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

SAVANNAH RIVER SITE WATCH, TOM CLEMENTS, THE GULLAH/GEECHEE SEA ISLAND COALITION, NUCLEAR WATCH NEW MEXICO, and TRI-VALLEY COMMUNITIES AGAINST A RADIOACTIVE ENVIRONMENT,	)	CA: 1:21-cv-01942-MGL
Plaintiffs,	)	
v.	)	
UNITED STATES DEPARTMENT OF ENERGY, JENNIFER GRANHOLM, in her official capacity as the Secretary, THE NATIONAL NUCLEAR SECURITY ADMINISTRATION and JILL HRUBY, in her official capacity as the Administrator,	)	
Defendants.	)	

JOINT REPLY ON ALTERNATIVE REMEDIES

Per the Court's August 19, 2024 Order, the parties provide their positions on "alternative remedies, in case the Court decides to enter judgment in favor of Plaintiffs as to any of their claims."[1] ECF No. 202.

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[1] Although the parties met and conferred about this joint reply, the parties did not review one another's positions given the four-day filing deadline.

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I. PLAINTIFFS' POSITION:

Plaintiffs have requested that this Court declare that Defendants violated NEPA, 42 U.S.C. §§ 4321 *et seq*., and its implementing regulations and, because of these violations, preclude Defendants from moving forward with the dual site pit production scheme until they fully comply with NEPA, and its regulations, by either authoring a new programmatic environmental impact statement or by supplementing the Complex Transformation Programmatic Environmental Impact Statement. ECF No. 21, Amended Complaint at p. 58. Plaintiffs also have sought fees, costs and expenses and any other relief that this Court may deem appropriate. *Id.*

Plaintiffs do not anticipate that there will be any question that this Court has the authority to declare that Defendants violated NEPA if the Court reaches that conclusion. Nor do Plaintiffs believe that there is any question that, should this Court conclude that Defendants violated NEPA, this Court should remand the issues to the respective agencies for further actions in accordance with the Court's ruling. This Court may also order the payment of reasonable fees, costs and expenses. 28 U.S.C. § 2412. Plaintiffs anticipate that Defendants will argue that this Court should remand without vacating the records of decision and amended records of decision for the 2019 CT SPEIS SA, 2020 SRS EIS and the 2020 LANL SWEIS SA. But that would not be appropriate here.

The Administrative Procedures Act states that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [....]" 5 U.S.C. § 706(2)(A). Consequently, several Circuit courts have held that when an agency acts unlawfully, "the ordinary result" is that the agency action is "vacated[.]" *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)(quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989) and *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 913, 110 S.Ct. 3177, 111 L.Ed.2d 695

(1990))(additional quotation marks omitted); *see also*, *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1369 (11th Cir. 2008)("vacatur … is the ordinary APA remedy")(Kravitch, J., concurring in part and dissenting in part).

In a concurring opinion issued just last month, Justice Kavanaugh recounted at length that vacatur is the typical remedy for unlawful agency actions. *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 603 U.S.____, 144 S.Ct. 2440, 2462-63, 30 Fla. Weekly Fed. S 512 (2024)(noting that Congress's use of "set aside" in the APA "plainly contemplated vacatur of agency actions" and that courts routinely employ vacatur to set aside unlawful agency actions)(Kavanaugh, J., concurring).

While a court may have discretion to depart from this typical practice, to do so turns on "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U. S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)(quotation omitted). In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the D.C. Circuit reasoned that "where an EIS was required but not prepared, courts should harbor substantial doubt that the agency chose correctly regarding the substantive action at issue…." 985 F.3d at 1052-53 (quoting *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018))(internal quotation and additional quotation marks omitted). Here, Plaintiffs have contended that Defendants violated NEPA by, among other actions, failing to prepare a programmatic environmental impact statement and moving forward without entertaining comments on alternatives, including whether to even have a dual site pit production plan or, if so, where pit production should occur. Thus, in circumstances like the current case, not vacating the agency's action "would subvert NEPA's purpose by giving substantial ammunition to agencies

seeking to build first and conduct comprehensive reviews later." *Id.* at 1052; *see also Oak Ridge Env't Peace All. v. Perry*. 412 F.Supp.3d 786, 859 (E.D.Tenn. 2019)(vacating decisions for NEPA violations and remanding to agencies to address).

