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

SAVANNAH RIVER SITE WATCH, et al.

Plaintiffs, **Case No. 1:21-cv-01942-MGL**

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPLETE/SUPPLEMENT THE ADMINISTRATIVE RECORD

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Plaintiffs challenge the National Nuclear Security Administration's ("NNSA") decision to produce plutonium pits at two locations – by re-purposing the Mixed-Oxide Fuel Fabrication Facility ("MOX Facility") located at the Savannah River Site ("Savannah River") near Aiken, South Carolina, and an existing facility at Los Alamos National Laboratory ("Los Alamos"), in Los Alamos, New Mexico. Plaintiffs argue that NNSA violated the National Environmental Policy Act ("NEPA") by implementing the two-site production strategy without preparing a new or supplemental programmatic environmental impact statement. The Court ordered NNSA to file the administrative record ("record") by April 14, 2023, ECF No. 35, and ordered Plaintiffs to "notify Defendants of any alleged record insufficiencies or omissions no later than July 10, 2023." ECF No. 152 at 1. NNSA filed the record as ordered, and on July 10 Plaintiffs notified NNSA of 42 documents they claimed should have been in the record. NNSA reviewed each of these 42 documents and determined that nine of Plaintiffs' requested documents were already in the record, six of Plaintiffs' requested documents were inadvertently omitted from the record and should be a part of the record, and the remaining documents were not directly or indirectly considered by the agency when it decided to produce plutonium pits at both Savannah River and Los Alamos.

After NNSA communicated its position to Plaintiffs, Plaintiffs responded, arguing that seven documents should be a part of the record because they drafted by the Department of Energy, NNSA, or other federal agencies, or they were included in public comments as hyperlinked citations. Those seven documents are:

- *W78 Replacement Program (W87-1): Cost Estimates and Use of Insensitive High Explosives Report to Congress*, (December 2018), ECF No. 161-4;
- *Plutonium Pit Production Engineering Assessment (EA) Results*, (May 2018), ECF No. 161-5;
- *GAO-20-703, NNSA Should Further Develop Cost, Schedule, and Risk Information*

for the W87-1 Warhead Program (2020), ECF No. 161-6;

- *High Risk Series, Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas*, (March 2019), ECF No. 161-8
- DNFSB's *Potential Energetic Chemical Reaction Events Involving Transuranic Waste at Los Alamos National Laboratory* (September 2020), ECF No. 161-9
- DNFSB's *29th Annual Report to Congress for Calendar Year 2018* (April 2019), ECF No. 161-10 and
- *Annual Transuranic Waste Inventory Report (DOE/TRU-20-3425)* (November 2020), ECF No. 161-11

NNSA informed Plaintiffs that the agency did not consider any of the seven documents as part of the decision-making process and, therefore, the seven documents should not be included in the record. As a result, Plaintiffs filed this renewed motion "to complete or supplement" (hereinafter "Motion") the record with those seven documents,[1] contending those documents were considered by the agency or, in the alternative, are necessary for effective judicial review. ECF No. 160-1. The Court should deny Plaintiffs' Motion.

First, the Court should reject Plaintiffs' request to "complete" the record because Plaintiffs have not shown that NNSA directly or indirectly considered the seven documents in dispute. The fact that the agency (or its parent agency) drafted a document or that the public cited a document in a comment letter to the agency does not mean that the agency (either actually or constructively) considered that document when reaching a particular decision. Second, the Court should reject

[1] Plaintiffs filed their original motion to complete or supplement the record on August 21, 2023, ECF No. 156. The Court however, denied this motion without prejudice and ordered the parties to file written statements ahead of a telephonic conference. The Court ultimately cancelled the telephonic conference and entered a third amended scheduling order allowing Plaintiffs to renew their motion to complete or supplement the record.

Plaintiffs' request to supplement the record because they have failed to clear the high bar for supplementation—namely demonstrating that supplementation is necessary to allow for adequate judicial review. The current administrative record is approximately 300,000 pages long and contains a thorough explanation of the agency's decision-making process, including a discussion of all the relevant factors. Supplementation under these circumstances would be an end-run around the record review rule, which limits judicial review to the record compiled by the agency.

I. BACKGROUND

NNSA's mission is to establish and maintain a safe, secure, and reliable nuclear weapons stockpile. A significant part of this mission is to oversee the production of plutonium pits—which are an essential component of nuclear weapons and necessary to maintain the nuclear stockpile. The executive and legislative branches of the United States' government have consistently recognized a need to eventually produce 80 pits per year to service the Nation's nuclear arsenal.[2] *See* 50 U.S.C. §2538a, as amended. However, NNSA's current pit production capacity cannot meet Congress' production mandate. Therefore, NNSA studied how best to implement §2538a to ensure the country's national security needs are met.

