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

SAVANNAH RIVER SITE WATCH, et al.,	)	Civil Action Number: 1:21-cv-01942-MGL
Plaintiffs,	)	
vs.	)	
UNITED STATES DEPARTMENT OF ENERGY, JENNIFER GRANHOLM, in her official capacity as the Secretary, et al.,	)	
Defendants.	)	

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs challenge decisions by the Department of Energy ("DOE") and the National Nuclear Security Administration ("NNSA") to produce plutonium pits (nuclear weapon components) at a to-be-built facility located at the Savannah River Site ("Savannah River") near Aiken, South Carolina, and to increase plutonium pit production at existing facilities at Los Alamos National Laboratory ("Los Alamos"), in Los Alamos, New Mexico. These decisions by DOE and NNSA implement express pit production requirements set by Congress to produce 80 plutonium pits by 2030. The heart of Plaintiffs' challenge is an alleged failure of DOE and NNSA to prepare a new or supplemental programmatic environmental impact statement in violation of the National Environmental Policy Act. Plaintiffs, however, have failed to establish Article III standing and present no basis under NEPA sufficient to overturn clear legislative direction from Congress to NNSA. Accordingly, the Court should dismiss Plaintiffs' claims.

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AEDA	Atomic Energy Defense Act
Amended RODs	Amended Records of Decision
APA	Administrative Procedure Act
Complex	Nuclear Weapons Complex
DOD	Department of Defense
DOE	Department of Energy
EIS	Environmental Impact Statement
Federal Defendants	Jennifer Granholm, the Secretary of Energy, NNSA, and Jill Hruby, Administrator of NNSA
Gullah/Geechee SIC	Gullah/Geechee Sea Island Coalition
Livermore	Lawrence Livermore National Laboratory – Livermore, CA
Los Alamos	Los Alamos National Laboratory – Los Alamos, NM
May 10, 2018 Joint Statement	Joint Statement from Ellen M. Lord and Lisa E. Gordon-Hagerty on Recapitalization of Plutonium Pit Production
MOX Facility	Mixed-Oxide Fuel Fabrication Facility
NEPA	National Environmental Policy Act
NNSA	National Nuclear Security Administration
NukeWatch	Nuclear Watch New Mexico
PEIS	Programmatic Environmental Impact Statement
Plutonium pits	Nuclear Weapon Components
RODs	Records Of Decision
Savannah River	Savannah River Site
SRS Watch	Savannah River Site Watch
Tri-Valley CARES	Tri-Valley Communities Against a Radioactive Environment
1996 SSM PEIS	Stockpile Stewardship and Management Programmatic Environmental Impact Statement
1999 Los Alamos SWEIS	Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico
2008 Los Alamos SWEIS	The 2008 Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico
2008 SPEIS	Final Complex Transformation Supplemental Programmatic Environmental Impact Statement
2014 Act	National Defense Authorization Act for Fiscal Year 2015
2019 Act	National Defense Authorization Act for Fiscal Year 2020
2019 SPEIS SA	Complex Transformation Supplemental Programmatic Environmental Impact Statement - Supplement Analysis
2020 Los Alamos SA	The 2020 Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory
2020 Savannah River EIS	2020 Final Environmental Impact Statement for Plutonium Pit Production at the Savannah River Site in South Carolina

I. INTRODUCTION

To achieve important national security objectives, Congress passed the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015 ("2015 Act") and the National Defense Authorization Act for Fiscal Year 2020 ("2020 Act"), both of which amended the Atomic Energy Defense Act ("AEDA") to increase the United States' production of plutonium pits for nuclear weapons. Specifically, the 2015 and 2020 Acts mandate that the Secretary of Defense and the Secretary of Energy ensure the production of at least 80 plutonium pits by the year 2030.[1] In enacting these statutes, Congress expanded plutonium pit production to service the United States' aging nuclear arsenal and to provide plutonium pits for the enduring stockpile, both of which Congress determined were necessary to maintain national security. *See infra*, Section I(B). Congress further established an express schedule of plutonium pit production. *Id.*[2]

[1] In their Complaint, Plaintiffs suggest that NNSA will not be able to comply with the statutory mandate to produce 80 plutonium pits each year by 2030. Compl. ¶ 3. 50 U.S. Code § 2538a(b) requires the Secretary of the Energy to file a certification with Congress each year stating whether or not the "national security enterprise [can] meet the requirements under subsection (a) [the plutonium pit production requirements]." NNSA has publicly stated, following a detailed review of completed conceptual design and cost schedule range estimates, that all required design, construction, commissioning, pit quality certification and production ramp-up to 50 pits per year at Savannah River by the end of 2030 are not currently achievable due to a number of technical, supply chain, construction execution and funding related issues. If the Secretary certifies that the nuclear security enterprise cannot meet the plutonium pit production requirements, she must "submit to the congressional defense committees a plan to enable the nuclear security enterprise to meet the requirements under subsection (a)." *Id.*, § 2538a(c). It will then be up to Congress whether to allocate additional resources to try to achieve its 2030 deadline.

[2] 50 U.S.C. § 2538a provides "consistent with the requirements of the Secretary of Defense, the Secretary of Energy shall ensure that the nuclear security enterprise—

(1) during 2021, begins production of qualification plutonium pits;
(2) during 2024, produces not less than 10 war reserve plutonium pits;
(3) during 2025, produces not less than 20 war reserve plutonium pits;
(4) during 2026, produces not less than 30 war reserve plutonium pits; and

To satisfy Congress's command to increase plutonium pit production, DOE and its semi-autonomous constituent agency, the NNSA, initiated plans to expand existing plutonium pit production at Los Alamos in New Mexico and to re-purpose the government's Mixed-Oxide Fuel Fabrication Facility ("MOX Facility") at Savannah River in South Carolina to produce additional plutonium pits. In support of those plans, in 2019 the NNSA conducted the *Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement* (hereinafter the ("2019 SPEIS SA")), in accordance with DOE's implementing procedures for NEPA (10 CFR 1021.314(c)). The 2019 SPEIS SA reviewed the adequacy of the agency's existing National Environmental Policy Act ("NEPA") documentation. This formal process considered numerous prior NEPA analyses (spanning nearly three decades) and evaluated the potential complex-wide environmental impacts of producing up to 80 pits per year at both Savannah River and Los Alamos. Based on its analysis in the 2019 SPEIS SA, NNSA determined that it need not undertake a new or supplemental programmatic environmental impact statement ("PEIS") evaluating its plutonium pit production program.

Nonetheless, NNSA *still* prepared site-specific environmental analyses addressing implementation of the program at Los Alamos and Savannah River—including an EIS for the latter. Like the 2019 SPEIS SA, these site-specific evaluations also built upon numerous prior site-specific analyses prepared by NNSA. Following these analyses, NNSA published two Amended Records of Decision ("Amended RODs") to document its pit production programmatic decisions at Los Alamos and Savannah River. NNSA also published a Record of Decision ("ROD") to document its site-specific decision at Savannah River to repurpose the MOX Facility

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(5) during 2030, produces not less than 80 war reserve plutonium pits."

to produce a minimum of 50 war reserve pits per year at SRS and to develop the ability to implement a short-term surge capacity to enable NNSA to meet the requirements of producing pits at a rate of not less than 80 war reserve pits per year beginning in 2030.

