IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND NUCLEAR, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF ENERGY, *et al.*, Defendants.	No. 1:16-cv-01641 (TSC)

DEFENDANTS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. STATEMENT OF CASE AND SUMMARY OF ARGUMENT

Plaintiffs initiated this lawsuit with a 47-page, 93-paragraph complaint alleging five counts against Defendants under four federal statutes. Am. Compl. (ECF No. 4). After Defendants moved for summary judgment, demonstrating all five counts to be meritless, *see* Defs.' Mem. of Points & Auths. in Support of their Mot. for Summ. J. ("Defs.' Mem.") (ECF No. 15), Plaintiffs filed a cross-motion and opposition abandoning all of their claims except their count demanding a new or supplemental EIS for Defendants' proposal to accept target material from Canada in a liquid, rather than solid, form (Count II, Am. Compl. 36). *See* Pls.' Corrected Mem. of Points & Auths. in Support of their Opp. to Defs.' Mot. for Summ. J. & Pls.' Cross-Mot. for Summ. J. ("Pls.' Mem.") (ECF No. 19-1). However, as Defendants showed, DOE took the required "hard look" at this change in circumstances and determined that a new or supplemental EIS was not warranted. Defs.' Mem. 44. That determination was based on DOE's technical analysis and expertise: DOE concluded that the potential impacts of transporting the target material in liquid form would not significantly differ from the impacts examined in the 1996 FRR FEIS for transporting the target material in a solid powder form. AR 101, AR 139. Consequently, the only question before the Court is whether Plaintiffs have overcome the "extreme degree of deference" they concede applies to DOE's technical judgments, Pls.' Mem. 21 (citation omitted). Plaintiffs have not met that burden.

Plaintiffs have staked their argument on six documents, none of which support their position. Plaintiffs forfeited their opportunity to seek review of three of the documents (a 1972 survey and the two declarations) because Plaintiffs failed to make a motion to supplement the record or properly present an argument to that end as required. *See CTS Corp v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014). These extra-record documents are beyond the scope of the Court's review. *See* Defs.' Mot. to Strike (ECF No. 21); Part III.A, *infra.* As for the documents that are

in the record – a 1977 EIS prepared by the Nuclear Regulatory Commission (AR 1),[1] the 1996 FRR FEIS (AR 22), and the 2000 SRS SNF EIS (AR 38) – Plaintiffs grossly misstate their findings. None of these documents evidences a "longstanding conclusion and policy" that shipments of liquid radioactive material are "unacceptable from an environmental standpoint," Pls.' Mem. 21. The alleged "policy" does not exist. Moreover, even if a policy did exist, that alone would not determine DOE's compliance with its NEPA obligations, which is the issue in this case. DOE properly determined the change to accepting target material in liquid form did not constitute a "substantial change[ ]" or "significant new circumstances or information" warranting a new or supplemental EIS under 10 C.F.R. § 1021.314.

Plaintiffs' other attempts to attack DOE's decision are similarly misdirected. Despite their protests about the "seriousness and complexity of the technical issues" they seek to present, Pls.' Mem. 17 n.11, Plaintiffs have taken no care to represent those technical issues accurately in their brief. *See, e.g.*, Notice of Errata (ECF No. 19); Part II, *infra* (correcting Plaintiffs' terminology errors). This lack of care has consequences for Plaintiffs' arguments. Among other missteps, Plaintiffs incorrectly assume that target material is "a form of" spent nuclear fuel, *e.g.*, Pls.' Mem. 1, and therefore wrongly conclude that shipments of solidified target material would have the same risk profile as "non-dispersible" solid spent nuclear fuel. Pls.' Mem. 10, 21. On the contrary, target material is *not* a type of spent nuclear fuel, and the solidified target material assumed in the FRR FEIS would have been a *dispersible* powder. *See* AR 22:9017-18. In other words, as a result of their carelessness, Plaintiffs premise their entire argument on an assumption of "non-dispersible" solid target material that is wholly incorrect. Pls.' Mem.10.

[1] Defendants inadvertently omitted portions of the 1977 EIS and are serving a corrected record and index on the same day as this filing. The corrected index is filed concurrently with this memorandum. *See* ECF No. 20.

Plaintiffs' declarants do not score much better. Although their declarations are improper and should be excluded, neither Dr. Resnikoff nor Dr. Edwards offers testimony that is reliable or probative of DOE's NEPA compliance. Dr. Resnikoff offers no support for most of his assertions, and Dr. Edwards' allegation of inconsistencies in the radionuclide inventories in the record reflects a misunderstanding of basic principles of radiochemistry—and a failure to read the documents he is referencing. Further, neither he nor Dr. Resnikoff have shown that accepting the target material in liquid form would present "a seriously different picture of the environmental impact of the proposed project *from what was previously envisioned*." *Blue Ridge Envtl. Def. League v. Nuclear Regulatory Comm'n*, 716 F.3d 183, 196 (D.C. Cir. 2013) (emphasis added; internal quotation marks and citation omitted). DOE evaluated the potential impacts associated with transporting a dispersible form of target material in the FRR FEIS. The declarants' apparent disagreement with the protocols used by the DOT and NRC in certifying the transportation package for carrying target material in liquid form is beside the point. Those assessments are not before the Court, and DOE was entitled to give them "great weight" in its review. *Consol. Rail Corp. v. ICC*, 646 F.2d 642, 652 (D.C. Cir. 1981).

Because Plaintiffs have not overcome the extreme deference owed to DOE's determination not to prepare a new or supplemental EIS, Plaintiffs cannot prevail on Count II of the complaint, the only claim they have preserved. Plaintiffs have conceded Defendants' Motion for Summary Judgment on the other claims by failing to respond to Defendants' arguments. *See* LCvR 7(b). Accordingly, Defendant's Motion to Strike should be granted, Defendant's Motion for Summary Judgment should be granted, and Plaintiffs' Cross-Motion should be denied. Summary judgment should be entered in favor of Defendants, and against Plaintiffs, on all counts of the complaint.

II. PERTINENT FACTUAL AND REGULATORY BACKGROUND

Defendants previously explained the nature and characteristics of the target material proposed for shipment into the United States from Canada. Defs.' Mem. 9. Defendants provide additional explanation here to clarify certain matters confused in Plaintiffs' Memorandum.

