, and CT SPEIS_70205–70496, ECF no. 81-4. It was discussed and provided via hyperlink at SRS_00000716–00000717 in the Lawton & Fettus comment letter dated May 17, 2019 found at SRS_00000713–00000728. ECF no. 106-1. The hyperlink to the document is still active on the page included in the AR and the document may be accessed through the AR page. A link was provided at SRS_00000520 in Nuclear Watch New Mexico's comment letter dated July 25, 2019 at SRS_00000514–00000531, ECF No. 106-1, and a hyperlink was also provided at SRS_00000560 as it was again quoted in Nuclear Watch New Mexico's comment letter dated August 12, 2019 at SRS_00000549–00000570, ECF no. 106-1. The report documents that by 2018 the "costs of the SRS facility alone have risen to an estimated $11.1 billion in the NNSA budget for Fiscal Year 2022." Am. Compl. ¶ 164.

The United States Government Accountability Office (GAO) authored GAO-20-703, *NNSA Should Further Develop Cost, Schedule, and Risk Information for the W87-1 Warhead Program* (2020). Exhibit 5. This document was provided to defendants via hyperlink in supplemental comments submitted on behalf of Plaintiffs on October 23, 2020. Exhibit 6 at p. 4, and quoted at length on pages 4–5. "GAO connected the action of pit production to the development of the W87-1 warhead: 'NNSA has less assurance that it will be able to produce sufficient numbers of pits in time to sustain W87-1 production on its current schedule.'" *Id.* Am. Compl. ¶ 154. This is noteworthy not only for the questionable ability of the scheme to meet its goals and how that could affect the analyses of other potential alternatives, but also because disposal space for transuranic (and other) waste at WIPP is necessarily limited. The GAO report noted both the complexity of the plan, the typical delays that attend such projects and the significant safety issues that have caused LANL to twice suspend laboratory-wide operations this century, most recently from 2013 through 2016. Exhibit 5 at pp. 29–31.

Another issue Plaintiffs have raised with the dual pit production plan is the problematic repurposing of the MOX facility at SRS for pit production–a mission it was not designed to host. This GAO report is relevant to that issue because the authors question how NNSA evaluated costs associated with the W78-1 program that the dual pit production operation is supposed to support and identifies "critical external risk" to the program associated with modernization of facilities to support it.

Yet another issue relevant to this dispute are the questions GAO raises about NNSA's ability to achieve and sustain pit production to meet its objectives. Exhibit 5 at pp. 29–31. This document provides information relevant to that topic and how an inability to achieve and sustain pit production could affect the analyses of other potential alternatives and programmatic issues

because disposal space for transuranic (and other) waste at WIPP is necessarily limited. While the document is dated September 2020, an earlier version was provided in February of 2020 to NNSA and DOD which deemed some of the information classified. This resulted in the issuance of the public document in September. Exhibit 5 at p. 6. Obviously, the document was before pertinent NNSA personnel if NNSA was commenting on and seeking to classify information contained therein.

The GAO also authored *High Risk Series, Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas,* (March 2019). Exhibit 7. A hyperlink to this document was provided at SRS_00000518 and quoted in Nuclear Watch New Mexico's comment letter dated July 25, 2019 and found at SRS_00000514–00000531, ECF no. 106-1. A hyperlink to this article was also provided at SRS_00000554–00000555 and quoted in Nuclear Watch New Mexico's comment letter dated August 12, 2019 at SRS_00000549–00000570, ECF no. 106-1. The High Risk List includes the MOX facility at SRS. Am. Compl. ¶ 156. This document is relevant because it lists NNSA's management of contractors as a high risk and that relates to the construction of the MOX facility at SRS which has been plagued with allegations of contractor fraud and remains relevant because of Plaintiffs' concerns about the modernization effort needed to convert that troubled facility to one suitable for pit production. Also of note is GAO's finding that NNSA has "unmet critical staffing needs, especially staffing to manage and oversee work on the agency's uranium and plutonium missions which are expected to grow." Exhibit 7 at pp. 217–18.