It is unlikely that vacating the relevant decisions would create a meaningful disruption here. This is because, as Defendants have noted publicly, pit production at the Savannah River Site remains many years away and during which time Defendants could complete the requisite NEPA analyses. There is no evidence that Defendants have issued CD-2 which requires completion of the project design, scope of work and estimated cost, much less CD-3, which allows for construction to begin. Moreover, vacatur would not disrupt activities at Los Alamos National Laboratory ("LANL") because even if the records of decision and amended records of decision that relate to the dual site pit production plan are vacated, the earlier decisions that allow some pit production at LANL will continue to be in effect, including the CT SPEIS record of decision which contemplates producing up to 20 pits per year at LANL.[2]

Vacatur is also necessary to ensure that any NEPA analyses are conducted in good faith and not to justify a decision already made. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)((NEPA evaluation "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made"); *see also*, 40 C.F.R. § 1502.5 (requiring that an EIS be prepared "early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made"); 40 C.F.R. § 1502.2(g) (EISs "shall serve as the means of

[2] Plaintiffs have been informed that Defendants intend to file a Declaration with this Joint Reply. Plaintiffs object as this is a Joint Reply and the Order governing this filing called for "arguments." Also, Plaintiffs have not been provided with this Declaration for review and, in the context of this briefing, will have no opportunity to respond to it.

assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"). Vacating the decisions would allow for a good faith NEPA evaluation instead of one conducted while construction is ongoing at a location that could be used to rationalize a predetermined choice among alternatives. *Public Serv. Co. of Colorado v. Andrus*, 825 F.Supp. 1483, 1505 (D.Idaho 1993)("[t]he more effort and resources that are put into a project, the less likely an agency is to abandon the project, or to change it in any significant manner, regardless of what the NEPA review reveals").

Granting vacatur of the relevant records of decision and amended records of decision and remanding for the completion of a PEIS would not, however, provide Plaintiffs with full relief. In order to ensure both compliance with a ruling of this Court and to ensure that there is no thumb on the scale in reaching any conclusions, this Court should also enjoin Defendants from pursuing their dual site production plan during the preparation and completion of additional NEPA review. This Court has "broad discretion when fashioning injunctive relief." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). Many other courts have issued injunctions to address NEPA violations. *See*, *e.g.*, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033-34 (9th Cir. 2007); *S.C. Coastal Conservation League v. Pruitt*, 318 F.Supp.3d 959, 968-70 (D.S.C. 2018); *Nat'l Mining Ass'n*, 145 F.3d at 1408-10; *Los Alamos Study Group v. O'Leary*, Civil Action No. 94-1306-M, (D.N.M. January 26, 1995)(enjoining construction on the Dual Axis Radiographic Hydrodynamic Test facility during EIS preparation).[3] Here, Plaintiffs meet the factors for an injunction because they have demonstrated that they will be irreparably injured, other remedies are inadequate, the balance of hardships supports an injunction and the public interest would not be disserved by an injunction.

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[3] Plaintiffs can provide a copy of this or other relevant orders from this matter upon request.

Plaintiffs, via their Declarations, have demonstrated irreparable injury because of the environmental nature of their injuries. *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)(environmental injuries are "often permanent or at least of long duration, *i.e*., irreparable"). "The balance of equities and the public interest favor issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA." *Sierra Club*, 510 F.3d at 1033 (citation omitted). Such is the case here. The public interest is served by an injunction not only because it would preclude environmental degradation related to a lack of sufficient transuranic waste storage at the SRS and LANL facilities and the Waste Isolation Pilot Plant ("WIPP") but would also serve the public interest in allowing comment and participation in the decisions at issue which affect not only citizens, including Plaintiffs, located near LANL and SRS and WIPP but other sites throughout the United States that are involved in nuclear weapons production and/or transuranic waste generation and disposition.