There are several different categories of material discussed in the environmental documents at issue in this case. As relevant here, target material is the substance remaining after highly enriched uranium targets are irradiated in a reactor, removed, and dissolved, in this case to recover molybdenum-99, a medical isotope. Defs.' Mem. 9; *see generally* AR 22:7947, 8574-76. The 1996 FRR FEIS assumed the target material would be converted into a solid powder form (oxide or calcine) and canned for shipment. AR 22:8576, 9017-18. DOE's 1996 Record of Decision announced that DOE would accept over-land shipments of target material from Canada into the United States, but did not specify the form of the target material. AR 23.

In 2013, DOE issued a Supplement Analysis concerning its proposal to accept the target material as a liquid solution – that is, without the last step of solidification into a powder form, as assumed in the FRR FEIS. AR 101. DOE determined that the potential environmental impacts of the proposal were not significantly different from those DOE previously analyzed in the FRR FEIS. AR 101:26,371. DOE issued a second Supplement Analysis in 2015 reviewing additional information about potential impacts in the materials supporting the U.S. and Canadian certifications of the NAC-LWT transportation package for transporting liquid target material. AR 139. DOE again concluded that a new or supplemental EIS was not warranted. AR 139:27,353-54.

In an attempt to distract from the thorough environmental review documented in the administrative record, Plaintiffs repeatedly employ misleading terminology to blur the distinctions between target material and other, distinct categories of radioactive materials, and

between the different forms (liquid and solid powder) of target material being described in different documents. For example, plaintiffs repeatedly characterize target material as "a form of" spent nuclear fuel, *e.g.*, Pls.' Mem. 1, 8, when that is not the case. As defined by statute, spent nuclear fuel means "fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing." 42 U.S.C. § 10101(23). *See* AR 22:7916; AR 37:11,530. There are many forms of spent nuclear fuel, such as plates, tubes, pins, or rods. AR 22:8560-61 (tables showing form of spent nuclear fuel by country and reactor in FRR FEIS); AR 22:8564-72 (depicting forms). Target material is not spent nuclear fuel. It is the substance that results from dissolving an irradiated target in acid and removing only the molybdenum-99.

Plaintiffs also sometimes refer to "liquid highly-radioactive materials." *E.g.*, Pls.' Mem. 12. This is not a regulatory category, and Plaintiffs do not define what they mean by this term. There is a regulatory category of "high-level radioactive waste," which is defined by statute. 42 U.S.C. § 10101(12). High-level radioactive waste includes "the highly radioactive material resulting from the reprocessing of spent nuclear fuel," or "other highly radioactive material the [NRC] determines by rule requires permanent isolation." *Id.* High-level radioactive waste includes "liquid waste produced directly in reprocessing [of spent nuclear fuel] and any solid material derived from such liquid waste that contains fission products in sufficient concentrations." *Id*. The definition does not include target material, which is subject to further reprocessing and is not waste. Defs.' Mem. 9.

As shown below, Plaintiffs' misleading use of terminology blurs these categories to support inferences that are improper.

III. ARGUMENT

Defendants will first address the proper scope of the record subject to judicial review, which is the subject of Defendants' concurrently filed Motion to Strike (ECF No. 21). Defendants will then respond to the few allegations in Plaintiffs' Memorandum.

A. Plaintiffs' Extra-Record Materials and Arguments Should be Excluded.

In an APA case "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). By way of two conclusory footnotes, Plaintiffs have asked the Court to review certain materials they concede are not in the certified administrative record: a 1972 survey by the Atomic Energy Commission; the Declaration of Marvin Resnikoff ("Resnikoff Decl.") (ECF No. 16-2); and the Declaration of Gordon Edwards ("Edwards Decl.") (as corrected, ECF No. 19-2). *See* Pls.' Mem. 11 n.8; *id.* at 17 n.11.[2] Plaintiffs did not seek leave to submit the documents for review before filing their dispositive motion, and they have failed to justify the consideration of these extra-record documents under the standards applied in the D.C. Circuit. Defendants therefore respectfully submit that the Court should strike the documents and the arguments in Plaintiffs' memorandum that are based upon them.

1. Legal Standard

The Administrative Procedure Act directs a court to review "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The "whole record" includes "all documents and

[2] Plaintiffs' filings also cite the web page for the Chalk River Site that is maintained by the Canadian Nuclear Safety Commission (CNSC), Pls.' Mem. 9 & n.4; a Wikipedia page for the Georgetown Reservoir, Edwards Decl. ¶ 12; and a 1978 report that they do not attach, Resnikoff Decl. ¶ 6 & n.1. These documents are not in the record, and Plaintiffs rightly do not contend that they are. *See Banner Health v. Burwell*, 126 F. Supp. 3d 28, 61-62 (D.D.C. 2015) (declining to consider publicly available document as part of the record).

materials that the agency directly or indirectly considered" when it made the decision under review. *Pac. Shores Subdiv. v. U.S. Army Corps of Engr's*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (internal quotation marks and citation omitted; alterations in original). "To ensure fair review of an agency action, therefore, the court 'should have neither more nor less information than did the agency when it made its decision.'" *Maritel, Inc. v. Collins*, 422 F. Supp.2d 188 (D.D.C. 2006) (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997)). *See Hill Dermaceuticals v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013) (calling this a "black-letter principle of administrative law").

Courts in this circuit may in exceptional cases review materials that are not in the agency-designated record. *See WildEarth Guardians v. Salazar*, 670 F.Supp.2d 1, 5 n. 4 (D.D.C. 2009). A party may invoke those exceptions to the rule limiting review to the administrative record in "one of two ways." *Id.* The party must show either (1) that the material "should have been properly part of the record but was excluded by the agency," or (2) that the material is "extrajudicial evidence that was not initially before the agency but the party believes should nonetheless be included," under certain recognized exceptions. *Id. See Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 151 F. Supp. 3d 1, 13-15 (D.D.C. 2015) (reviewing case law in detail), on reconsideration 164 F. Supp. 3d 56 (D.D.C. 2016); *accord Oceana, Inc. v. Pritzker*, No. 15-1220, 2016 WL 6581169, at *4 (D.D.C. Nov. 4, 2016) (explaining distinction between "completion" of the record and "supplementation" of the record with extra-record evidence); *Animal Legal Def. Fund v. Vilsack*, 110 F. Supp. 3d 157, 159 (D.D.C. 2015).