NNSA decided that the best way to realize §2538a production and timing requirements was to implement a two-site strategy. Ultimately, the two-site strategy involves expanding existing plutonium pit production at Los Alamos and re-purposing the government's MOX Facility at Savannah River to produce additional plutonium pits. To comply with NEPA, NNSA studied the two-site strategy in the *Final Supplement Analysis of the Complex Transformation Supplemental*

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

Programmatic Environmental Impact Statement (hereinafter the "2019 SPEIS SA") (cited as DOE/EIS-0236-S4-SA-02) in 2019, and then undertook two site-specific NEPA analyses that were tiered to the original programmatic NEPA documents and that studied the cumulative impacts of producing plutonium pits at two locations. *See* https://www.energy.gov/nepa/downloads/doeeis-0236-s4-sa-02-final-supplement-analysis.

As part of this, the 2019 SPEIS SA reviewed numerous prior NEPA analyses spanning nearly three decades, including two programmatic EISs and multiple site-specific EISs and EAs, all of which are part of the administrative record.[3] In the 2019 SPEIS SA, NNSA, in compliance with

[3] The first programmatic EIS in the post-Cold War era was the *Stockpile Stewardship and Management Programmatic Environmental Impact Statement* ("1996 SSM PEIS"), and is located in the Administrative Record in two places at SRS_00023170_ to _SRS_00024583 and SRS_00024584 to SRS_00027363 (searchable version)._The 1996 SSM PEIS evaluated reasonable alternatives for reestablishing interim pit production capability on a small scale. *Id.* It analyzed a production level of 80 pits per year at Savannah River and Los Alamos at a programmatic level and associated impacts across the Complex. *Id.*

In 2008, NNSA prepared the Final Complex Transformation Supplemental Programmatic Environmental Impact Statement ("2008 SPEIS"), which supplemented the 1996 SSM PEIS, and further surveyed the nationwide environmental impacts of the plutonium pit production program, as well as other aspects of the Complex. Among other things, the 2008 SPEIS evaluated the potential environmental impacts (under two alternatives) of producing between 125 and 200 pits per year at Los Alamos or Savannah River, among other sites. The 2008 SPEIS in located in the administrative record at SRS_00061312 to SRS_00065248.

In addition to these programmatic environmental studies, NNSA also conducted numerous site-specific studies as part of its ongoing and robust effort to ensure full analysis of all potential environmental impacts arising from NNSA's management of the nuclear weapons complex, including the production of nuclear pits. These site-specific studies include: (i) the *Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico* ("1999 Los Alamos SWEIS"), *see* SRS_00036474 to SRS_00038740; the 2008 *Final Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico* ("2008 Los Alamos SWEIS"), SRS_00065310 to SRS_00068602; the 2020 *Final Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory* ("2020 Los Alamos SA"), SRS_00075525 to SRS_00075672; and the 2020 *Final Environmental Impact Statement for Plutonium Pit Production at the Savannah River Site in South Carolina* ("2020 Savannah River EIS"), SRS_00005907 to SRS_00007077.

DOE's NEPA regulations, determined that a new or supplemental programmatic environmental impact statement ("PEIS") was unnecessary because NNSA's prior NEPA work adequately evaluated the environmental impacts of plutonium pit production at levels similar to those of the current plan to produce pits at both Savannah River and Los Alamos.

Nonetheless, NNSA *still* prepared site-specific environmental analyses addressing implementation of the program at Los Alamos and Savannah River and tiered those site-specific documents to the 1996 SSM PEIS, 2008 SPEIS, and 2019 SPEIS SA. Following completion of the 2020 Los Alamos SA and 2020 Savannah River EIS, both of which comprehensively addressed the potential site-specific environmental impacts of plutonium pit production at those two sites, NNSA published two programmatic Amended Records of Decision ("RODs") and two site-specific RODs to implement its program-wide plan for plutonium pit production at the two facilities on September 2, 2020 and November 5, 2020.[4]

Plaintiffs brought this case challenging NNSA's decision to produce plutonium pits at both Savannah River and Los Alamos without first preparing a new or supplemental programmatic EIS. NNSA compiled the administrative record, which shows NNSA comprehensively studied the programmatic effects of pit production, including producing pits at both Savannah River and Los Alamos. The administrative record is voluminous, and includes, *inter alia*, the four RODs, multiple site-specific NEPA analyses for Los Alamos, the 2019 SPEIS SA, the 2020 Los Alamos SA, the

[4] *See* Amended Record of Decision for the Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory, Los Alamos, NM, 85 Fed. Reg. 54544 (Sept. 2, 2020); Amended Record of Decision for the Complex Transformation Supplemental Programmatic Environmental Impact Statement, 85 Fed. Reg. 54550 (Sept. 2, 2020); Amended Record of Decision for the Complex Transformation Supplemental Programmatic Environmental Impact Statement, 85 Fed. Reg. 70598 (Nov. 5, 2020); Record of Decision for Final Environmental Impact Statement (EIS) for Plutonium Pit Production at the Savannah River Site (SRS) in South Carolina (DOE/EIS-0541), 85 Fed. Reg. 70601 (Nov. 5, 2020).