The Defense Nuclear Facilities Safety Board (DNFSB) authored a Technical Report, *Potential Energetic Chemical Reaction Events Involving Transuranic Waste at Los Alamos National Laboratory* (September 2020). Exhibit 8. Not only was a link to this document provided in supplemental comments submitted to Defendants on behalf of Plaintiffs on October 23, 2020,

the document was included with the correspondence. Exhibit 6 at p. 3. Moreover, as the document demonstrates on its face, it was submitted to Defendant, DOE on September 24, 2020. Exhibit 8 at p. 1. This document is relevant to the many safety concerns expressed by Plaintiffs regarding radiation risks to workers and the public, Am. Compl. ¶ 176, and highlights dangers to workers at LANL from transuranic waste. This concern is directly relevant to Defendants' assessment of whether workers and citizens in New Mexico and South Carolina would be at risk for excessive radiation exposure through pit production's generation of transuranic waste.

DNFSB submitted its *29th Annual Report to Congress for Calendar Year 2018* (April 2019). Exhibit 9. A hyperlink to this document was provided, and the document was quoted, at SRS_00000890 in Santa Clara Pueblo's comment letter dated August 5, 2019 found at SRS_00000885–00000890, ECF 106-2. While the link is still active in the page included in the AR, the document at the destination page has now been removed. The document was also quoted from and a link provided at SRS_00000522 in Nuclear Watch New Mexico's comment letter dated July 25, 2019 at SRS_00000514–00000531, ECF no. 106-1. This document is relevant to worker safety issues at LANL, SRS and WIPP.

In 2020, Defendant, DOE authored its Annual Transuranic Waste Inventory Report (DOE/TRU-20-3425) (November 2020). Exhibit 10. Transuranic waste generation as a result of a dual site pit production scheme and the ability to dispose of this waste at the Waste Isolation Pilot Plant in New Mexico were issues brought up repeatedly by various commenters, including Plaintiffs, and remains directly relevant to this litigation. *See* Am. Compl. ¶¶ 6, 128–137. Indeed, the importance of this data is supported by the inclusion of both the 2018 and 2019 Annual Transuranic Waste Inventory Reports in the AR. The 2018 Report is located at SRS_00052691–00053120, ECF no. 127-3, and the 2019 Report is located at SRS_00053458–00053886, ECF no.

127-4. What is distinct about the 2020 Waste Inventory Report is that, unlike the previous two years, it includes projections for transuranic waste associated with pit production at both SRS and LANL. The document is and was intended to be used for strategic planning regarding this waste, Exhibit 10 at p. 9, and, because it addresses both transuranic waste production in general and transuranic waste production associated with pit production now and going forward, this document would have been before the requisite personnel who are tasked with making the decisions regarding pit production and, necessarily, the disposal of transuranic waste from that production.

Furthermore, the data included in the 2020 document was in existence and before Defendant, DOE well before the record of decisions published in November of 2020 as the cutoff for data inclusion was December 31, 2019. Exhibit 10 at pp. 1, 4. The Report was signed as prepared by a DOE employee on November 5, 2020, Exhibit 10 at p. 3, the date the record of decision was issued for the SRS EIS and the date of decision for the second amended record of decision regarding the CT SPEIS. The data was certainly before Defendant, DOE well before that time and, given its subject matter and the inclusion of the two earlier reports in the AR, is precisely the type of information Defendants were reviewing related to one of the primary issues attendant to pit production raised in Plaintiffs' comments and complaint.

C. The Documents at Issue Were Before the Respective Agencies at the Relevant Time and Should be Included in the Administrative Record.

The Administrative Record is not complete and requires additional documents to be added in order for this Court to have the entire AR on which to base its review of the Defendants' actions in this NEPA case. Defendants have already admitted that the AR does not include several documents that they "considered" and that should be included. If that concession was not enough to puncture the presumption that the AR is currently complete, Plaintiffs have provided reasonable grounds and identified specific documents that were provided to Defendants to consider directly

or indirectly. This is particularly true when one considers that the documents Plaintiffs have identified are authored by Defendants or by GAO or DNFSB—two government entities whose work is directly related to that of the Defendants and who provide Defendants with analyses of their activities. "[I]t is axiomatic that documents created by an agency itself or otherwise located in its files were before it." *City of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 76 (D.D.C. 2008) (citing *Fund for Animals*, 391 F. Supp. 2d at 198).