If this Court so finds, Plaintiffs respectfully request the Court declare that Defendants violated NEPA; that these issues be remanded to the agencies so that they may comply with NEPA; that the amended records of decision for the CT SPEIS and the LANL SWEIS and the record of decision for the SRS EIS, *see* ECF No. 187, pp. 13-14, be vacated; that this Court grant an injunction precluding construction activities at SRS and at LANL related to the dual site pit production plan; and that this Court award Plaintiffs their reasonable fees, costs and expenses.

II. DEFENDANTS' POSITION:

Defendants complied with NEPA, and the Court should enter judgment in their favor. ECF Nos. 191, 200. However, should the Court find a NEPA violation, then a remand to the agency to conduct further NEPA analysis without vacatur is appropriate.

A. Plaintiffs' NEPA claim challenges only the decision to produce pits at a second site; thus, any remedy should be limited to the second production site RODs.

Congress—not NNSA—has required increased pit production by statute. *See* 50 U.S.C. § 2538a(a); ECF No. 187 ¶¶ 37, 46-49. Increased pit production is not subject to NNSA's discretion and is therefore not within the scope of this NEPA challenge or any remedy this Court may fashion. *See* 42 U.S.C. § 4336(a)(4); § 4336e (10)(B)(vii); and § 4331(b); *see also Blanco v. United Comb & Novelty Corp.*, 2013 WL 5755482, at *6 (D. Mass. Oct. 22, 2013) (common law and equitable remedies "cannot be in conflict with those provided by the statutes.").

Thus—necessarily—the core of Plaintiffs' complaint is not that NNSA is increasing pit production, but that NNSA has not prepared a new programmatic EIS prior to exercising its limited discretion to produce pits at two locations, as opposed to one. ECF No. 21 ¶¶ 124, 126, 180, 187. Given the narrow scope of Plaintiffs' challenge, the only agency decisions at issue are the CT SPEIS November 2020 Amended ROD and the November 2020 SRS EIS ROD ("Second Production Site RODs"). 85 Fed. Reg. 70598 (Nov. 5, 2020); 85 Fed. Reg. 70601 (Nov. 5, 2020); JSF ¶¶ 23, 33, 60. For example, Plaintiffs do not (and cannot) challenge the 1996 ROD and subsequent RODs, which authorize pit production at Los Alamos. 61 Fed. Reg. 68014 (Dec. 26, 1996); 64 Fed. Reg. 50797 (Sept. 20, 1999); 73 Fed. Reg. 55833 (Sept. 26, 2008); 73 Fed. Reg. 77644 (Dec. 19, 2008); ECF No. 187 ¶¶ 23, 33, 60. Therefore, this Court should not order relief that blocks previously authorized production at Los Alamos.

B. The Court should narrowly tailor any remedy as to the second production site RODs.

Equitable relief "must be limited to the inadequacy that produced [the] injury in fact." *Gill v. Whitford*, 585 U.S. 48, 66 (2018). In fashioning a remedy, courts should not be "more burdensome [to the defendant] than necessary to redress the complaining parties." *Califano v.*

Yamasaki, 442 U.S. 682, 702 (1979). Following these principles, should the Court find that NNSA issued the Second Production Site RODs in violation of NEPA, it should focus any remand with instructions to address the specific NEPA violation and any corresponding injury-in-fact. Plaintiffs' passing request for an injunction, ECF No. 195 at 26, should be denied.[4]

C. The Court should not vacate the agency's decision but should only remand with instructions to remedy any NEPA violation.