2020 Savannah River EIS and decades-worth of documents that NNSA considered when determining to produce pits at both Savannah River and Los Alamos.

The Court's scheduling order, ECF No. 35, contemplated that the administrative record would remain open until Plaintiffs had an opportunity to review the record and discuss with Defendants any purported omissions. As noted above, Plaintiffs did identify a variety of documents that they believed should have been included in the administrative record, and Defendants worked with Plaintiffs in good faith to ensure the administrative record was complete. As part of this process, NNSA determined that six documents were inadvertently omitted, and it added them to the administrative record.[5] *See* ECF No. 161.

However, Defendants have not added to the administrative record seven additional documents identified by Plaintiffs (*see* supra at 1), which they claim should be a part of the record because those documents were either authored by government agencies or were included as hyperlinked citations to public comments. Beyond the documents' authorship or hyperlinked citation in public comments, Plaintiffs have offered no evidence that NNSA's decision makers (or their subordinates) directly or indirectly considered those seven documents. Despite their failure to produce evidence showing NNSA directly or indirectly considered the disputed documents, Plaintiffs now move the Court to mandate that these seven documents be included in the administrative record.

[5] The six documents added to the administrative record were: (1) DOE, Memo: Need to Consider Intentional Destructive Acts in NEPA Documents, DOE Office of NEPA Policy and Compliance, (December 1, 2006); (2)DOE/NNSA, Stockpile Stewardship and Management Programmatic Environmental Impact Statement (1996) and Record of Decision; (3) National Nuclear Security Administration (NNSA)'s Defense Programs Advisory Committee (DPAC) report on pit aging, (2018) (Please check the date on this document. Should it be 2019); (4) 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); (5) JASON Plutonium Pit Lifetime Report, (November 28, 2006); and (6) Lawrence Livermore National Laboratory report, Plutonium at 150 years, (2012).

II. APA STANDARDS

Courts review agency compliance with NEPA under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*, and that review is limited to the "full administrative record that was before [the agency] at the time [it] made [the] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971), *abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977); *see also Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891-92 (9th Cir. 2002). The "whole record," consists of "all documents and materials directly or indirectly considered by agency decision makers." *Thompson v. U.S. Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989) (cleaned up); *S.C District Court case* (applying this same standard). Review under the APA is "highly deferential" and as a result, there is a "presumption that the record compiled by the agency is the record on which it rested its decision." *Sanitary Bd. of City of Charleston, W. Va.v. Wheeler*, 918 F.3d 324, 334 (4th Cir. 2019) (citing *Fla. Light & Power Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

Plaintiffs are correct that they may move to alter the administrative record prepared by the agency in two distinct ways – completion or supplementation.[6] A plaintiff may seek to "complete" the record with "'evidence that was allegedly before the agency but nevertheless excluded from the administrative record.'" *Taylor Energy Co. LLC v. United States by & through U.S. Coast Guard Nat'l Pollution Funds Ctr.*, No. CV 20-1086 (JDB), 2021 WL 538052, at *2 (D.D.C. Feb. 15, 2021). (citation omitted) Or a plaintiff may seek to "supplement" the record by introducing "extra-record

[6] Supplementation of the administrative record is "distinct from completion of the administrative record in APA cases":

> Completing the record means including evidence that the agency considered but did not submit. Supplementing the record means introducing evidence that the agency did not consider but is 'necessary for the court to conduct a substantial inquiry.'

Gun Owners of America, Inc., v. Department of Justice, No. 1:20-CV-10639, 2023 WL 6304681, at *5 (E.D. Mich. Sept. 27, 2023) (quoting Matthew N. Preston II, *The Tweet Test: Attributing Presidential Intent to Agency Action*, 10 BELMONT L. REV. 1, 12–13 (2022)).

evidence . . . that was not initially before the agency' but that the plaintiff 'believes should nonetheless be included in the administrative record.'" *Id.* at *3 (quoting *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 77 (D.D.C. 2018)).