Plaintiffs made no attempt to invoke these exceptions to seek inclusion of the documents prior to filing their dispositive motion and thus forfeited their opportunity to do so. *CTS Corp.*, 759 F.3d at 64 (relegating argument to footnote "result[s] in forfeiture"); *Banner Health*, 126

F.Supp.3d at 60-61 (deeming plaintiff's request for consideration of extra-record materials "tardy" because it was filed at the same time as dispositive motion). Any such argument made belatedly would fail in any event because these documents are properly excluded.

2. The 1972 survey is not part of the administrative record.

Plaintiffs state that they "intend to seek inclusion" of a 1972 Atomic Energy Commission Environmental Survey that they contend "considered and rejected transportation of liquid spent fuel on environmental grounds." Pls.' Mem. 11 & n.7. Given that the document has not even been submitted for review by Defendants, let alone the Court, the 1972 Study should not be considered.

Plaintiffs do not have a basis to seek inclusion of the survey, even if they were given an opportunity to belatedly make a motion. An agency "is entitled to a strong presumption of regularity" in its designation of the record. *Pac. Shores*, 448 F. Supp. at 4. "[T]o rebut the presumption of regularity," a plaintiff must "introduce non-speculative, concrete evidence to support their belief that the specific documents, allegedly missing from the administrative record were directly or indirectly considered by the actual decision makers involved in the challenged agency action." *Dist. Hosp. Partners, L.P. v. Sebelius,* 971 F. Supp. 2d 15, 20 (D.D.C.2013), *aff'd sub nom. Dist. Hosp. Partners, LP v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015). Conclusory allegations are not sufficient. A party arguing that specific documents should be included in the record "must articulate when the documents were presented to the agency, to whom, and under what context." *Animal Legal Def. Fund,* 110 F. Supp. 3d at 160 (citation and internal quotation marks omitted). Plaintiffs have not done so.

Plaintiffs did not submit any evidence, concrete or otherwise, to support their assertion that the 1972 survey is part of the administrative record. Although Plaintiffs imply that the survey is in the record because it is a "reference document cited in the NRC Transportation EIS,"

Pls.' Mem. 11 n.8, the NRC's citation to a document in 1977 does not establish that the document was before the DOE, a separate agency, in 2013. An agency is not deemed to have considered every document referenced in the documents it has included in the record. For example, in *Cape Hatteras Access Preservation Alliance. v. U.S. Department of the Interior*, 667 F. Supp. 2d 111 (D.D.C. 2009), the Fish and Wildlife Service included a National Park Service document in the administrative record but not a Biological Opinion ("BiOp") cited in that document. The court declined to supplement the administrative record with the BiOp. *Id.* at 114. Although the parties agreed the Park Service document had "heavily relied" upon the BiOp, "that fact alone does not mean it was actually before the [FWS] at the time it made its decision." *Id. See also, e.g.*, *Grunewald v. Jarvis*, 924 F. Supp. 2d 355, 358 (D.D.C. 2013) (denying motion to include document that was cited in a document referenced in the record); *WildEarth Guardians*, 670 F. Supp.2d at 5-6 (holding that plaintiff failed to show agency "considered" 1979 document listed in "previous federal actions" in challenged Federal Register notice); *Ctr. For Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1277 (D. Colo. 2010) (rejecting the "consideration by citation" argument, "[i]n accordance with the majority of courts"), cited with approval in *Grunewald*, 924 F. Supp. 2d at 358.

DOE's designation of the record, which did not include the 1972 survey, is entitled to a presumption of regularity, and Plaintiffs have not submitted any "non-speculative, concrete evidence" to overcome that presumption, *Dist Hosp. Partners*, 971 F. Supp. 2d at 20. Accordingly, Plaintiffs' arguments based on the 1972 survey should be disregarded and Plaintiffs should be precluded from submitting the document for review, should they seek to do so in the future.

3. Plaintiffs do not identify exceptional circumstances justifying consideration of the Resnikoff and Edwards Declarations.

The declarations of Marvin Resnikoff and Gordon Edwards submitted by Plaintiffs are not part of the record and should be disregarded, along with the arguments based on those declarations in Plaintiffs' Memorandum.

The D.C. Circuit recognizes only a handful of "unusual circumstances" where extra-record evidence may be considered by a court. *Am. Wildlands v. Kempthorne*, 530 F.3d 991,1002 (D.C. Cir. 2008). These circumstances include a showing that "the agency deliberately or negligently excluded documents that may have been adverse to its decision"; that "background information [is] needed to determine whether the agency considered all the relevant factors"; or that "the agency failed to explain administrative action so as to frustrate judicial review." *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Am. Wildlands*, 530 F.3d at 1002) (internal quotation marks omitted). These circumstances, however, "are the exception, not the rule." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) ("*Theodore Roosevelt I*"). There must be "a strong showing of bad faith or improper behavior" or demonstration that the administrative record is "so bare that it prevents effective judicial review." *Id. See also CTS Corp*, 759 F.3d at 64 (exceptions for extra-record evidence "are quite narrow and rarely invoked" and "primarily limited to cases where the procedural validity of the agency's action remains in serious question, or the agency affirmatively excluded relevant evidence") (internal quotation marks and citations omitted). A plaintiff cannot prevail on a motion to include extra-record evidence absent a showing of one of these "gross procedural deficiencies." *Hill*, 709 F.3d at 47.

Plaintiffs forfeited any opportunity to make that showing here. The few conclusory allegations they make in a footnote do not suffice to preserve their argument. Pls.' Mem. 17

n.11. In fact, this was the tactic the D.C. Circuit rejected in *CTS*, 759 F.3d 52. There, the petitioner had submitted extra-record expert analysis by attaching it to its brief and describing it in a footnote. *See id.* at 64. The D.C. Circuit rejected the petitioner's attempt to "*sua sponte* supplement the record." *Id.* The court held that "hiding an argument [in a footnote] and then articulating it in only a conclusory fashion results in forfeiture." *Id.*

CTS straightforwardly compels rejection of the Resnikoff and Edwards declarations. Just like the petitioner in *CTS*, Plaintiffs did not move to supplement the record. Instead, Plaintiffs "hid[ ] an argument" in a footnote stating their justification "in conclusory fashion." *Id. See* Pls.' Mem. 17 n.11. Plaintiffs' footnote on page 17 generically asserts that the declarations will "give the Court a sense of the seriousness and complexity of the technical issues on which [Plaintiffs] would seek to comment if DOE were ordered to prepare a new or supplemental EIS." *Id.* Plaintiffs do not identify the D.C. Circuit standard for extra-record evidence, nor do they explain how the declarations satisfy it. *See id.*[3] Under *CTS*, this slapdash presentation of the