Should the Court decide that additional NEPA analysis is necessary, the Court should allow NNSA to complete this additional NEPA work without disrupting the vitally important and congressionally mandated national security mission to produce eighty plutonium pits per year. When considering whether a court should remand a deficient agency action or remand and vacate that action, courts have applied a two-part test first articulated by the D.C. Circuit in *Allied-Signal v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993).[5] Although the Fourth Circuit has not formally adopted the *Allied-Signal* test, *see Sierra Club v. U. S. Army Corps of Eng'rs*, 909 F.3d 635, 655 (4th Cir. 2018), at least one district court in South Carolina cited *Allied-Signal* when

[4] A plaintiff seeking a permanent injunction must demonstrate he has suffered an irreparable injury, available remedies are inadequate to compensate for that injury, a remedy at equity is warranted, and the public interest would not be disserved by the permanent injunction. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Plaintiffs have not argued these factors, much less met their burden of establishing through evidence. Nor could they, as there are lesser remedies that can address Plaintiffs' injury and the public would be disserved by an injunction.

[5] *See*, *e.g.*, *Wilderness Soc'y v. U.S. Dep't of Interior*, 2024 WL 3443754, at *6 (D.D.C. July 16, 2024) (holding that vacatur was unnecessary after weighing the two *Allied-Signal* factors); *Ohio Env't Council v. U.S. Forest Serv.*, 2023 WL 6370383, at *2–3 (S.D. Ohio Aug. 3, 2023) (same); *N. N. M. Stockman's Ass'n v. U. S. Fish & Wildlife Serv.*, 494 F. Supp. 3d 850, 928–41, 1027–44 (D.N.M. 2020), aff'd, 30 F.4th 1210 (10th Cir. 2022) (same); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 109 (D.D.C. 2017) (same).

determining that courts have the discretion to remand without vacatur.[6] *See Friends of Park v. Nat'l Park Serv.*, No. 2:13-cv-03453-DCN, 2014 WL 6969680, at *3 (D.S.C. Dec. 9, 2014). Other circuits to consider the issue have adopted the *Allied-Signal* test. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) (collecting cases).

The two factors for weighing vacatur are: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" and (2) "the disruptive consequences of" vacatur. *Allied-Signal*, 988 F.2d at 150–51. Stated differently, courts consider whether there is "at least a serious possibility that [the agency] will be able to substantiate its decision on remand," and whether vacatur will lead to impermissibly disruptive consequences in the interim. *See Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014); *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008).

There is "no rule requiring either the proponent or opponent of vacatur to prevail on both factors." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015). "Rather, resolution of the question turns on the Court's assessment of the overall equities and practicality of the alternatives." *Id.* However, Defendants "bear the burden to prove that vacatur is unnecessary." *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019). This burden is not insurmountable as district courts retain "discretion to leave agency action in place while the decision is remanded for further explanation." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng's*, 985 F.3d 1032, 1051 (D.C. Cir. 2021) (quotation marks omitted).

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[6] Even if the Court does not find the Allied-Signal case (and its two-part test) to be persuasive, the Court still "has broad discretion to craft equitable remedies based on the circumstances unique to the case." *Hair Club for Men, LLC v. Ehson*, 2016 WL 6780310, at *5 (E.D. Va. Nov. 14, 2016). There are few cases like this one where the national security concerns are so great and the economic consequences of vacatur are so dramatic.

In this case, the Court should not vacate Defendants' decisions because they can readily correct any NEPA violation on remand and because vacatur would have significant national security and economic implications.

1. NNSA fully complied with NEPA; but to the extent the Court finds a violation, any error is remediable.

When considering the seriousness of the agency's error, courts should gauge how readily an agency may be able to cure the defect in its decision-making process. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009); *see also Allied-Signal*, 988 F.2d at 150–51 (the severity of an agency's errors below turns on "the extent of doubt whether [it] chose correctly."). The core consideration is whether the error "incurably tainted the agency's decision-making process." *Black Warrior Riverkeeper, Inc.*, 781 F.3d at 1290.