A party seeking to "complete" the record "must 'put forth concrete evidence to show that the record is incomplete" and "identify reasonable, non-speculative grounds for [their] belief that the documents were considered by the agency and not included in the record." *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 7 (D.D.C. 2018); *see also Sanitary Bd. of City of Charleston*, 918 F.3d at 334 ("A party challenging an agency bears a special burden of demonstrating that the court should reach beyond the record"). "[A]bsent clear evidence" that an agency considered a document but left it out of the administrative record, "[the] agency is entitled to a strong presumption of regularity, that it properly designated the administrative record." *Forest Cnty. Potawatomi Cmty. v. United States*, 270 F. Supp. 3d 174, 178 (D.D.C. 2017). Clear evidence means a "'strong, substantial or prima facie showing that the record is incomplete.'" *S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs, Charleston Dist.*, 611 F. Supp. 3d 136, 142 (D.S.C. 2020)

A party seeking to supplement the record carries an even higher burden. Supplementing the record with extra-record evidence is the "exception, not the rule." *Id.* at 141; *see also Forest Cnty.*, 270 F. Supp. 3d at 178 (quoting *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1105 (D.C. Cir. 1979)). Supplementation is only appropriate when:

> (i) it appears that the agency relied on documents or materials not included in the record or if the agency deliberately or negligently excluded documents that may have been adverse to its decision;
>
> (ii) if background information is needed to determine whether the agency considered all the relevant factors, or to permit explanation or clarification of technical terms or subject matter; or

(iii) if the agency so failed to explain administrative action that it frustrates judicial review.

Brandon v. Nat'l Credit Union Ass'n, 115 F. Supp. 3d 678, 684 (E.D. Va. 2015). These exceptions are narrow because if courts routinely admitted new evidence when reviewing agency decisions, they "would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

III. ARGUMENT

A. Plaintiffs have not shown that additional documents were directly or indirectly considered by agency decisionmakers and are required to complete the administrative record.

Defendants compiled and filed a voluminous record, which provides the documents that NNSA directly or indirectly considered in making the decision to produce plutonium pits at Los Alamos and Savannah River. That process is entitled to a presumption of regularity. *Nardea v. Sessions*, 876 F.3d 675, 680 (4th Cir. 2017) ("[T]he 'presumption of regularity [that] attaches to the actions of Government agencies. . .'"). With respect to the seven documents at issue in Plaintiffs' Motion, Plaintiffs have come forward with no evidence to rebut the presumption of regularity and their legal arguments are unavailing.

First, Plaintiffs appear to argue that the presumption of regularity has been rebutted because NNSA voluntarily agreed to add six documents to the record. Motion 13–14, 19-20. This argument fails outright. An agency's decision to add certain documents to the record is not evidence that other documents were omitted from the record.

Second, Plaintiffs offer two reasons why they believe NNSA considered the seven documents identified in Plaintiffs' motion: (1) six of the documents were cited and hyperlinked in comment letters to the agency; and (2) three of the documents were authored by DOE or NNSA. Motion 19-22. Neither of these reasons is sufficient to rebut the presumption that the agency

"properly discharged [its] official duties," in compiling the administrative record. *Chestnut v. Jaddou*, No. CV 3:21-0497-MGL, 2022 WL 4096607, at *3 (D.S.C. Sept. 7, 2022). Ultimately, proving that an agency is aware of a document or even possesses that document is not the same as proving the agency considered the document as part of the decision-making process. *Wilderness Workshop v. Crockett*, No. 1:11-CV-1534-AP, 2012 WL 1834488, at *4 (D. Colo. May 21, 2012) ("Awareness does not, however, constitute consideration.").

Defendants will address each of Plaintiffs' arguments in turn.

1. An agency's voluntary addition of documents to the administrative record during litigation does not rebut the presumption of regularity.

As noted above, Plaintiffs appear to argue that the presumption of regularity has been rebutted because NNSA agreed that six documents not contained in the agency's original April 14filing should be included in the record. This argument, which is implied in Plaintiffs' motion, ignores the clear import of the Court's scheduling orders, and fails as a matter of law.

First, the Court's own scheduling orders specifically contemplated that the record would remain open until: (1) NNSA made its initial filing, (2) Plaintiffs had the opportunity to review that filing, and (3) the parties had an opportunity to discuss whether additional documents were appropriately part of the record. ECF Nos. 35 and 152.[7] Scheduling orders contemplating such

[7] The Court's original scheduling order stated:

1. Defendants shall file a copy of the administrative record no later than April 14, 2023.

2. Plaintiffs shall notify Defendants of any alleged record insufficiencies or omissions no later than May 30, 2023. Defendants shall notify Plaintiffs of any objections to alleged record insufficiencies or omissions within seven days thereafter.