[3] For the legal standard, Plaintiffs cite (but do not quote) a footnote in *Webb v. Gorsuch*, 699 F.2d 157 (4th Cir. 1983), which in turn cites *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977). The *Webb* footnote states that "courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary." 699 F.2d at 159 n.2. This statement is plainly out of line with D.C. Circuit precedent, as evidenced by *Theodore Roosevelt I*, which reiterates—in a NEPA action—that consideration of extra-record evidence is "the exception, not the rule." 616 F.3d at 514. The Second Circuit's decision in *Suffolk*, cited by *Webb*, likewise suggests that extra-record evidence may be considered in NEPA cases, 562 F.2d at 1384-85, although the court noted uncertainty about what constitutes the record in a NEPA case to begin with, *id.* at 1384 n.9, and ultimately concluded that plaintiff's expert testimony "consist[ed] primarily of opinions and estimates rather than hard facts," and "f[e]ll short of demonstrating" that the agency ignored relevant data, *id.* at 1386. Defendants have found that *Suffolk* was cited favorably by the D.C. Circuit in dictum in *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 369 n.56 (D.C. Cir. 1981), and was applied in two district court decisions in this Circuit to permit consideration of extra-record evidence in NEPA cases. *See Chem. Weapons Working Grp. v. U.S. Dep't of Def.*, No. 03-645, 2007 WL 7713916, at *2 (D.D.C. Mar. 8, 2007); *Atchison, Topeka & Santa Fe Ry. Co. v. Callaway*, 459 F. Supp. 188, 192-93 (D.D.C. 1978). However, the dictum and the decisions do not bind this Court, and they predate the limiting statements in recent D.C. Circuit decisions such as *CTS Corp.*, *Hill*, and *Theodore Roosevelt I*, which do.

declarations "results in forfeiture." 759 F.3d at 64. *See also, e.g., Banner Health*, 126 F. Supp. 3d at 61 (declining review of extra-record documents because the plaintiffs "ha[d] not even attempted to show that [the legal] standard was met" and their assertion that documents were "needed to assist the court's review" was "not enough" to meet their burden).

Even a generous reading of Plaintiffs' footnote would not entitle them to submit the declarations, which they concede "are not in the administrative record," Pls.' Mem. 17 n.11. Plaintiffs' footnote does not identify any "gross procedural deficienc[y]" that could justify the court's consideration of the Resnikoff and Edwards declarations, *Hill*, 709 F.3d at 47. Plaintiffs do not suggest there has been "bad faith or improper behavior," *Theodore Roosevelt I*, 616 F.3d at 514, and Plaintiffs cannot seriously contend that the voluminous administrative record precludes effective judicial review, *Hill*, 709 F.3d at 47. Plaintiffs' only stated reason for submitting the declarations is to "give a sense of the seriousness and complexity of the technical issues" that Plaintiffs would raise in public comment on an EIS or supplemental EIS. Pls.' Mem. 17 n.11. This is not one of the circumstances the D.C. Circuit recognizes as a basis for considering extra-record documents. *Compare, e.g., Hill Dermaceuticals v. Food & Drug Admin.*, 2012 WL 5914516, at *9 (D.D.C. May 18, 2012), aff'd 709 F.3d at 47 (declining to consider extra-record declarations plaintiff had submitted to "put the issues in context").

Any belated attempt by Plaintiffs to argue that the declarations "are needed to show [DOE] failed to consider all relevant factors," would also fall flat. *Dania Beach*, 628 F.3d at 590. To the extent Plaintiffs are arguing that the declarations should be submitted because they did not have an opportunity to comment, they cite no authority to support such a position. Nothing in NEPA, the CEQ regulations, or DOE regulations requires an agency to solicit public comment on a determination whether to prepare a supplemental EIS. *See Idaho Sporting*

Congress Inc. v. Alexander, 222 F.3d 562, 566 (9th Cir.2000) (agency may use "non-NEPA environmental evaluation procedures" to determine "whether new information or changed circumstances require the preparation of a supplemental EA or EIS"); *accord Hodges v. Abraham*, 300 F.3d 432, 446 (4th Cir. 2002) (same, in upholding use of Supplement Analysis). DOE's regulations require only that a supplement analysis be made "available to the public for information" after it issues. 10 C.F.R. § 1021.314(c)(3). Further, the declarations are proffered only "to give the Court a sense" of the issues on which Plaintiffs "would seek to comment" on a hypothetical EIS. Pls.' Mem. 17 n.11. Plaintiffs do not contend that the declarations are "needed" for the Court to assess the adequacy of DOE's analysis in the context of this litigation, *Dania Beach*, 628 F.3d at 590. In fact, the declarations identify factors that DOE considered, at length, by application of its technical expertise.

Dr. Resnikoff, for example, addresses the potential impacts associated with a "regulatory fire" (a fire at 1,475 degrees F for 30 minutes) and what he calls a "hydrocarbon fire" (a fire he assumes to be 1,850 degrees F). Decl. ¶ 4. Dr. Resnikoff states that in both scenarios "all radionuclides would be released from the task quantitatively as a liquid or steam." *Id.* ¶ 5. Dr. Resnikoff does not offer analysis or support for that assertion, *see* Part III.B.2, *infra*, but even if he had, his declaration would not show that DOE *failed to consider* fire scenarios. DOE evaluated the potential impacts of a "regulatory fire" in its review of the NRC certification materials, which found that a cask would *not* release its contents as liquid or steam in that scenario. *See* AR 122:27,089 (finding the contents of cask "will not boil" in an accident involving a fire). DOE also considered the potential impact of a long-duration fire associated with a transportation accident by reference to the Yucca Mountain EIS. AR 101:26,388, 26,390. The fact that Dr. Resnikoff reaches a result that is different from the regulators' (based on

analysis that Dr. Resnikoff does not describe or document) does not establish that DOE failed to consider a relevant factor.