In response to those two Amended RODS and the Savannah River site-specific ROD, Plaintiffs—four environmental groups and one individual from California, New Mexico, and South Carolina—filed this lawsuit alleging that DOE, Jennifer Granholm, the Secretary of Energy, NNSA, and Jill Hruby, Administrator of NNSA,[3] (together "Federal Defendants") violated NEPA by expanding plutonium pit production to 80 pits per year by 2030 and by initiating new plutonium pit production at Savannah River without completing a new or supplemental programmatic environmental impact statement. *See* Compl. ¶ 1. Plaintiffs' request that the Court order Federal Defendants to undertake one more programmatic NEPA analysis—in addition to the numerous analyses already prepared—is meritless. But the Court need not address Plaintiffs' claim on the merits, because it should dismiss their complaint for these threshold reasons:

- First, Plaintiffs lack standing because: (ii) neither the organizational nor the individual Plaintiffs have alleged an actual or imminent injury, only speculative and remote future harm, and have alleged harms in geographically remote areas; (iii) Plaintiffs are relying on informational harms that do not confer standing absent a concrete injury; and (iv) the organizational Plaintiffs have not alleged injury to their mission.
- Second, Plaintiffs' NEPA claim relating to the number of plutonium pits produced fails because they are challenging Congress' judgment, not an agency action, and

[3] Jill Hruby was sworn in as Administrator of NNSA on July 26, 2021, and was automatically substituted as a defendant in place of Charles Verdon. *See* Fed. R. Civ. P. 25(d).

DOE and NNSA lack discretion to alter Congress's mandate to produce specific numbers of plutonium pits on a Congressionally-required schedule. Moreover, Plaintiffs' challenge to the expansion of pit production is non-justiciable because they ask this Court to substitute its judgment for the considered political decisions of the Executive and Legislative branches in a way that would dramatically interfere with the political branches' national security objectives.

Accordingly, the Federal Defendants respectfully request that the Court grant this motion to dismiss Plaintiffs' complaint.

II. BACKGROUND

A. Factual History

NNSA's mission is to establish and maintain a safe, secure, and reliable nuclear weapons stockpile. It is charged with creating an infrastructure that can produce and maintain nuclear weapons and their component parts (also known as the nuclear weapons complex ("Complex")) in a manner that (i) meets our national security requirements and (ii) is cost-effective. 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. *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. DOE and NNSA have spent decades

planning for a program to produce plutonium pits at a rate of no fewer than 80 pits per year beginning in the year 2030. *See infra* at 8–10. This planning became even more critical when Congress mandated pit production levels in 2014[4] and then increased those mandatory production levels in 2019.[5] Federal law now requires that at least 80 war reserve pits be produced in the year 2030 and every year thereafter. *See* 50 U.S.C. 2538a, as amended.

NNSA's current pit production capacity cannot meet this statutory requirement. [6]

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[4] In passing the 2015 Act, Congress explicitly stated its intent to bolster our nuclear capabilities:

It is the sense of Congress that—

> (1) the requirement to create a modern, responsive nuclear infrastructure that includes the capability and capacity to produce, at minimum, 50 to 80 pits per year, is a national security priority;
>
> (2) delaying creation of a modern, responsive nuclear infrastructure until the 2030s is an unacceptable risk to the nuclear deterrent and the national security of the United States; and
>
> (3) timelines for creating certain capacities for production of plutonium pits and other nuclear weapons components must be driven by the requirement to hedge against technical and geopolitical risk and not solely by the needs of life extension programs.

Pub. L. No. 113–291, 128 Stat. 3885–87 (2014).

[5] In the 2020 Act, Congress amended the production requirements set forth in the 2015 Act and concluded that "any further delay to achieving a plutonium sustainment capability to support the planned stockpile life extension programs will result in an unacceptable capability gap to our deterrent posture." Pub. L. No. 116–92, 133 Stat. 1952 (2019).

[6] From 1952 to 1989, plutonium pits for the nuclear weapons stockpile were manufactured at the Rocky Flats Plant near Golden, Colorado, at a rate of 1,000 to 2,000 pits per year. In December 1989, pit production at Rocky Flats ceased and DOE decided not to restart production at the facility. Since 1989, a modest (and insufficient) number of pits have been produced at Los Alamos, always less than 20 per year.

Therefore, NNSA has studied how best to implement Congress' command to produce 80 pits per year by 2030. On May 10, 2018, the Under Secretary of Defense for Acquisition and Sustainment and the NNSA Administrator issued a Joint Statement describing the government's preference for implementing a two-site strategy—production of a minimum of 50 pits per year at Savannah River and production of a minimum of 30 pits per year at Los Alamos. *See Joint Statement from Ellen M. Lord and Lisa E. Gordon-Hagerty on Recapitalization of Plutonium Pit Production*, May 10, 2018, https://www.energy.gov/nnsa/articles/joint-statement-ellen-m-lord-and-lisa-e-gordon-hagerty-recapitalization-plutonium-pit ("hereinafter, the "May 10, 2018 Joint Statement") (last visited Sept. 24, 2021). The selected two-site strategy (i) improves the resiliency, flexibility, and redundancy of our nuclear security enterprise by reducing reliance on a single production site; (ii) enables the capability to allow for enhanced warhead safety and security to meet Department of Defense ("DoD") and NNSA requirements; (iii) allows for the deliberate, methodical replacement of older existing plutonium pits with newly manufactured pits as risk mitigation against plutonium aging; and (iv) responds to changes in deterrent requirements driven by renewed competition between the great powers. *See* 85 Fed. Reg. 70598 (Nov. 5, 2020). NNSA's preference for implementing a two-site strategy was not made in a vacuum, but was informed by thirty years of extensive studies surveying the environmental impacts of the plutonium production program, including three programmatic environmental analyses and many other site-specific environmental analyses.[7]

[7] NNSA undertook extensive NEPA analysis on how to implement Congress's mandate to produce 80 plutonium pits per year by 2030; however, NEPA was only required for the discretionary decisions of how to implement the mandate. As discussed more fully below, NEPA's requirements were not triggered by the statutory mandate to expand plutonium pit production.