3. Plaintiffs may file a motion to complete or supplement the administrative record, if necessary, no later than June 20, 2023. Defendants shall file any response to such motion on or before July 5, 2023. *If no motion to supplement the record is filed, the record shall be considered complete on June 20, 2023*.

ECF No. 35 (emphasis added).

iterative proceedings are commonplace in cases brought under the APA. Particularly where, as here, the administrative record is voluminous, agencies can and do overlook documents that are appropriately considered in the administrative record. But this circumstance cannot be twisted to mean that the agency's ultimate determination of the scope of the administrative record is not afforded deference—particularly where, as here, NNSA undertook a rigorous internal review to determine whether the precise documents identified by Plaintiffs were directly or indirectly considered in the decision-making process.

Second, courts have expressly rejected the "contention that an agency [that] voluntarily and timely adds documents to an administrative record at the request of the opposing party before a merits decision by a reviewing court somehow waives the presumption that the administrative record, as amended, conforms with legal requirements." *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, No. 5:10-cv-476-D, 2011 WL 12544193, at *2 (E.D.N.C. May 10, 2011). To the contrary, NNSA's "willingness to compromise and agree to supplement the administrative record . . . only bolsters [its] argument that [it] [] compiled the administrative record in good faith." *Voyageur Outward Bound Sch. v. United States*, No. 1:18-cv-01463-TNM, 2019 WL 11584988, at *2 (D.D.C. Apr. 8, 2019). Plaintiffs' argument, if adopted, would discourage the parties from attempting to resolve, or at least narrow, administrative record issues before seeking relief from the Court. *See N.C. Wildlife Fed'n*, 2011 WL 12544193, at *2 ("[P]arties to litigation should be encouraged to compromise their disputes."). For these reasons, the Court should reject any implication that NNSA's agreement to add six documents to the record rebuts the presumption of regularity.

With the presumption of regularity intact, Plaintiffs have not mustered the necessary clear evidence showing that NNSA considered the seven disputed documents and nonetheless refused to include them in the record. *See Forest Cnty. Potawatomi Cmty.*, 270 F. Supp. 3d at 178-79.

2. Hyperlinked citations in comment letters do not prove that the agency reviewed or considered those hyperlinked materials.

Plaintiffs believe they have proven that NNSA considered six of the seven disputed documents because those documents were cited (with hyperlinks) in public comment letters to NNSA. The fact that an agency may be aware of a document does not mean that it considered the document in making its decision; to the contrary, documents that the agency knew about but did not consider are properly excluded from the administrative record.[8] *See Wilderness Workshop*, 2012 WL 1834488, at *4. Consistent with this principle, the fact that a third party has cited a document in a comment letter to the agency does not demonstrate by itself that the agency considered that document. *See In re Delta Smelt Consol. Cases*, No. 1:09-CV-1053 OWW DLB, 2010 WL 2520946, at *4 (E.D. Cal. June 21, 2010); *Defs. of Wildlife v. Dalton*, 24 C.I.T. 1116, 1120 (2000). Courts have rejected "consideration by citation" arguments because: (1) it would allow the public to craft the administrative record instead of the agency; and (2) it would create an "unworkable rule" where agencies would have to review and retain every document referenced in public comment letters—which could result in unworkably vast records. *Knight v. U.S. Army Corps of Eng'rsi*, No. 4:18-CV-352, 2019 WL 3413423, at *2 (E.D. Tex. July 29, 2019); *Audubon Soc'y of Portland v. Zinke*, No. 1:17-CV-00069, 2017 WL 6376464, at *5 (D. Or. Dec. 12, 2017); *Ga. River Network v. U.S. Army Corps of Engineers*, No. 4:10-CV-267, 2012 WL 930325, at *5 (S.D. Ga. Mar. 19, 2012), *aff'd*, 517 F. App'x 699 (11th Cir. 2013).

Plaintiffs do not cite a single case supporting their theory that hyperlinking citations in public comments is somehow different than merely citing documents in comments. Plaintiffs' citations to

[8] Plaintiffs appear to misunderstand the scope of the "before the agency" standard by equating awareness or possession with consideration. But this view is inconsistent with case law that makes clear that only those documents directly or indirectly considered in making a particular decision were "before the agency." *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1236 n.9 & 1237 (E.D. Cal. 2013) ("'[E]verything that was before the agency' must be construed narrowly to include only those documents directly or indirectly considered by the relevant decision makers.").