Dr. Edwards, in his declaration, purports to identify "discrepancies" in the radionuclide inventories in the record. Edwards Decl. ¶ 11 & Annex B. DOE's analysis considered the appropriate inventory. In its letter report supporting the 2013 Supplement Analysis, DOE assumed an inventory of 21 radionuclides (including 13 fission products) for purposes of examining the impacts of incident-free transportation and transportation accidents. AR 101:26,385. The isotopes identified in this inventory are representative of the radiologic constituents of the target material as it existed in 2013—taking into account radioactive decay and the half-life of constituents initially present in the material.[4] *Compare, e.g.*, AR 22:8576-77 (table showing bounding radionuclide inventory for target material in solid powder form after one year of decay of target material in liquid solution, solidification, canning). By contrast, the inventory of 123 radionuclides in the 2012 AECL letter includes, "for completeness," additional radionuclides "with half lives *that are much shorter in relation in the time elapsed* from 2003 to present." AR 88:25,063 (emphasis added). The inventory does not account fully for decay. Context also explains the third inventory Dr. Edwards cites, from the CNSC Technical Assessment Report. This inventory includes 21 fission products (more and in some instances different from the 13 in DOE's letter report) because it is a summary of the inventory used to assess the capability of the transportation package to shield humans from its radioactive contents

[4] "Radioactive decay refers to a process whereby the radioactive elements undergo nuclear transformations that ultimately convert them to stable (nonradioactive) elements. Many fission products formed during reactor operation have short half-lives (the time required for a quantity of radioactive material to decrease to one-half of its original amount) and others remain radioactive for tens to thousands of years." AR 22:8563. The FRR FEIS explains that "[t]he rapid decay of short half-lived radioactive material leads to reduction of the amount of radioactive material in the spent nuclear fuel over time." *Id.* This same principle applies to the radioactive material in target material. *See* AR 22:8576-77.

(not accident impacts). AR 118:26,985. In order to "ensure conservativism," CNSC included "*additional* radionuclides, such as beta emitters" that are not actually present in the target material. AR 118:26,985 (emphasis added). Thus, reviewing the inventories in context, there is no discrepancy that DOE failed to consider.

Dr. Edwards also fails to demonstrate an accident risk that DOE failed to consider. DOE examined the potential impacts of an accident involving release into a body of water, as Dr. Edwards purports to do. *Compare* Edwards Decl. ¶¶ 20-23 *with* AR 139:27,350-51. The difference is that while DOE's review examined the impacts of a leak into Lake Ontario and the Ottawa River, which the shipments might actually cross, *see id*.,[5] Dr. Edwards analyzed a leak into a reservoir in the District of Columbia, Edwards Decl. ¶ 22, which is not remotely close to any of the approved transportation routes, *see* AR 138:27,295; 27,314. Dr. Edwards thus fails to establish that DOE "neglected" relevant factors—only that DOE chose to look at an analysis that used more realistic and supportable parameters than his.

Courts regularly grant motions to strike extra-record materials like Dr. Resnikoff's and Dr. Edwards's declarations. For example, in *National Wildlife Federation v. Marsh*, 568 F. Supp. 985 (D.D.C. 1983), the plaintiff submitted affidavits from environmentalists and an economist questioning the Army Corps of Engineers' analysis of the potential impacts of oil spills associated with a proposed refinery permit. The court granted the Army's motion to strike because the affidavits "d[id] not point out factors neglected by the [agency], but rather ask[ed]

[5] DOE reviewed the analysis in the CNSC Technical Assessment Report. AR 118:27,013-15. Consistent with applicable IAEA regulations, the CNSC assumed a leak of 0.033 percent of the contents of the transportation package. AR 118:27,014. The CNSC notes that an accident scenario on land involving the dispersal of radioactive material into the environment is "non-credible," and that the probability of an aquatic-based accident would be even lower because "the distances travelled on bridges . .. are only a fraction of the total distance travelled." AR 118:27,012-13, 27,013.

the Court to substitute its judgment for that of the agency." *Id.* at 999 n.36 (internal quotation marks and citation omitted). More recently, in *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39 (D.D.C. 2009), the court struck the declaration of an expert who opined that the National Marine Fisheries Service had failed to account for statistical bias in its methodology used to track bycatch (fish caught and thrown back into the sea). Because bias had been addressed by the agency during the rulemaking process, the declaration "d[id] not add factors that [the agency] failed to consider as much as it question[ed] the manner in which [the agency] went about considering the factors it did." *Id.* at 48 (citation and internal quotation marks omitted; some alterations in original). The declaration was therefore found to be improper.

The Supreme Court has proscribed that "an agency must have the discretion to rely on the reasonable opinions of its own qualified experts." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 370-378 (1989). The Resnikoff and Edwards Declarations fail to show that DOE neglected factors; they only "question the manner in which [DOE] went about considering the factors it did," *Oceana*, 674 F. Supp. 2d at 48. Defendants therefore respectfully request that their Motion to Strike be granted as to the Resnikoff and Edwards Declarations, the 1972 survey, and the arguments based upon those documents in Plaintiffs' memorandum and any future filing.

B. Plaintiffs' NEPA Theories Are Baseless.

Even if this Court were to consider their improper arguments based on extra-record evidence, Plaintiffs have presented a far narrower case in their Memorandum than they did in their Complaint. The only count of the Complaint on which Plaintiffs seek summary judgment is their claim that DOE violated NEPA by failing to prepare a new or supplemental EIS. Compl.

36 (Count II).[6] Within this one count, Plaintiffs offer only two theories. First, patently misstating the record, Plaintiffs posit that the 1977 NRC EIS and the extra-record 1972 survey "explicitly rejected shipment of radioactive waste in liquid form, because it was more easily dispersed into the environment." Pls.' Mem. 3. Although neither document actually says or even suggests what Plaintiffs allege, by the end of the brief, Plaintiffs expand that allegation into an outlandish theory that there is a "well-established and longstanding environmental conclusion and policy that shipping radioactive materials in liquid form is unacceptable from an environmental standpoint." Pls.' Mem. 21. The Court will find no such "conclusion" or "policy" in the documents Plaintiffs cite. Moreover, even if there had been such a policy, DOE's departure from it would only warrant a supplemental or new EIS if the change presented "a seriously different picture of the *environmental impact* . . . from what was previously envisioned.'" *Blue Ridge*, 716 F.3d 183, 196 (D.C. Cir. 2013) (citation and internal quotation marks omitted; emphasis added).