Specifically, the first programmatic EIS in the post-Cold War era was the *Stockpile Stewardship and Management Programmatic Environmental Impact Statement* ("1996 SSM PEIS"). Compl. ¶ 61; https://www.energy.gov/nepa/downloads/eis-0236-final-programmatic-environmental-impact-statement.[8] 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. Compl. ¶ 64; https://www.energy.gov/nepa/downloads/doeeis-0236-s4-final-supplemental-programmatic-environmental-impact-statement. 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. *Id.*

As noted above, in 2019, NNSA prepared the 2019 SPEIS SA, which analyzed NNSA's pit production approach at a programmatic level. *See* Compl. ¶ 76; https://www.energy.gov/nepa/downloads/doeeis-0236-s4-sa-02-final-supplement-analysis. In the 2019 SPEIS SA, NNSA determined that the May 10, 2018 Joint Statement's proposed two-site approach for pit production did not constitute a substantial change from actions analyzed previously and there are no significant new circumstances or information relevant to

[8] The 1996 SSM PEIS, 2008 SPEIS, the 2019 SPEIS SA and related site-specific environmental studies can be viewed in their entirety on DOE's website. *See*, *generally*, https://www.energy.gov/nepa/downloads.

environmental concerns. *Id.*

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, all of which were referenced by Plaintiffs' Complaint, included: (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* Compl. ¶ 19; the 2008 *Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory, Los Alamos, New Mexico* ("2008 Los Alamos SWEIS"), *id.* ¶¶ 87, 97; the 2020 *Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory* ("2020 Los Alamos SA"), *id.*; and the 2020 *Final Environmental Impact Statement for Plutonium Pit Production at the Savannah River Site in South Carolina* ("2020 Savannah River EIS"), *id.*, ¶ 79.

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 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. *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, 85 Fed. Reg. 70601 (Nov. 5, 2020).

B. Plaintiffs' Complaint

Plaintiffs' lawsuit challenges the NNSA's conclusions in the 2019 SPEIS SA that additional program-wide environmental studies were unnecessary. Specifically, Plaintiffs allege that the Federal Defendants violated NEPA by failing to consider the program-wide environmental impacts of expanding pit production to 80 pits per year and adopting a two-site productions strategy. Compl. ¶ 1. Plaintiffs seek, *inter alia*, a declaration from the Court that Federal Defendants violated NEPA by failing to prepare, circulate for comment, and consider a PEIS "concerning the proposed plan to dramatically expand plutonium pit production." *Id.*, Prayer for Relief, ¶ A.

Assuming their allegations are true, Plaintiffs are comprised of "non-profit and/or community organizations and an individual who have strong interests advocating for protection of the environment from impacts of *existing* nuclear facilities, including environmental justice-related impacts, and *advocating against nuclear proliferation*." *Id.* ¶ 10 (emphasis added). Specifically, Plaintiffs are comprised of four organizations – Savannah River Site Watch ("SRS Watch"), Gullah/Geechee Sea Island Coalition "Gullah/Geechee SIC"), Nuclear Watch New Mexico ("NukeWatch"), and Tri-Valley Communities Against a Radioactive Environment ("Tri-Valley CARES") —and one individual—Tom Clements.

SRS Watch is a non-profit organization based in Columbia, South Carolina. *Id.* ¶ 11. SRS Watch's mission is to "monitor programs and policies being pursued by the U.S. Department of Energy, with a focus on activities at the Savannah River Site." *Id.* It performs its mission by

research, public outreach, filing FOIA requests, and advocacy and education. *Id.* SRS Watch claims that its interests "will be impacted or harmed by nuclear waste disposal and plutonium storage, processing, and management at Savannah River," but does not allege that such harm would arise specifically from the decision being challenged—as opposed to existing operations at Savannah River. *Id.* It further alleged that it is harmed by "the deprivation of environmental information and analysis to which it is legally entitled and denial of an opportunity for informed public participation" under NEPA. *Id.* ¶ 15.

Tom Clements is the director of SRS Watch. *Id.* ¶ 13. Clements lives approximately 50 miles from Savannah River and also claims to have recreated in certain "natural areas adjacent to or near Savannah River." *Id.* Clements also alleges that he "regularly travels on Interstate 20 between Columbia, SC and Atlanta, GA," which he claims is a segment of the "transport" route on which plutonium will be shipped from Los Alamos (in New Mexico) and "the Pantex site in Texas" where plutonium pits will be stored prior to shipment to Savannah River for processing and after production at Savannah River. *Id.* ¶ 14. Clements does not allege how often such shipments would be expected; nor why their shipment on this stretch of highway presents any specific risk to him. *Id.* Clements does allege that "in the event of a serious accident at the pit facilities at [Savannah River]," individuals such as himself, who "live, travel, and/or recreate in the vicinity of [Savannah River]. . . would . . . be at risk of exposure." *Id.* ¶ 15.

Gullah/Geechee SIC is a "non-profit organization that operates in accordance with the mission of the Gullah/Geechee Nation to preserve, protect, and promote its people's history, culture, language, and homeland." *Id.* ¶ 16. The Gullah/Geechee SIC alleges that its interests (and those of its members) are harmed by "the risk of a catastrophic failure of the repurposed and overhauled MOX facility," "which would likely result in the release of nuclear or toxic materials,

placing the environment, workers and local residents in extreme peril." *Id.* The Complaint does not allege that Gullah/Geechee SIC members are such workers or local residents. Rather, the Complaint alleges that many of its members "reside downstream of Savannah River and are also part of underserved communities of color"[9] but does not provide any specificity as to where such members reside. *See id.*

NukeWatch is a nonprofit organization based in Albuquerque, New Mexico., with a mission "to use research, public education, and effective citizen action to promote safety, environmental protection and cleanup at nuclear facilities, including Los Alamos, and to advocate for U.S. leadership toward a world free of nuclear weapons." *Id.* ¶ 18. It further alleges that its Executive Director "regularly recreates just outside the boundaries of Los Alamos," but provides no allegation of how his recreating might be harmed by the decisions challenged in this case. *Id., generally.* The Complaint does allege that NukeWatch is harmed by "the deprivation of environmental information and analysis" and the "opportunity for informed public participation" under NEPA. *Id.* ¶ 21.

Finally, Tri-Valley CARES is an organization that (although not alleged with any specificity), appears to monitor/be interested in the operations of the Lawrence Livermore National Laboratory ("Livermore"), in Livermore, California. *Id.* ¶¶ 22-23. Plaintiffs allege that the majority of Tri-Valley CARES' 6,000 members "live, or recreate within 50 miles" of Livermore. They further allege that "Tri-Valley CARES, including its Executive Director Ms. [Marylia] Kelley, is harmed by operations at the [Livermore] Main Site and its high explosives testing range,

[9] Plaintiffs' Complaint references President Biden's Executive Order on Environmental Justice. *See*, *e.g.*, Compl. ¶ 56. Section 301 of the Executive Order makes clear that it "does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Exec. Order No. 14008, 86 Fed. Reg. 7619, 7633 (Jan 27, 2021).

including dangerous activities directly related to DOE-NNSA's plan to expand pit production." *Id.* ¶ 27. The relevant activities "involve [Livermore's] development and testing of a new warhead design type which the pits produced at the Los Alamos Lab and Savannah River Site will ultimately be placed." *Id.* Plaintiffs allege that past weapons testing at Livermore has caused uncontrolled releases such that sites within Livermore have been placed on the Superfund list. *Id.* However, these alleged risks of harm appear to arise from a "new warhead replacement program" being undertaken at Livermore and unidentified "sites *other* than [Los Alamos] and [Savannah River]"; however, that program is not authorized by the decision challenged by Plaintiffs in this case. *See id.* ¶ 4 (emphasis added). Other than that, like the other organizations, Tri-Valley CARES alleges harm due to alleged inadequacies in the NEPA process. *Id.* ¶ 27.