Doe #1 v. Syracuse Univ., 468 F. Supp. 3d 489, 503 n.11 (N.D.N.Y. 2020) and *Estate of Roman v. City of Newark*, 914 F.3d 789, 796 (3d. Cir. 2019) are facially inapposite because neither of those cases addresses hyperlinks in the context of an administrative record dispute. Plaintiffs' reliance on *Friends of the Mahoning River v. U.S. Army Corps of Engineers*, 487 F. Supp. 3d 638, 640 n.1 (N.D. Ohio 2020) for the proposition that, as a matter of law, hyperlinked citations to comments are part of the administrative record is also misplaced. The *Friends of the Mahoning River* court never resolved the legal question of whether hyperlinked citations are part of the administrative record because the Army Corps of Engineers agreed it had clicked on and considered the hyperlinked materials. *Id.* Because the Army Corps considered the hyperlinked documents, and the hyperlinks were already in the comments – which were filed with the administrative record – the *Friends of the Mahoning River* Court determined that the record was already complete. *Id.* The situation here is inapposite because the agency did not consider the hyperlinked materials.

Regardless of whether a plaintiff is arguing "consideration by citation" or "consideration by hyperlinked citation," the same concerns remain –Plaintiffs could craft their own administrative record by filing comments that include hundreds or thousands of hyperlinked documents. Here, Plaintiffs have failed to provide clear evidence that the agency directly or indirectly considered the hyperlinked documents; and the mere presence of the hyperlink is insufficient to rebut the presumption of regularity.

3. Possession of a document by an agency is not the equivalent of consideration.

Plaintiffs correctly claim that DOE or NNSA authored three of the seven disputed documents; that the Defense Nuclear Facilities Safety Board ("DNFSB") authored two of the documents; and that the Government Accountability Office ("GAO") authored the remaining two documents. But authorship, standing alone, does nothing to prove that NNSA considered these documents when deciding to implement a two-site strategy for plutonium pit production. To begin

with, documents, regardless of whether they were authored by other federal agencies, which were not considered by the deciding agency are not a part of the administrative record. *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1350 (9th Cir. 1996). Therefore, the fact that the DNFSB and GAO authored four of the seven disputed documents is immaterial. Likewise, the fact that DOE or NNSA drafted three of the disputed documents – without more – does not prove by clear evidence that the agency considered those three documents when deciding to produce plutonium pits at both Los Alamos and Savannah River. DOE and NNSA have authored millions of pages of documents and they do not consider every self-authored document when making individual decisions.

To rebut the presumption that the record is complete, a plaintiff must do more than show the agency possessed the document. *See Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008). A plaintiff must "identify reasonable, non-speculative grounds for its belief that the documents were considered" by the agency decision makers. *E.g.*, *Pinnacle Armor, Inc*, 923 F. Supp. 2d at 1239 (citing *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008). An agency is not deemed to have considered, even indirectly, every document that an agency employee has ever created, reviewed, or placed in a file. *Stand Up for California! v. United States Dep't of Interior*, 71 F. Supp. 3d 109, 117 (D.D.C. 2014). To the contrary, possession of certain records by an agency – even those documents the agency authored – "is not sufficient to show that the same records were considered by the agency in connection with a decision subject to an APA challenge." *Id.* It would be unworkable to require agencies to include within the record every tangentially relevant document that the agency had ever authored or commented on regardless of whether the relevant decision makers considered those documents or not when reaching the challenged decision. *Detroit Int'l Bridge Co. v. Gov't of Canada*, No. CV 10-476 (RMC), 2016 WL 10749142, at *2

(D.D.C. Apr. 25, 2016); *Safari Club Int'l v. Jewell*, No. CV-16-00094-TUC-JGZ, 2016 WL 7785452, at *3 (D. Ariz. July 7, 2016).

For example, in *Detroit Int'l Bridge Co.*, the plaintiffs sought inclusion of prior drafts of a crossing agreement that were negotiated between the Department of State and the Government of Canada (with input from the State of Michigan). *Id*. In *Detroit Int'l Bridge Co.*, plaintiffs argued that because the Department of State was (1) in possession of the earlier drafts, and (2) made comments on those early drafts, it considered the prior drafts when reaching its decision to approve the final crossing agreement years later. The court rejected that argument, holding that: "[t]he fact that the drafts of the Crossing Agreement were commented on and discussed with the Michigan parties in previous years does not mean that the agency considered the drafts, comments, and communications when it evaluated the final, June 2012 submission of the Crossing Agreement." *Detroit Int'l Bridge Co.*, 2016 WL 10749142, at *2. Here, NNSA has not included the seven disputed documents in the record because it did not consider the government-authored documents when deciding to produce plutonium pits at Savannah River and Los Alamos. The fact that NNSA may have considered those documents when making decisions about other aspects of its missions does not mean that those documents were considered when deciding to produce plutonium pits at Los Alamos and Savannah River.