This is a case where, at worst, Defendants endeavored to comply with NEPA but committed a few harmless technical violations. *See*, *e.g.*, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 2:17-CV-372, 2021 WL 855938, at *3 (S.D. Ohio Mar. 8, 2021) (finding remand without vacatur appropriate where defendants had not "completely abandoned their duties under NEPA"). Defendants completed programmatic EISs in 1999 and 2008, evaluating the environmental impacts of pit production. NNSA completed exhaustive feasibility studies including a formal Analysis of Alternatives, Engineering Assessment, and Work Force Analysis. NNSA formally re-evaluated its programmatic EIS and an EIS for LANL, and also conducted a new EIS for Savannah River. *See* ECF No. 191 at 1. As previously briefed, ECF Nos. 191 and 200, Defendants had the requisite information necessary to make an informed decision about the environmental impacts of producing pits at both Los Alamos and Savannah River. Plaintiffs' entire case boils down to an argument that NNSA did not properly package the information into a single programmatic EIS

which, if accurate, begs for remand without vacatur so that Defendants can determine, in the first instance, the appropriate steps to take under NEPA to comply with a remand order. Because Plaintiffs have not identified information that NNSA failed to consider that would also likely alter its decision, remand without vacatur is appropriate should the Court find a NEPA violation.

2. Disruptive Consequences of Vacatur

The second *Allied-Signal* factor considers whether vacatur "would lead to serious, disruptive consequences." *Semonite*, 422 F. Supp. 3d at 100. Relevant considerations include national security and economic impacts of vacatur, as well as the disruptive effects on the environment and local communities. *See Swan View Coal. v. Haaland*, No. CV 22-96-M-DLC, 2024 WL 3219206, at *18 (D. Mont. June 28, 2024); *Wash. v. U.S. Dep't of the Navy*, 2023 WL 5670963, at *4 (W.D. Wash. Sept. 1, 2023) (when considering equities of vacatur, noting that disruption of important national security objectives weighed in favor of remand without vacatur). It is difficult to imagine a case where vacatur would be more disruptive.

Here, Congress has ordered NNSA to produce 80 pits per year by 2030. ECF No. 187 ¶¶ 37, 46-49. Congress determined this action was necessary based on advice from the relevant national security agencies. *Id.* Even though Defendants have already suffered supply-chain delays related to the pandemic, they are working diligently towards meeting Congress's objective as soon as possible. Vacatur would delay Congress's mandated action by several additional years, frustrating this important national security mission at a critical moment in international relations. *See* Decl. of Brian Schepens, attached as Ex. A.[7] This alone should militate against vacating the

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[7] Defendants have attached the Declaration of Brian Schepens, the Deputy Director of the Savannah River Acquisition and Project Management Office, because there is no evidence in the existing record that would establish the real-life consequences of vacatur. Because the "remand without vacatur" test instructs the court to consider the consequences of vacatur, this declaration

RODs and disrupting NNSA's ability to provide the enduring national security capability and capacity to produce not less than 80 war reserve pits per year. *Id.* ¶ 1. But if the disruptions to national security were not enough to preclude vacatur, vacatur would also lead to significant and unnecessary economic disruption. Starting, stopping, and starting again a multi-billion-dollar project will cost the American taxpayer billions of dollars, will lead to the immediate loss of 1,400 jobs, and will have a multi-billion-dollar adverse impact of the local, regional, and national economy. *Id.* ¶¶ 2–5. Moreover, a multi-year delay to complete a sweeping programmatic NEPA analysis would risk NNSA's ability to retain talented scientists and other skilled workers who have been hired to oversee and run NNSA's pit production efforts at Los Alamos and Savannah River, further endangering Defendants' ability to meet Congress's production mandate. *Id.* ¶ 2.

Simply put, the disruptive effects of vacatur far outweigh any perceived NEPA deficiencies. Under these circumstances, the Court should remand without vacatur should it find that NNSA violated NEPA. To do otherwise, would interfere with an important national security objective endorsed by Congress and would have seismic economic impacts.

Respectfully submitted this 23rd day of August 2024,

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By: */s/ J. Scott Thomas*________

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is necessary to inform the Court of the significant national security and economic effects of a potential vacatur. Defendants informed Plaintiffs they would be filing this declaration and that it would address the economic effects of vacatur.

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