III. LEGAL STANDARDS

A. Rule 12(b)(1) Motion

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Plaintiffs bear the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768–69 (4th Cir. 1991). Where, as here, "standing is challenged on the pleadings, [courts] accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party." *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). However, courts need not accept factual allegations "that constitute nothing more than 'legal conclusions' or 'naked assertions.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Courts are "powerless to create [their] own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990). Moreover, Courts can consider documents that are (i) explicitly incorporated into the complaint by reference; (ii) attached to the complaint as exhibits;

and (iii) submitted by the movant and are integral to the complaint and clearly authentic. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016); *Lydick v. Erie Ins. Prop. & Cas. Co.*, 778 F. App'x 271, 272 (4th Cir. 2019).

B. Rule 12(b)(6) Motion

When evaluating a Rule 12(b)(6) motion, courts "accept as true the facts stated in [plaintiffs'] complaint and draw all reasonable inferences in [plaintiffs'] favor." *Bender v. Elmore & Throop, P.C.*, 963 F.3d 403, 405 (4th Cir. 2020). Courts, however, are not required to accept legal conclusions as true. *Prynne v. Settle*, 848 F. App'x 93, 99 (4th Cir. 2021) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). When deciding whether the pleading standard has been met, courts must "separate[e] the legal conclusions from the factual allegations . . . and then determin[e] whether [the factual] allegations allow the court to reasonably infer that the plaintiff is entitled to the legal remedy sought." *Id.* (citing *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 346 (4th. Cir. 2011)).

IV. ARGUMENT

Congress has determined it is necessary to produce eighty plutonium pits per year to maintain our nuclear capabilities and ensure the defense of the United States. Plaintiffs ask this Court to halt the implementation of this vital national security decision to order a duplicative programmatic environmental impact study. But Plaintiffs have failed to establish that this Court has jurisdiction to grant their far-reaching requests.

First, Plaintiffs have failed to establish standing to pursue their claim. Plaintiffs – whether as an individual or as an organization representing its members – fail to allege any concrete, imminent injury arising out of the expansion of plutonium pit production. Rather, they rely on speculative and conclusory allegations of potential harm from hypothetical accidents and

allegations of pure procedural harm. *See* Compl. ¶¶ 15, 17, 21, 28. Plaintiffs also fail to allege any concrete harm arising from any of their claimed deprivations of information. Moreover, the organizational Plaintiffs have failed to establish any injury to themselves because they fail to allege a cognizable impairment of their missions. But even if the Plaintiffs had established standing, their claim challenging the decision to expand plutonium pit production—which was a discretionary, political decision made by Congress—must be dismissed.

A. Plaintiffs' Failure to Demonstrate Standing Deprives this Court of Jurisdiction

The doctrine of constitutional standing—an essential aspect of the case-or-controversy requirement of Article III, § 2 demands that a plaintiff have "'a personal stake in the outcome of the controversy' [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). At its "irreducible constitutional minimum," the doctrine requires satisfaction of three elements: (1) a concrete and particularized injury in fact, either actual or imminent, (2) a causal connection between the injury and defendant's challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560. To allege a concrete and particularized injury in fact, a plaintiff must show more than a "possible future injury;" he must show that harm has actually occurred or is "certainly impending." *See Whitmore*, 495 U.S. at 158. Neither conjectural future injuries nor alleged fear of such injuries are sufficient to confer standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 107, n.8 (1983).

Plaintiffs' factual allegations fail to establish standing. First, Plaintiff Clements, and the organizational plaintiffs (to the extent they rely on representational standing), fail to allege any actual, imminent injury to themselves or the environment. Rather, they rely on vague allegations

of speculative accidents that they believe *could* happen at one of three locations spread across the country. Second, the organizational plaintiffs also fail to allege facts that could support a finding of direct injury to themselves as organizations. They make no allegations demonstrating that Federal Defendants' decision to implement the plutonium pit production plan impaired their organizational mission or otherwise caused them cognizable harm. Accordingly, Plaintiffs' claim should be dismissed for lack of standing.

1. Plaintiffs Have Only Alleged Speculative Injury from "Mishaps," not Imminent Injury to Themselves

Plaintiffs have only alleged speculative, hypothetical harms – including hypothetical harms that fall outside of geographic areas where they or their members live and/or recreate. Their allegations have not established a case or controversy as required by Article III of the Constitution.

As noted above, to establish standing, a plaintiff (whether an organization or an individual) must establish, among other things, "a concrete and particularized injury in fact, either actual or imminent." *Lujan*, 504 U.S. at 560; *see also S. Walk at Broadlands,* 713 F.3d at 182. Where an organization relies upon a theory of representational standing, it must meet this requirement, in part, by relying upon alleged injury to its members. *See S. Walk at Broadlands,* 713 F.3d at 182 ("to plead representational standing, an organization must allege that (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit.") (internal quotation omitted). To show that its members would have standing, an organization must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id.* (quoting *Summers v. Earth Island Inst.,* 555 U.S. 488, 498 (2009)). Neither Clements nor the organizational plaintiffs (even assuming they can rely on alleged injury to their executive officers rather than to members)

allege a concrete injury that is actual or imminent. Rather, they rely on vague allegations of possible injury should there be some future accident or "mishap" at one of the three facilities they identify. *See, e.g.,* Compl. ¶¶ 15, 28.