In sum, Plaintiffs offer only two theories for their arguments that NNSA considered the seven documents, and therefore they should be included as part of the complete administrative record– hyperlinked citations to comment letters and authorship of the documents. But under neither theory do Plaintiffs prove by clear evidence that the agency considered the disputed documents, and the Court should deny Plaintiffs' Motion.

B. Plaintiffs have not met the high burden of showing that the record must be supplemented.

Plaintiffs argue that if the Court does not complete the record with the seven disputed documents, it should supplement the record with those documents because those documents are necessary: (1) to determine whether the agency considered relevant factors; and (2) to explain technical information. Motion 22–24. As this Court recently emphasized, "[f]ederal courts may supplement an agency's administrative record only if it 'does not reveal the agency's reasoning or if it appears that the agency acted in bad faith.'" *Chestnut*, 2022 WL 4096607, at *3 (quoting *Save Our Sound OBX, Inc. v. N.C. Dep't of Transp.*, 914 F.3d 213, 226–27 (4th Cir. 2019)). On the heels of this Court's *Chestnut* opinion, the Ninth Circuit reiterated that courts should "place a thumb on the scale against supplementation of the AR."[9] *BlueMountains Biodiveristy Project v. Jeffries.*, 72 F.4th 991, 998 (9th Cir. 2023) (citing *Goffney v. Becerra*, 995 F.3d 737, 747–48 (9th Cir. 2021).

1. Supplementation is not necessary to determine whether NNSA considered all relevant factors.

The "relevant factors" exception is a somewhat of a misnomer because a plaintiff seeking to establish the exception "must establish more than just that the document is relevant." *Pinnacle Armor, Inc.*, 923 F. Supp. 2d at 1234. To properly invoke the exception, Plaintiffs must show that the "document in question [] do[es] more than raise 'nuanced points' about a particular issue; it must point out an 'entirely new' general subject matter that the defendant agency failed to consider." *Id.* (quoting *In re Delta Smelt*, 2010 WL 2520946, at *5); *accord Bay.org v. Zinke*, 2018 WL 3965367, at *6. If mere relevance were the test, Plaintiffs could "drive a truck through what is supposed to be

[9] Citing *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009), Plaintiffs claim that "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." Motion 13. Plaintiffs place too much importance on *dicta* in *Ohio Valley Envtl. Coal.*, which is not binding on this Court, and ignore persuasive authority like *Blue Mtns*. where the Ninth Circuit, in a NEPA case, just held that courts should "place the thumb on the scale against supplementation of the AR." *Blue Mtns.*, 72 F.4th at 998.

a narrow exception to the record review rule." *In re Delta Smelt*, 2010 WL 2520946, at *6; *Bay.org*, 2018 WL 3965367, at *6; *Pinnacle Armor*, 923 F. Supp. 2d at 1234. This Court recently confirmed how narrow the "relevant factors" exception is when it held that the record may be supplemented "only when it is so bare that it prevents effective judicial review[,]', because it fails to delineatethe path by which the agency reached its decision." *Chestnut*, 2022 WL 4096607, at *3 (quoting *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011)(cleaned up) and *Occidental Petroleum Corp. v. Sec. and Exch. Comm'n*, 873 F.2d 325, 338 (D.C. Cir. 1989)).

Plaintiffs have not identified a single factor or category of information that NNSA failed to consider when it evaluated producing plutonium pits at Savannah River and Los Alamos. Instead, they argue generally that the seven disputed documents "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." Motion 24. But the fact that a document may be relevant, standing alone, is not an exception to the record review rule that allows supplementation.[10]

The perfect example of why the relevant factors exception does not apply in this case is the 2020 Annual Transuranic Waste Inventory Report.[11] Plaintiffs admit that NNSA considered the

[10] The *Pinnacle Armor* Court rejected Plaintiffs' argument in a nearly identical factual posture and held that plaintiffs are not entitled to supplement the record with their preferred documents if the agency already considered a particular factor:

> Plaintiff argues [] that Documents 1–4 should be considered under the relevant factors exception because they contain information about the manufacturing and construction of several variants of Pinnacle Armor using the Dragon Skin technology. But this is not an argument about whether NIJ neglected to consider the general subject matter of "manufacturing and construction." Rather, Plaintiff simply argues that NIJ should have considered *this particular information* about manufacturing and construction. This does qualify these documents for consideration under the "relevant factors" exception.

Pinnacle Armor, Inc., 923 F. Supp. 2d at 1234.