Plaintiffs' second contention is that "the environmental impacts resulting from the change in the form" from solid to liquid "are significant or uncertain, as compared with the original proposal's impacts." Pls.' Mem. 23 (internal quotation marks, brackets, and citation omitted). Plaintiffs appear to premise this argument on cherry-picked quotations from the 1977 EIS and 1972 survey that, when read in context, actually contradict Plaintiffs' argument. They also rely on the analysis of accident risk in their expert declarations, which are improper, and unavailing to the extent they attempt to call into question the technical judgments of DOE, DOT, NRC, and CNSC. The Supreme Court requires a court to grant the agency "discretion to rely on the

[6] Defendants showed that only the supplemental EIS theory of the claim is properly presented in this case, given Defendants' prior EISs. Defs.' Mem. 26-27, 40-42. Plaintiffs do not respond to the point and should be barred from doing so in their reply. *See Am. Wildlands*, 530 F.3d at 1001 (plaintiffs forfeit arguments made "for the first time in their reply brief").

reasonable opinions of its own qualified experts" in determining whether a supplemental EIS is required. *Marsh*, 490 U.S. at 378. The Court's task is complete once it has "satisfied [it]sel[f] that the agency has made a reasoned decision," *id.*, as DOE has done here.

Thus, as detailed below, neither of Plaintiffs' theories is supported by the record, and neither casts doubt on DOE's determination that the potential impacts of transporting the target material in liquid form would not significantly differ from the impacts DOE previously analyzed in the FRR FEIS.

1. Plaintiffs' allegation of a "longstanding . . . policy" against transporting radioactive material as a liquid has no basis in the record.

Plaintiffs' primary contention in their memorandum is that DOE's decision not to prepare a new or supplemental EIS "is based on its disregard for the federal government's well-established and longstanding environmental conclusion and policy that shipping radioactive materials in liquid form is unacceptable from an environmental standpoint." Pls.' Mem. 21. Although they repeat variations on this theme throughout their memorandum (*e.g.*, *id.* at 2, 11, 23), Plaintiffs cite only a handful of statements to support it, none of which evidences such a policy or anything close to it. In fact, the NRC's certification of the NAC-LWT transportation package contradicts the existence of any such policy. AR 121.

Plaintiffs allege, first, that a 1977 environmental impact statement prepared by the NRC "assumed" that spent nuclear fuel would be shipped in solid form "based on the government's consensus that the environmental impacts of shipping liquid were significant and unnecessary . . . ." Pls.' Mem. 9. That is false. The 1977 EIS addressed the "environmental impact of radioactive material shipments in all modes of transport." AR 1-0008.[7] *See also* AR 22: 9014-

[7] Citations to the replacement version of the 1977 EIS in the record are to "AR 1-x," where "x" is the final set of digits in the Bates number. "AR0000001-0001" becomes "AR 1-0001".

15 (describing "modal study" in 1977 EIS). In the first passage cited by Plaintiffs (at Pls.' Mem. 10), the 1977 EIS states that "the potential consequences for most radiological shipments" in an accident causing a release of the material "are not severe" and "are limited by one or more parameters: short half-life, nondispersible form, low radiotoxicity." AR 1-0009. The section containing this statement describes the procedures by which NRC considered the different consequences and alternatives: it selected one of the three "parameters" at a time. AR 1-0009-10. This section does not state that materials *must* or *will* be shipped in a non-dispersible form because other options are "unacceptable," as Plaintiffs contend. Pls.' Mem. 11.

Plaintiffs next cite a discussion of accident impacts from Chapter 7 of the 1977 EIS. Pls.' Mem. 10 (quoting AR 1-0228). The accident discussed in that example involves spent nuclear fuel from a light-water-cooled power reactor. AR 1-0227. The EIS's selection of this fuel as an example does not refer to any assumption that materials must be solid to be transported. Rather, the EIS states that "the majority of currently operational power reactors are of the light-water reactor (LWR) variety)," and in "the material flow in the front of fuel cycle" for these reactors, the fuel containing highly enriched uranium is "pressed into pellets," which are fabricated into rod assemblies." AR 1-0035. The irradiated elements are removed and transported, as a solid, to a reprocessing plant. *Id.* Thus, the spent nuclear fuel addressed in the 1977 accident scenario *is* solid—not "assumed" to be so based on a "government[ ] consensus," Pls.' Mem. 9. In fact, as Plaintiffs are forced to concede, the 1977 EIS "did not compare the relative risks" of solid and liquid forms of spent nuclear fuel or anything else. Pls.' Mem. 10.

Further, Plaintiffs have not established the relevance of this 1977 accident scenario to the specific NEPA issue in this case. At issue is DOE's 2013 determination that the potential impacts of accepting target material in liquid form "*would not be significantly different*" from

those previously analyzed in the FRR FEIS. AR 101:26,371 (emphasis added). Although the methodology of the 1977 EIS was considered in the FRR FEIS, AR 22:9014, the 1977 EIS's specific *conclusions* about accident impacts are relevant to this NEPA question only if the FRR FEIS adopted those conclusions. It did not. The FRR FEIS states that the radioactive release fractions assumed for spent nuclear fuel in the 1977 EIS were "*not applicable*" to the target material shipments under consideration. AR 22:9017 (emphasis added). The FRR FEIS also noted that the solid powder form of target material—"*unlike spent nuclear fuel*"—would present greater risks in an accident than in incident-free transportation. AR 22:8349. Therefore, the 1977 EIS accident scenario involving spent nuclear fuel is simply beside the point, with respect to the NEPA question in this case.

The 1972 survey cited in the 1977 EIS is also unavailing, to the extent the Court considers it. *But see* Part III.A.2, *supra.* The passage cited by Plaintiffs discusses accident impacts associated with transporting spent nuclear fuel and solid waste from a light-water nuclear power plant. Pls.' Mem. 11. The excerpts note that the radioactivity resulting from a release of this material in an accident "is unlikely to be large," in part due to the solid "form" of this material. *Id.*[8] This statement does not indicate a preference for one form of material over another. It certainly does not "consider[ ] and reject[ ]" transportation of liquid radioactive material "on environmental grounds," as Plaintiffs assert. *Id.*

Plaintiffs' chain of misstatements continues in discussing subsequent EISs. For example, Plaintiffs contend that the "formal policy" DOE "adopted" in the 1996 Record of Decision was for "management of the HEU target residue material as a solid." Pls.' Mem. 13. There is no

[8] Defendants have located the survey and reserve the right to address it in greater detail should the Court decide to supplement the record with it. As noted above, however, DOE determined the survey is not in the record, and Plaintiffs have not overcome "the strong presumption of regularity" attached to that determination, *Pac. Shores*, 448 F. Supp. 2d at 4.

such policy in the 1996 ROD. The block quotation Plaintiffs provide is from the FRR FEIS, which states that "the target material considered for management would be put in U_3O_8 or UO_2 form and canned for transport." AR 22:8070. That is an assumption, not a policy preference. The FRR FEIS states that "[t]here are *currently* two methods for preparing the [target] residual materials containing aluminum for transport," calcining and oxidizing. AR 22:8575 (emphasis added). The FRR FEIS did not exclude the possibility of shipping target material in liquid form, and neither did the ROD.