"To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019), cert. denied, 140 S. Ct. 392 (2019) (quoting *Peterson v. Nat'l Telcoms. & Info. Admin*., 478 F.3d 626, 632 (4th Cir. 2007)); *see also Am. Humanist Ass'n v. S.C. Dep't of Educ.*, No. CIV.A. 6:13-2471-BHH, 2015 WL 2201714, at *2 (D.S.C. May 11, 2015) ("The Court cannot bootstrap standing with imaginative speculation or the mere chance that it could happen."). The Fourth Circuit has emphasized that plaintiffs relying on an increased risk of harm must demonstrate that such risk is substantial enough to demonstrate imminence and show that any threatened injury is not remote or speculative. *See South Carolina*, 912 F.3d at 726 (affirming dismissal for lack of standing where the State of South Carolina claimed the termination of the "MOX process" at Savannah River would make the State the permanent repository of nuclear waste because the State's claims of harm to its citizens from radioactive waste were remote and speculative).[10] Many other courts have dismissed claims, like the ones here, that merely allege speculative increased risks of harm without showing a "substantial probability" that the plaintiff will be injured by the alleged increased risk. *See*, *e.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) ("Increased-risk-of-harm cases implicate the requirement that an injury be actual

[10] *Beck v. McDonald*, 848 F.3d 262, 274 (4th Cir. 2017) (affirming dismissal for lack of standing because Plaintiffs who sued over data breach failed to "push the threatened injury of future identity theft beyond the speculative to the sufficiently imminent."); *Holland v. Consol Energy, Inc.*, 781 F. App'x 209, 211 (4th Cir. 2019) (holding that the United Mine Workers of America 1992 Benefit Plan lacked standing to sue coalminers' former employer for changing its health coverage because even though the Plan may ultimately have to provide additional coverage for retired coal workers, there were no allegations that any healthcare claims against the Plan were imminent).

or imminent because '[w]ere all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, nonimminent injuries could be dressed up as increased risk of future injury.'") (citation omitted).[11]

As noted above, applying these principles in a case that is strikingly similar to this one, the Fourth Circuit found that the State of South Carolina could not establish standing for its NEPA claim by alleging conjectural future harms from the presence of plutonium at Savannah River. *South Carolina*, 912 F.3d at 728. In that case, South Carolina alleged that the terminating of a facility using the "MOX process" to address nuclear waste would result in it becoming a permanent repository for plutonium, causing "increased radiation exposure to the public, increased risks of

[11] *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016) (plaintiff, a holder of U.S. public debt who sued to challenge the Debt Limit Statute, lacked constitutional standing because his allegations of future injury were entirely conjectural and would require "(1) federal debt [to[reach the statutory ceiling; (2) the Treasury Department [to] exhaust any 'extraordinary measures' to avoid a default; (3) the United States [to] be unable to pay its obligations with 'cash on hand' in a given day; (4) payment on [plaintiff's] securities to come due during such time; and (5) [plaintiff to] continue to hold those securities."); *Adult Video Ass'n v. U.S. Dep't of Just.*, 71 F.3d 563, 567 (6th Cir. 1995) ("Adult Video alleges a hypothetical harm if, at some point in the future, its members decide to distribute 'After Midnight' in the Western District of Tennessee; the government decides to prosecute for that distribution; and if a jury subsequently finds the film to be constitutionally protected material. This is precisely the sort of hypothetical future harm prohibited by current standing requirements."); *Doolittle v. United States*, No. 5:17-CR-275-FL, 2020 WL 9937828, at *4 (E.D.N.C. July 27, 2020), report and recommendation adopted sub nom. *Doolittle v. United States*, No. 5:17-CR-275-FL-1, 2021 WL 2258309 (E.D.N.C. June 3, 2021) (dismissing a prisoner's challenge that the imposition of supervised release unlawfully exceeded the statutory maximum sentence because "whether he might later violate his supervision and whether an additional prison term might be imposed under § 3583(k) is speculative at this point. . .and as a result, he lacks standing to challenge any future revocation sentence under § 3583(k)."); *Faircloth v. Food & Drug Admin.*, No. 2:16-CV-5267, 2017 WL 4319495, at *4 (S.D.W. Va. Sept. 28, 2017) (dismissing plaintiff's challenge to the Federal Drug Administration's final rule designating e-cigarettes as a tobacco product because plaintiff's claim that this rule will increase e-cigarette prices or cause e-cigarette manufacturers to go out of business are "squarely the type of conjectural or hypothetical future injury that fails to give plaintiff standing."); *Roe 1 v. Prince William Cty.*, 525 F. Supp. 2d 799, 805 (E.D. Va. 2007) (dismissing challenge to a local resolution requiring police to question detainees about their immigration status because the "possibility that Plaintiffs in this matter would first be stopped and then be unlawfully questioned about their immigration status or illegally detained is [] remote and conjectural.").

nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 727. The Fourth Circuit rejected South Carolina's contention, finding that it rested on a "highly attenuated chain of possibilities." *Id.* at 728 (quoting *Clapper*, 568 U.S. at 410).

Application of the Fourth Circuit's analysis—where the court found that the State of South Carolina lacked standing to protect its citizens from conjectural future environmental harms related to the use of nuclear materials at Savannah River—makes clear that Plaintiffs have fallen short of alleging a non-speculative injury. For example, SRS Watch and Clements allege possible harm "*[i]n the event of* a serious accident" due to "a *risk* of catastrophic failure" that "*could bring* disastrous impacts." Compl. ¶¶ 15, 16, 17 (emphasis added). But such allegations are speculative and rely on an attenuated chain of causation, and are the type of allegations that the *South Carolina* Court found to be insufficient. 912 F. 3d at 728; *see also Clapper*, 568 U.S. at 409 ("'threatened injury must be certainly impending to constitute injury in fact,'" and that "'[a]llegations of possible future injury' are not sufficient'") (quoting *Whitmore*, 495 U.S., at 158).

Moreover, Plaintiffs' allegations are even less sufficient than those in the *South Carolina* case, because they fail to allege any factual basis that could support a chain of causation at all. Plaintiffs fail to allege any detail whatsoever regarding the nature of the "release of radioactive and hazardous material" they fear will happen. Compl. ¶ 15. For instance, they make no allegation describing how any potential "release" would actually threaten Mr. Clements—who lives "approximately 50 miles from the northeastern boundary" of Savannah River. *Id.* ¶ 13. *See also id.* ¶ 22 (alleging that majority of Tri-Valley CARES' members "reside, work and/or recreate within 50-miles of Livermore"). Similarly, Gullah/Geechee SIC fails to identify *any* associated individual who might be at risk—but more generally, they fail to make any allegation providing a

factual basis for an alleged increased risk of harm. *See id.* ¶ 17 (noting that members "reside *downstream* of Savannah River and are also part of underserved communities of color") (emphasis added); *see also id.* ¶ 19 (NukeWatch alleging that its Executive Director "regularly recreates just outside the boundaries of Los Alamos," but providing no allegation as to how his recreating might be harmed by the decisions challenged in this case). Ultimately, the Plaintiffs ask the Court to assume that because their challenge involves plutonium production, any individual who "live[s], travel[s], and/or recreate[s]" in some undefined "vicinity" of the Savannah River is subject to an increased risk of harm sufficient to establish a "realistic danger of sustaining a direct injury." *South Carolina*, 912 F.3d at 726. But as *South Carolina* makes clear, that is simply not the case. *Id.* at 727.