[11] Two other documents proposed for inclusion by Plaintiffs, the DNFSB's *Technical Report, Potential Energetic Chemical Reaction Events Involving Transuranic Waste at Los Alamos National*

2018 and 2019 waste reports, demonstrating that NNSA considered the issue of waste storage. Moreover, Plaintiffs do not identify any data in the 2020 waste report that diverges from the 2018 or 2019 reports in any significant way. In fact, the waste data used by the agency in its NEPA documents is more conservative than the data reported in the 2020 waste report.[12] Because the relevant factors exception only applies when "the document in question [does] more than raise 'nuanced points' about a particular issue[,] [and instead] point[s] out an 'entirely new' general subject matter that the defendant agency failed to consider," *Audubon Soc'y of Portland*, 2017 WL 6376464, at *6, the 2020 waste report clearly falls outside that exception. The other six documents also fall outside the exception because NNSA exhaustively studied and considered the topics addressed by all of the disputed documents including, *inter alia*, waste storage and safety.

An alternative reason to reject Plaintiffs' argument that the "relevant factors" exception applies is that several of the seven documents are irrelevant to consideration of pit production. For example, the documents entitled *W78 Replacement Program (W87-1): Cost Estimates and Use of Insensitive High Explosives Report to Congress* and *GAO-20-703, NNSA Should Further Develop Cost, Schedule, and Risk Information for the W87-1 Warhead Program* largely discuss the cost of a particular weapons program. But the costs associated with a particular weapon program are irrelevant to environmental impacts associated with pit production. *See Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (monetary costs are not the focus of

Laboratory, (September, 2020) and *29th Annual Report to Congress, for Calendar Year 2018 (April 2019)* also address the movement and storage of transuranic waste – a factor that was thoroughly studied and considered by NNSA. Plaintiffs are not entitled to supplement the record with these particular documents of their choosing.

[12] When evaluating the total projected transuranic waste that could be sent to the Waste Isolation Pilot Plant in New Mexico, NNSA's NEPA documents accurately accounted for pit production at Savannah River and Los Alamos by adding the additional inventory to that presented in the 2019 waste report. Using the 2020 waste report would have reduced the total transuranic wastes below the more conservative value presented in the NNSA NEPA documents.

NEPA, environmental costs are). Therefore, NNSA did not need to consider a document discussing the costs of the W78 Replacement Program when studying the environmental impacts of pit production.

For all of these reasons, the Court should conclude that the relevant factors exception does not apply and deny Plaintiffs' motion to supplement the record.

2. Plaintiffs have failed to show it is necessary to supplement the record to allow this Court to understand complex technical or scientific matters.

Plaintiffs also seek to supplement the record because the documents "provide necessary technical background information." ECF No. 156-1 at 23. This blanket assertion is plainly inadequate to carry Plaintiffs' burden. As with all of the exceptions to the record review rule, Plaintiffs must make a showing that "the existing record is so inadequate as to frustrate judicial review." *Pinnacle Armor*, 923 F. Supp. 2d at 1245 (citing *e.g.*, *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988)). Plaintiffs have not even attempted to do so; and they could not plausibly suggest that any of these documents provide technical background that is not already thoroughly addressed by documents contained in the extensive administrative record.

General allegations that documents may assist the Court cannot justify supplementing the record. Instead, each document must be considered carefully to "'determine whether it truly assists the court in understanding technical or complex matters.'" *Pinnacle Armor*, 923 F. Supp. 2d at 1243 (citation omitted). Plaintiffs have not even tried to argue with specificity that *any* document meets that standard. For example, Plaintiffs offer GAO documents that they claim address potential challenges with modifying the MOX facility, contracting challenges, staffing challenges, and potential cost and timeline overruns. *See* Motion 16–17. But Plaintiffs have not demonstrated how these documents clarify technical or complex matters in any way. The dearth of specificity in Plaintiffs' motion illuminates the sole purpose for adding these documents to the record – to bolster

Plaintiffs' generic talking points. The Court should reject Plaintiffs' attempt to invoke the "technical background" exception to bolster their non-technical litigation themes.

IV. CONCLUSION

For the reasons explained above, to grant Plaintiffs' motion would eviscerate the Supreme Court's seminal guidance that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Because Plaintiffs have not shown the agency considered documents that are not in the administrative record or that those documents are necessary for the Court to conduct judicial review, their motion to complete or supplement the administrative record should be denied.

Respectfully submitted on this 10th day of October, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2023, I electronically filed the foregoing Response in Opposition to Plaintiffs' Motion to Complete/Supplement the Record with the Clerk of the Court using the CM/ECF system, which will send a notification of the filing to all parties.

/s/ J. Scott Thomas
JEFFREY SCOTT THOMAS