Plaintiffs make a similar error in discussing the 2000 SRS SNF EIS. They cite DOE's assumption that the target material would be converted to a solid powder form prior to shipment, AR 39:12,017, which is true, but does not reflect a preference or policy against shipping the material in a liquid form.

Plaintiffs' other quotations from the FRR FEIS are similarly off-base. Plaintiffs contend that the FRR FEIS "recognizes the undesirability of transporting liquid highly-radioactive materials," Pls.' Mem. 12, but this is a category Plaintiffs have invented. *See* Part II, *supra*. The quoted page of the FRR FEIS, AR 22:8059, addresses liquid high-level radioactive wastes, a regulatory category of materials that are distinct from and do not include target material. *See* Part II, *supra*. Plaintiffs also quote a passage stating that "essentially none of the radioactive material" in spent nuclear fuel would be released in an accident because the radioactive material "is an integral part of the solid fuel." Pls.' Mem. 12 (quoting AR 22:8280). Target material is not spent nuclear fuel. *See* Part II, *supra*. Neither quotation supports Plaintiffs' allegation of a policy against transporting radioactive material in liquid form.[9]

[9] Plaintiffs do not address the fact that radioactive isotopes and materials are transported as liquids under applicable federal regulations. *See* Defs.' Mem. 32 n.16 (noting that DOT regulates transportation of "hazardous radioactive materials, such as deuterium and tritium, which are transported as liquids or gases" under 49 C.F.R. §§ 172.101, 173.425).

Simply put, none of the documents Plaintiffs cite, in or out of the record, evidence a policy against transporting radioactive material or target material in particular in liquid form.

2. Plaintiffs have not shown that there are environmental impacts associated with transporting target material in liquid form that are significantly different from those DOE analyzed in the FRR FEIS.

Plaintiffs' second theory of their NEPA count is that, contrary to DOE's determination, the impacts of a change to shipping target material in a liquid form are "significant or uncertain." Pls.' Mem. 23 (citation omitted). Although they do not actually articulate this argument in the "argument" section of their memorandum, *see id.*, Plaintiffs' framing of the fact section suggests that they are relying on the discussion in the 1977 EIS about "non-dispersible" materials, and their expert declarations questioning the certification procedures and conclusions of the NRC and CNSC that DOE discussed in the 2015 SA. Neither of these references supports the argument.

Plaintiffs place mistaken emphasis on the discussion in the 1977 EIS stating that the "nondispersible form" of a material is necessary to limit impacts. Although the 1977 EIS does suggest that the non-dispersible form of a substance may limit the consequences of an accident, the solid form of target material discussed in the FRR FEIS would not be in a "nondispersible form." The FRR FEIS assumed the target materials would be transported as a solid powder, which could dissemble and disperse into the air. AR 22:9017-18. *See* Defs.' Mem. 37-38. The 1977 EIS does not support Plaintiffs' allegations about impacts at all.

Plaintiffs, through their experts, also purport to find greater potential impacts to health and safety than those found by NRC, and its Canadian counterpart the CNSC, in certifying the NAC-LWT transportation package. Because the expert declarations and the arguments based upon them should not be considered, Part III.A.3, *supra*, the Court need not address these contentions. Even so, Plaintiffs' contentions about the transportation package are easily dismissed. The certifications of the NAC-LWT transportation package is not at issue in this

lawsuit.[10] The relevant issue is whether DOE reasonably relied upon the *fact* of the certification, and the *materials* underlying it, in assessing the potential impacts of accepting the target material in liquid form. *See, e.g.*, AR 139:27,345-46 (reviewing NRC's Safety Evaluation Report finding that there was no risk that the full contents of the cask would be released in an accident, or that criticality would occur). *See generally* AR 139:27,345-352 (describing NRC and CNSC findings and comparing them to the 2013 SA).

DOE's reliance on NRC certification is reasonable and appropriate. The deference owed to the determinations of the NRC in certification matters is well-established. In *Consolidated Rail Corporation v. Interstate Commerce Commission*, 646 F.2d 642 (1981), the D.C. Circuit upheld an ICC determination that railroads could not charge rates for "special train service" for transporting spent nuclear fuel. *See id.* at 652. The court noted that DOT and NRC had decided not to require special train service for these shipments and held that "the safety regulations promulgated by DOT and NRC are entitled to be considered by the ICC as embodying prima facie the appropriate balance between safety and nuclear development." *Id.* Although the ICC had conducted its own analysis of the necessity of special train service, the court faulted the ICC for not taking the DOT/NRC finding "into account." *Id.* at 653. The court warned that "the ICC should properly have given great weight" to the "determination by a sister agency vested with the jurisdiction and expertise to make just such a finding." *Id. See also Lorion v. U.S. Nuclear Regulatory Comm'n*, 785 F.2d 1038, 1043 (D.C. Cir. 1986) (affording NRC determination about cask performance the "highest level of deference"). *Consolidated Rail* establishes that DOE was

[10] Specifically, Plaintiffs may not use this NEPA action against DOE as a vehicle to challenge the Certificate of Compliance issued by the NRC or the Certificate of Competent Authority issued by the DOT.

not only reasonable in relying upon the DOT and NRC certifications, but that it would have been unreasonable for it *not* to do so.

Plaintiffs appear to be asking the Court to second-guess the determinations of DOE, DOT, and NRC by reference to the extra-record litigation declarations of Dr. Resnikoff and Dr. Edwards. That is plainly inappropriate. DOE may "rely on the reasonable opinions of its own qualified experts," *Marsh*, 490 U.S. at 378, and those experts properly considered the DOT and NRC certifications and supporting materials, *Consol. Rail*, 646 F.2d at 652. "[W]hen [a court] consider[s] a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations," a court must "recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact." *Fed. Power Comm'n v. Fla. Power & Light Co*., 404 U.S. 453, 463 (1972). The 2013 Supplement Analysis and 2015 Supplement Analysis demonstrate that there is a more than substantial basis in fact for DOE's conclusion that the potential impacts of transporting target material in liquid form would not be significantly different from those analyzed in the FRR FEIS.