The inadequacy of Plaintiffs' allegations of injury do not stop there. Plaintiffs also fail to allege facts demonstrating that the Federal Defendants' adoption of the plutonium pit production plan is actually the alleged cause of their concern. For instance, while Tri-Valley CARES conclusorily alleges that its members will face increased risk due to "DOE-NNSA's plan to expand pit production," Compl. ¶ 27, its factual allegations make clear that this alleged risk actually arises out of a "new warhead replacement program" being undertaken at Livermore and unidentified "sites *other* than Los Alamos and Savannah River. *Id.* ¶ 4. Plaintiffs make no allegation that this new warhead replacement program was authorized under Federal Defendants' plutonium pit production plan. *See id.*

Moreover, Plaintiffs' concerns (including those of Tri-Valley CARES) appear to arise largely from prior and existing operations at the relevant sites. For instance, Tri-Valley CARES emphasizes alleged risk from existing and past operations at Livermore. *See id.* ¶ 27 (alleging harm by "operations at the [Livermore] Main Site and its [] high explosives testing range"); *id.*

(alleging that past weapons development at Livermore caused uncontrolled releases resulting in contamination). This is even more the case for NukeWatch, who alleges only non-specific "harm caused by *prior and ongoing* production of nuclear weaponry at [Los Alamos]." *Id.* ¶ 21 (emphasis added).

Finally, to the extent Plaintiffs rely on the possibility of catastrophic accidents relating to the transportation of nuclear materials, their allegations are equally inadequate. They provide no factual allegations demonstrating that the speculative risk of an accident occurring at some point along the "main DOE transport corridor between [Savannah River in South Carolina] and [Los Alamos in New Mexico]" could render it "plausible on its face" that any Plaintiff might be harmed. *See id.* ¶ 14; *Beck*, 848 F.3d at 270 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). At most, they allege that one Plaintiff—Mr. Clements—"regularly travels on Interstate 20 between Columbia, SC and Atlanta, GA." Compl. ¶ 14. The fact that Mr. Clements sometimes travels on a small segment of the same route that some materials related to the plutonium pit production program may be transported is facially inadequate to allege a future, particularized injury that is "certainly impending. *See Clapper*, 568 U.S. at 409 (finding that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible future injury' are not sufficient"). Indeed, to rule otherwise would be to find that the hundreds of thousands of individuals who occasionally travel on the interstate system between South Carolina and New Mexico would all have standing in this case. But this is not the law. *Cf. Lujan*, 504 U.S. at 565–566 (holding that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly in the vicinity of it.").

In sum, Plaintiffs' parade of conjectural, non-imminent, speculative harms rely on—at most—an attenuated chain of causation that is unsupported by specific factual allegations.

These allegations are insufficient to confer Article III standing and Plaintiffs' claim should be dismissed.

2. Plaintiffs Cannot Establish Standing By Asserting Purely Procedural Harms

In addition to alleging a risk of harm due to speculative "mishaps," Plaintiffs claim that they were harmed by "the deprivation of environmental information and analysis to which [they are] legally entitled and [the] denial of an opportunity for informed public participation. . . ." *Id.* ¶¶ 15, 17, 21. Such bald allegations of procedural harm are insufficient to establish standing for their claims.

The Supreme Court has repeatedly rejected the idea that pure procedural violations, absent a concrete injury, can confer standing. *See Lujan*, 504 U.S. at 575; *see also Summers*, 555 U.S. at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). In *Lujan* the Court expressly rejected the idea that a plaintiff has standing based on "his interest in having [a] procedure observed." *Id.* at 573, n. 8. The *Lujan* Court made clear that "an individual [can] enforce procedural rights," but only if "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Id.*; *see also Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 344 (4th Cir. 2017) ("One cannot allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement.").

Here, as discussed at length above, Plaintiffs have failed to allege any factual basis for a concrete injury to themselves (or their members). As such, Plaintiffs' claim to be harmed by Federal Defendants' decision not to prepare a programmatic EIS is a prototypical claim of a deprivation of a "procedural right in vacuo," and is insufficient. *See Summers*, 555 U.S. at 496.

Plaintiffs may argue that the deprivation of information that must be disclosed by statute may cause an actual injury sufficient to establish Article III standing in certain circumstances. *See Dreher*, 856 F.3d at 345. While true, an alleged "statutory violation *alone* does not create a concrete informational injury sufficient to support standing." *Id.* Rather, "a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled and that the denial of that information *creates a 'real' harm with an adverse effect*." *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1550 (2016)). But as the Supreme Court recognized in *Spokeo*, procedural violations can often happen without any consequent injury:

> A violation of one of the FCRA's [Federal Credit Reporting Act] procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

136 S. Ct. 1540, 1550.

Again, here Plaintiffs have not alleged any concrete harm that arose from the asserted NEPA violations. Nor can an alleged NEPA violation itself be deemed sufficient to cause actual injury for purposes of Article III. Indeed, were an allegation that the failure to comply with NEPA sufficient to allege cognizable "informational'" harm, then every NEPA claim would automatically confer standing. *See Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 84–85 (D.C. Cir. 1991) (explaining that "sustain[ing] an organization's standing in a NEPA case solely on the basis of 'informational injury' ... would potentially eliminate any standing requirement in NEPA cases"); *Wild Va. v. Council on Envtl. Quality*, Case No. 3:20-cv-00045, 2021 WL 2521561, at

*13 (W.D. Va. June 21, 2021), appeal docketed, No. 21-1839 (4th Cir. Aug. 2, 2021) (noting that relying on pure alleged informational injury would result that such plaintiffs asserting environmental interest "would virtually always have standing with respect to NEPA violations"). Therefore, the type of informational harm Plaintiffs allege in Paragraphs 15, 17, and 21 of their Complaint cannot constitute an independent basis for constitutional standing

3. The Organizational Plaintiffs Cannot Establish Organizational Standing

Finally, the organizational plaintiffs do not adequately allege direct injury to themselves, and thus cannot assert organizational standing as an alternative means of invoking the Court's jurisdiction. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005).

An entity has organizational standing when "(1) 'a defendant's actions impede its efforts to carry out its mission,' and (2) force the organization to divert its resources in order to address the defendant's actions." *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 182 (M.D.N.C. 2020) (quoting *Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012); *see also Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 362 (4th Cir. 2020), *cert. denied*, No. 20-855, 2021 WL 1725174 (May 3, 2021) (finding no organizational standing where plaintiff "did not allege that it had expended resources as a result of [the challenged action], nor did it explain a way in which [the challenged action] 'perceptibly impaired' its activities.") quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). And, any diversion of resources must be directly caused by the defendant's actions, not by the plaintiff's voluntary choice to expend resources. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) *(*noting that the *Havens Realty* standard is not met simply because an organization makes a "'unilateral and uncompelled' choice to shift its resources away from its primary objective to address a government action") (internal citation omitted).

If the act of suing the government (and expending litigation resources) was sufficient to confer Article III standing to challenge an agency action, there would be no meaningful standing requirement. Here, the organizational plaintiffs have made no cognizable allegations that Federal Defendants' decision to adopt the plutonium pit production program imposed any direct burdens on them. The only harms they allege are "the deprivation of environmental information and analysis to which [they are] legally entitled and denial of an opportunity for informed public participation" under NEPA. Compl. ¶ 21; *see also id.* ¶ 15, 17.