With only one exception, DOE's Annual Transuranic Waste Inventory Report of 2020 (Exhibit 10), Plaintiffs have identified specific documents that were attached, via hyperlinks, to comment letters submitted by various organizations, including Plaintiffs, and should therefore be included in the AR together with the comment letters. Unlike citations, attachments to comment letters are to be included in the AR. *Envtl. Council of Sacramento v. Slate*r, 184 F. Supp. 2d 1016, 1029 (E.D. Cal. 2000). And, in analogous circumstances, courts have treated documents that are hyperlinked as sufficiently included for consideration in deciding motions to dismiss on failure to state a claim and the bases for the allegations are at issue. *See, e.g.*, *Doe #1 v. Syracuse Univ.*, 468 F. Supp. 3d 489, 503 n.11 (N.D.N.Y. 2020) (videos sufficiently referenced by inclusion of hyperlink in complaint); *Estate of Roman v. City of Newark*, 914 F.3d 789, 796 (3d. Cir. 2019) (considering hyperlinked article and press release in amended complaint in motion to dismiss context). This treatment is not surprising as hyperlinks may allow access to documents more readily than simply attaching a PDF file because the file may be corrupt or too large to either download or to be received via email given size restrictions.

Two documents, *W78 Replacement Program (W87-1): Cost Estimates and Use of Insensitive High Explosives Report to Congress* (Exhibit 3) and *Plutonium Pit Production Engineering Assessment (EA) Results* (Exhibit 4), were not only drafted by NNSA and provided

to Defendants via hyperlinks in comment letters, the hyperlinks in the AR for these documents are still operative and the documents may be retrieved through those links in the AR. In a similar circumstance, a court held that it did not need to supplement the administrative record with hyperlinked documents because the documents were already in the AR before it. *Friends of the Mahoning River v. U.S. Army Corps of Engineers*, 487 F. Supp. 3d 638, 640 n.1 (N.D. Ohio 2020) (materials hyperlinked already included in administrative record). In that case, the defendants stated that "the substance of these materials are already part of the administrative record, because the web pages are hyperlinked within the record." *Id*. That is the case for two documents here, and would have been for others if the documents had not been superseded, but Defendants have refused to recognize that the documents are part of the AR.

Moreover, these documents were also, in several instances, quoted in the body of the substantive comment letters and were therefore placed before the agencies for consideration during the relevant time period. NEPA requires Defendants to assess, consider and respond to comments in good faith. *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 537 (8th Cir. 2003); *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 554 (9th Cir. 1977).

DNFSB's Technical Report, *Potential Energetic Chemical Reaction Events Involving Transuranic Waste at Los Alamos National Laboratory*, was not only linked but was actually provided to Defendant, DOE, not only by Plaintiffs but was also directly provided to them almost a month earlier by DNFSB itself. Exhibit 8. There is no doubt that this document was before Defendant DOE before November 5, 2020 when records of decision were issued. Nor is there any doubt that the topic of this document, which highlights dangers to workers at LANL from transuranic waste, was directly relevant to the issues that Defendant were or should have been

assessing concerning a plan by which citizens in New Mexico and South Carolina would be at risk for exposure to transuranic waste through pit production.

One document was not included in comments. The 2020 Annual Transuranic Waste Inventory Report was, as noted earlier, authored by Defendant, DOE. It included data that was extant well before the recorded decisions. Exhibit 10 at p. 1, 4. The preparation of the document was completed, at the latest, on November 5, 2020—the same date of two of the recorded decisions. Exhibit 10 at p. 3. As the document in question addresses not only transuranic waste production throughout 2019 but also includes projections for transuranic waste production associated with pit production now and going forward, Exhibit 10 at pp. 43–44, 127, 376; it would have been before the requisite personnel who are tasked with making the decisions regarding pit production and, necessarily, the disposal of transuranic waste from that production. This is demonstrated by the subject matter, transuranic waste disposal including that associated with the pit production and strengthened by the inclusion of the 2018 and 2019 Transuranic Waste Inventory Reports in the AR. The presence of those previous annual reports shows that Defendants were considering this very information in making the determinations that Plaintiffs have challenged. The document states that it is to be used by DOE for "strategic planning" purposes which would include assessing a major initiative that would result in the production of extensive amount of transuranic waste.

All of the documents Plaintiffs have identified herein were before Defendants during the relevant time period and should be included in the AR.