Plaintiffs' proffered declarations do not show otherwise. As noted above, the declarations discuss scenarios that DOE evaluated in its 2013 and 2015 Supplement Analyses. *See* Part III.A.3, *supra*. Plaintiffs' experts use different, unsupported assumptions and, unsurprisingly, reach different and irrelevant results.[11]

Dr. Resnikoff's declaration fails to take into account the regulatory requirements for Type B casks like the NAC-LWT cask and provides no support for any of his claims. For

[11] Defendants reserve the right challenge the expertise of Dr. Resnikoff and Dr. Edwards should the Court decide to consider their testimony over Defendants' objection.

example, Dr. Resnikoff asserts without support that the contents of the cask would be released in accident as "liquid or steam" and that "fire, seals, and [pressure] valves of the cask would be damaged within one half hour of the regulatory fire." Resnikoff Decl. ¶¶ 5, 6.[12] The only citation that appears in his declaration is to a 1978 report that he does not provide and which is based on an old regulation, long since amended. *Id.* ¶ 5 & nn. 1, 2. Dr. Resnikoff does not identify the type of cask being discussed, which is a telling omission because a Type B cask cannot be certified under the current regulation if it has a pressure release system that would allow radioactive materials to escape. AR 86:24,871. *See also* AR 139:27,345-346 (describing NRC certification and findings).

The remainder of Dr. Resnikoff's declaration critiques the completeness of NRC's analysis. *E.g.*, Resnikoff Decl. ¶¶ 7-14. But the ideal design of NRC's certification procedures is not before the Court. The only question here is whether DOE reasonably determined, based on NRC's findings – but also those of CNSC – that shipping target material in liquid form, in an NAC-LWT cask, would not have potential impacts significantly different from those DOE previously considered. *See* AR 101:26,388 (finding that impacts of a release of cask contents in an accident "enveloped" by those analyzed in Yucca Mountain EIS).

Dr. Edwards's analysis of accident risk is also ineffective. Dr. Edwards uses a radionuclide inventory that includes fission products considered by the CNSC as part of its radioactive shielding calculations. *See* Edwards Decl. ¶ 19 & Annex B. As explained above, this CNSC inventory includes fission products that are *not* contained in the target material for purposes of adding a layer of "conservatism" to its shielding analysis. *See* Part III.A.3, *supra*. Dr. Edwards also assumes that a liter of liquid target material with this radionuclide content

[12] Dr. Resnikoff equates a regulatory fire to the heat of a "flaming house." Decl. ¶ 4. He does not offer a citation for that comparison.

could leak into a reservoir containing a municipal drinking supply. Decl. ¶ 20. Dr. Edwards does not cite any support for his assumption that a liter of material could leak from the NAC-LWT package. *See* AR 139:27,350 (noting that the CNSC assessed the risk of a leak as non-credible). Further, he bases his analysis on a water source that is nowhere close to any of the approved transportation routes. Because he did not base his assumptions on the actual parameters of DOE's proposal, Dr. Edwards cannot show that proposal has potential environmental impacts DOE failed to consider.

As the Resnikoff and Edwards declarations confirm, Plaintiffs' quarrel with DOE's analysis "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise," *Marsh*, 490 U.S. at 376-77. This dispute is not properly before the Court because Plaintiffs did not seek leave to submit these declarations. However, even if the Court were to review the declarations it is clear that the court "must defer to the informed discretion of the responsible federal agencies." *Id.* at 377 (internal quotation marks and citation omitted). *See Blue Ridge*, 716 F.3d at 195 (court "must generally be at [its] most deferential" when reviewing agency's "technical judgments and predictions" (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)). Plaintiffs have failed to overcome the deference owed to DOE's determination that a new or supplemental EIS is not warranted.

Summary judgment should be granted to Defendants on Count II of the Complaint.

C. Defendants' Motion for Summary Judgment Should Be Granted as Conceded on Counts I, III, IV, and V of the Complaint.

By failing to address any count other than Count II, Plaintiffs have conceded that summary judgment is appropriate as to the remaining counts of their Complaint. In addition, Plaintiffs have conceded that summary judgment is appropriate as to other allegations in Count II (such as the allegations about the adequacy of federal regulations, downblending in Canada,

terrorist attacks, risks to transportation workers and members of the public, quality assurance at NAC, storage conditions and processing at the Savannah River Site, taxpayer costs) that they failed to brief in their memorandum.

Under Local Rule 7, "the Court may treat [a] motion as conceded" if a memorandum of points and authorities in opposition "is not filed within the prescribed time." LCvR 7(b). This rule "is understood to mean that if a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded." *Wannall v. Honeywell, Inc*., 775 F.3d 425, 428 (D.C. Cir. 2014). A district court's finding of concession will be reversed only for abuse of discretion. *Texas v. United States*, 798 F.3d 1108, 1113-14 (D.C. Cir. 2015), *cert. denied sub nom Texas v. Davis*, 136 S. Ct. 981 (2016); *F.D.I.C. v. Bender*, 127 F.3d 58, 67 (D. C. Cir. 1997) (applying predecessor rule 108(b)). "Where the district court relies on the absence of a response as a basis for treating [a] motion as conceded," the court of appeals "will honor its enforcement of the rule." *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997)

Under a straightforward application of Rule 7(b), Plaintiffs have conceded summary judgment to Defendants on all counts other than Count II, and all theories of Count II not presented in Plaintiffs' briefing. Plaintiffs' memorandum does not respond to Defendant's arguments concerning Count I (failure to prepare an EA), Count III (failure to prepare a programmatic EIS); Count IV (violation of the Atomic Energy Act and Department of Energy Act); Count V (violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), or the other allegations in Count II mentioned above. Thus there is effectively no memorandum in opposition to Defendants' motion as it pertains to those counts and claims. Defendants' motion should therefore be granted as conceded with respect Counts I, III, IV, and V of the Complaint,

and any remaining allegations in Count II not addressed above. *See, e.g., Hayes v. Dist. of Columbia*, 923 F. Supp. 2d 44, 49 (D.D.C. 2013) (granting defendants' motion for summary judgment as conceded as to two counts of complaint because "the plaintiff failed to respond at all to the defendant's arguments regarding [those] claims").

IV. CONCLUSION

Defendants respectfully submit that their Motion to Strike should be granted, that their Motion for Summary Judgment should be granted, and that Plaintiffs' Cross-Motion for Summary Judgment should be denied.

Respectfully submitted this 6th day of December,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2016, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Judith E. Coleman