First, as discussed above, an alleged deprivation of a "procedural right *in* vacuo" does not comprise a cognizable injury for purposes of Article III standing. *See Summers*, 555 U.S. at 496. But even setting this defect aside, this alleged harm is insufficient to establish organizational injury under the authorities discussed above. Plaintiffs never allege that the Federal Defendants' plutonium pit production plan—nor their decision not to prepare a new or supplemental programmatic EIS for the plan—perceptibly impeded the organizational plaintiffs' "efforts to carry out [their] mission[s]." *Lane*, 703 F.3d at 674; *see also Havens Realty,* 455 U.S. at 379 & n.21. And, there is not a single allegation in the Complaint that any of the organizational plaintiffs were forced to divert resources because of the challenged action. *See Md. Shall Issue, Inc.*, 963 F.3d at 362. To be sure, the organizational plaintiffs allege long-standing concern with the DOE and NNSA facilities at issue here. But standing "is not measured by the intensity of the litigant's interest or the fervor of his advocacy," *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 238–39 (4th Cir. 2020), reh'g granted 981 F.3d 311 (4th Cir. Dec. 3, 2020) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982)).

Because the organizational plaintiffs have alleged no facts that support their alleged organizational standing, their claims should be dismissed.

B. Plaintiffs' Claim Challenging the Number of Nuclear Pits to Be Produced Should be Dismissed Because Congress Mandated the Number of Nuclear Pits to Be Produced

Even if the Court finds that Plaintiffs have established standing for their claim then it still should be dismissed because Plaintiffs challenge Congress' decision to expand plutonium pit production.[12] There is no subject matter under the Administrative Procedure Act ("APA") for such a claim; and moreover, because Federal Defendants have no discretion to alter the number of plutonium pits they are required to produce, they have no obligation under NEPA to evaluate the expansion of plutonium pit production.

1. The Court Lacks Subject Matter Jurisdiction Under the APA Because the Decision to Produce More Pits was Made by Congress, not an Agency

Plaintiffs' claim, alleging a violation of NEPA, is brought exclusively under the Administrative Procedure Act. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) ("Since neither FAHA nor NEPA itself provides a private right of action, all of these claims lie under the Administrative Procedure Act (APA)"). Therefore, Plaintiffs' claims can only proceed if they identify a final agency action subject to judicial review under the APA. *See* 5 U.S.C. §§ 702, 706; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *N.C. All. for Transp. Reform, Inc.*, 713 F. Supp. 2d at 501. The final agency action requirement is jurisdictional in this Circuit. *Natl. Veterans Leg. Services Program v. U.S. Dept. of Def.*, 990 F.3d 834, 839 (4th Cir. 2021).

Plaintiffs allege that the Federal Defendants violated NEPA, in part, because they failed to

[12] If the Court finds Plaintiffs have standing, which it should not, the only claim that can proceed under NEPA is Plaintiffs' allegation that NNSA should have prepared a new or supplemental PEIS before adopting a two-site production strategy. Plaintiffs cannot challenge Congress's decision about how many pits must be produced through NEPA.

conduct a new PEIS addressing the proposal to expand plutonium pit production. Compl. ¶ 1 ("Plaintiffs challenge the Defendants' failure to prepare a new or supplemental Programmatic Environmental Impact Statement ("PEIS") pursuant to NEPA *for the decision to more than quadruple the production of plutonium pits*. . . ."") (emphasis added); ¶ 134 ("The Defendants' current plan is a substantial change from the 2008 CT SPEIS, including its stated purpose and need, *to significantly increase the number of pits* and to have a dual-site method of production.") (emphasis added). But, the only decision to expand plutonium pit production was made by Congress. Congress, not DOE or NNSA, decided to mandate the increased production of plutonium pits, indeed, mandating a precise schedule for such expansion. 50 U.S.C. § 2538a (requiring the production of at least 10 war reserve plutonium pits during 2024, 20 war reserve plutonium pits during 2025, 30 war reserve plutonium pits during 2026, and 80 war reserve plutonium pits during 2030.)

Because Plaintiffs are challenging a Congressional mandate and not a "final agency action" as defined by 5 U.S.C. § 704 and 40 C.F.R. § 1508.1, the Court lacks subject matter jurisdiction to review Plaintiffs' claim under the APA. The APA explicitly instructs that Congress should not be viewed as a federal agency and that Congress' actions fall outside the scope of APA review:

> "For the purpose of this chapter--
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, *but does not include*--
>
> (A) *the Congress*; . . .

5 U.S.C. § 701(b)(1) (emphasis added). Plaintiffs' claim directly challenges "the decision to more than quadruple the production of plutonium pits." Compl. ¶ 1. That decision was made by

Congress, and cannot be challenged in an APA claim as Plaintiffs attempt to do here. *Comm. for Immigrant Rts. of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009) ("[Section] 1357 is a statute enacted by Congress, and therefore is not an "agency action" for which the APA authorizes a person to bring suit."); *see also Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1003 (5th Cir. 1981) ("courts have traditionally refused to review the wisdom or accuracy of legislative decisions") quoting *Oklahoma ex rel. Phillips v. Guy Atkinson Co*., 313 U.S. 508, 527 (1940) . The Court should therefore dismiss Plaintiffs' claim challenging Congress' decision to expand plutonium pit production.

2. Even if the Court has Subject Matter Jurisdiction to Review the Number of Pits to Be Produced, NEPA Does Not Apply Because the Agency Lacks Discretion When Implementing a Congressional Mandate

Even assuming the Court had subject matter jurisdiction to address Congress' mandate to produce 80 pits by 2030, Plaintiffs' claim fails as a matter of law, because the Federal Defendants have no discretion to *refuse* to expand pit production in the manner delineated by Congress.

It is well established that NEPA imposes no obligations on an agency that has no discretion to consider environmental values in its decision making process. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767–69 (2004); *see also Alaska Wilderness League v. Jewell*, 811 F.3d 1111, 1117 (9th Cir. 2015). The Supreme Court explained in *Public Citizen* that "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an [Environmental Impact Statement] based on the usefulness of any new potential information to the decision making process." 541 U.S. at 767. The Court further determined that it "would not . . . satisfy NEPA's 'rule of reason' to require an agency to prepare a full [Environmental Impact Statement] due to the environmental impact of an action it could not refuse to perform." *Id.* at 769. That situation occurs, the Court explained,

when a federal agency "simply lacks the power to act on whatever information might be contained in the [Environmental Impact Statement]" and "simply could not act on whatever input" the public could provide based on the information in the NEPA document. *Id*. at 768-69. The Court therefore held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect," and "the agency need not consider these effects . . . when determining whether its action is a 'major Federal action'" to which NEPA would apply. *Id*. at 770. Even before *Public Citizen*, lower courts, including the Fourth Circuit, had consistently recognized that NEPA claims fail as a matter of law when the agency lacks discretion to affect environmental change.[13]