D. The Documents at Issue also Qualify for Inclusion Under a Recognized Exception.

As stated earlier, a Court may include documents in the administrative record if "(1) if it appears that the agency relied upon documents not in the record, (2) to illustrate factors that the

agency should have considered but did not, [or] (3) to provide background information helpful to an understanding of unclear or technical portions of the record…." *S.C. Coastal Conservation League v. USACE*, 611 F. Supp. 3d at 147–48.

Plaintiffs have already demonstrated that the documents were before the agency for consideration during the relevant time period and should be included. Moreover, there is no need to prove actual reliance by the agencies on these documents in reaching their decisions. An agency may not exclude information from the administrative record simply because it did not "rely" on the excluded information in its final decision. *See, e.g.*, *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006).

The dates of both the DNFSB Technical Report (Exhibit 8) and DOE's 2020 Annual Transuranic Waste Inventory Report (Exhibit 10) both support inclusion in the AR. *Alliance for the Wild Rockies v. Marten*, 585 F. Supp. 3d 1252, 1263 (D. Mont. 2021) (supplementing record with relevant document dated one month after record of decision which indicates "much of the information contained therein was known to the agency" at time of decision). The DNFSB technical report was authored and provided to Defendant, DOE prior to November 5, 2020 both by Plaintiffs and by DNFSB. The subject of the report was highly relevant to some of the primary issues Defendants were, or should have been, considering—namely, the actual doses of radiation associated from transuranic materials including those associated with pit production that workers and the public may experience. The DNFSB report also analyzed potential lethal doses of radiation at PF-4 (where pit production is to be expanded) and other LANL facilities. There was also a much larger potential dose calculated for public exposures. Exhibit 8 at Table 1, p. 10.

Similarly, the 2020 Transuranic Waste Inventory Report (Exhibit 10) was prepared by DOE, is an annual report that incorporated data from the previous year to assess transuranic waste,

was complete as of the day that two of the relevant decisions here—the ROD for the SRS EIS and the SAROD for the CT SPEIS, addressed transuranic waste associated with pit production at LANL and projected transuranic waste for pit production at SRS which is not just relevant but a central issue in this matter. This information was important to Defendants to review as demonstrated by both its subject matter and the inclusion of the Annual Transuranic Waste Inventory Report for 2018 and 2019 in the AR. The Court's review of this document and the data contained therein is necessary for it to determine whether Defendants properly considered all of the relevant factors and also provides additional understanding and technical knowledge about the vast amount of transuranic waste produced by various operations throughout the country and how that waste and the additional waste generated by the proposed dual site pit production may or may not be able to be emplaced at WIPP.

The other documents qualify for supplementation not only because they were before the requisite agencies but also because they address relevant factors such as safety, feasibility of alternatives and the lengthy nature of the proposal and, consequently, the lack of disposal space for waste generated by it. They all provide necessary technical background information to this Court to assess these same issues. "[W]here suit is brought citing violations of the NEPA, and where it appears that these exhibits may augment the technical information available to the court and may raise issues as to whether defendants considered all relevant evidence," supplementation may be allowed. *Defenders of Wildlife v. North Carolina Dep't of Transp.*, No. 2:11-CV-35-FL, 2012 WL 13201567, at *3 (E.D.N.C. June 6, 2012).

In *American Wild Horse Preservation Campaign v. Salazar*, the court ruled that it was not necessary for the plaintiffs to have even included the expert declarations with their comments because the defendant was "on notice, and in possession," of the documents in question. 859 F.

Supp. 2d 33, 46 (D.D.C. 2012). Instead, the court determined that because the defendant already possessed the documents and the plaintiffs' comment letters, which were part of the administrative record, 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*.

In this case, the documents in question were either authored by Defendants or were authored by other governmental agencies and provided to Defendants both by Plaintiffs and others. These are not esoteric treatises that Defendants would have no reason to be aware of. "Publicly available reports, especially those relating to relevant issues and drafted as a result of an agency request, should be considered by the agency and therefore should be included in the administrative record." *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 142 (D.D.C. 2002). Plaintiffs and others repeatedly placed these publicly available, relevant documents before Defendants both by providing them, by quoting from them and by directing Defendants to them in many comment letters. They should be included in the AR to assist this Court in its review.

III. CONCLUSION

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

Respectfully submitted this 25th day of September, 2023.

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