Here, the 2015 and 2020 Acts mandate that the Secretary of Defense and the Secretary of Energy ensure the production of at least 10 war reserve plutonium pits during 2024, 20 war reserve plutonium pits during 2025, 30 war reserve plutonium pits during 2026, and 80 war reserve plutonium pits during 2030. 50 U.S.C. § 2538a. Congress vested the Executive Branch with no

[13] *See*, *e.g.*, *Sugarloaf Citizens Ass'n v. F.E.R.C.*, 959 F.2d 508 (4th Cir.1992) (F.E.R.C. certification of small power facility for PURPA purposes purely ministerial and not a major federal action); *Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir.1990) (I.C.C. issuance of Notice of Interim Trail Use not a major federal action because Secretary had no discretion to refuse to issue notice if statutory requirements were met); *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir.1988) ("The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding 'federal' action emphasize authority to exercise discretion over the outcome."); *Minnesota v. Block*, 660 F.2d 1240, 1259 (8th Cir. 1981) ("Because the Secretary has no discretion to act, no purpose can be served by requiring him to prepare an EIS, which is designed to insure that decisionmakers fully consider the environmental impact of a contemplated action."); *South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1980) ("[m]inisterial acts ... have generally been held outside the ambit of NEPA's EIS requirement. Reasoning that the primary purpose of the impact statement is to aid agency decision making, courts have indicated that nondiscretionary acts should be exempt from the requirement."); *National Ass'n for the Advancement of Colored People v. Medical Ctr., Inc.*, 584 F.2d 619 (3d Cir.1978) (H.E.W.'s ministerial approval of capital expenditures plan under Social Security Act not major federal action).

discretion to alter these production requirements. In other words, the number of plutonium pits to be produced each year is governed by statute, not by any decision-making vested in the Executive Branch.

As discussed above, in the very first paragraph of their Complaint, Plaintiffs make clear that their key contention is that Federal Defendants violated NEPA by failing to prepare a PEIS "for the decision to more than quadruple the production of plutonium pits. . ." Compl. ¶ 1. Their Prayer for Relief confirms this focus: they ask the Court to declare that Federal Defendants violated NEPA by failing to prepare and circulate a PEIS "concerning the proposed plan to dramatically expand plutonium pit production." *Id.* Prayer for Relief, ¶ A. But Federal Defendants have no discretion to alter the Congressionally-mandated expansion of plutonium pit production.

As such, it would be inconsistent with NEPA's rule of reason for Federal Defendants to address the expansion of plutonium pit production in a programmatic EIS. Indeed, the analysis of alternatives "is the heart of the environmental impact statement" and serves to "sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. The analysis must include "the alternative of no action," *id.* § 1502.14(d), but the agency must only examine "reasonable alternatives." *Id.* § 1502.14(a). But given Congress' direction, Federal Defendants could not consider any alternative to producing the statutorily-mandated number of plutonium pits—and especially could not consider a no action alternative where it maintained current levels of pit production. In sum, the Court should dismiss Plaintiffs' claim alleging that Federal Defendants violated NEPA by failing to adequately analyze the impacts of, or alternatives to, expansion of plutonium pit production.

3. Plaintiffs' Challenge to the Number of Pits to be Produced is Non-redressable Because It Seeks to Entangle the Court in a Political Question

And finally, the Court should dismiss Plaintiffs' claim challenging the expansion of pit production, because Plaintiffs are attempting to embroil the judiciary in a policy dispute that implicates one of our Nation's most significant national security and geostrategic concerns: nuclear deterrence. Because Plaintiffs' claim touches at the heart of national security decisions made by the political branches, it is non-redressable under the political question doctrine.

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it "'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264 (1821)). However, the Supreme Court has recognized a "narrow exception to that rule, known as the 'political question' doctrine." *Id.* (citing *Japan Whaling Assn. v. American Cetacean Soc*., 478 U.S. 221, 230 (1986)). "The political-question doctrine excludes from judicial review those controversies that revolve around decision making in the fields of foreign policy and national security." 16A Am. Jur. 2d Constitutional Law § 271; *see*, *e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government ... which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210. One of the Supreme Court's leading political question doctrine cases is *Baker*, in which the Court set forth six factors for considering whether a particular claim presents a non-justiciable political question:

> (1) a textually demonstrable commitment of the issue to a coordinate political department;

> (2) a lack of judicially discoverable and manageable standards for resolving it;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;
>
> (5) an unusual need for unquestioning adherence to a political decision already made; or
>
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker, 369 U.S. at 217; *see also Taylor v. Kellogg Brown & Root Servs., Inc*., 658 F.3d 402, 408 (4th Cir. 2011).

Plaintiffs' claim implicates the fourth and fifth *Baker* factors. As discussed above, Plaintiffs make clear that at the root of their challenge is a contention that Federal Defendants should *not* expand plutonium pit production. This Court should decline their invitation to wade into the executive branch's implementation of the Congressional mandate to produce eighty plutonium pits per year by 2030. Few matters cut as close to the core of Article I and Article II powers as the realms of foreign policy, national security, and defense – all of which are implicated by the political decision to maintain an effective nuclear arsenal. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.");[14] *see also South Carolina*, 912 F.3d at 729 ("To confer standing on South

[14] In *El-Shifa*, the D.C. Circuit found that a Federal Tort Claims Act suit filed by the owners of a Sudanese pharmaceutical plant were non-justiciable under the political question doctrine because

Carolina at this juncture based on an alleged injury—becoming the permanent repository of nuclear material—that the political branches already have made written and legally binding commitments to forestall would improperly usurp the powers of the political branches.") (marks and citations omitted).

If the Court exercised jurisdiction over this case, it would substantially interfere with Congress's judgment that the United States must produce eighty plutonium pits annually by 2030 and would disregard Congress's pronouncement that "any further delay to achieving a plutonium sustainment capability to support the planned stockpile life extension programs will result in an unacceptable capability gap to our deterrent posture." Pub. L. No. 116–92, 133 Stat. 1952 (2019). Any judicially-created delays in implementing plutonium pit production will effectively preclude DOE and NNSA from meeting the legislative and executive branches' national security imperative to maintain and revitalize our nuclear weapons program. Because responsibility for our national security is vested exclusively with the legislative and executive branches, the Court should decline to exercise its jurisdiction in a way that would undo the political branches' judgment about steps necessary to ensure our nuclear readiness.

V. CONCLUSION

The Court should dismiss Plaintiffs' Complaint in its entirety because Plaintiffs have relied on vaguely alleged, remote, and speculative harms and have therefore failed to establish Article III standing. If the Court finds the Plaintiffs have standing, though, it should nonetheless dismiss Plaintiffs' NEPA challenge to the expansion of plutonium pit production. Congress decided how many war reserve pits must be produced and Plaintiffs cannot challenge that decision by way of

courts could not second-guess the President's discretionary, military decision to order a missile strike on the plant. *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 836.

their Complaint.

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