IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

VIRGINIA URANIUM, INC., *et al*. Plaintiffs, v. MCAULIFFE, *et al*., Defendants.	)	Case No. 4:15-cv-00031-JLK

MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(6)
ON BEHALF OF THE ROANOKE RIVER BASIN ASSOCIATION
AND THE DAN RIVER BASIN ASSOCIATION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Proposed Intervenors-Defendants Roanoke River Basin Association and Dan River Basin Association (collectively "Local Intervenors") hereby move this Court to dismiss Plaintiffs' Complaint with prejudice. In the Complaint, Plaintiffs concede that Congress has left states in charge of regulating conventional uranium mining on private lands. Even more, Plaintiffs' prayer for relief seeks state-issued permits for uranium mining precisely because there is no federal agency, no federal department, and no federal regulatory process for obtaining such permits. Even if Plaintiffs' tortured reading of the Atomic Energy Act were accepted, the requested relief would be unconstitutional as a "type of federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes . . . ." *New York v. United States*, 505 U.S.144, 175 (1992). That is,

Plaintiffs' prayer for injunctive relief exposes the fatal flaws in Plaintiffs' solitary cause of action.

Local Intervenors tender herewith a memorandum in support of their motion setting forth in detail the grounds for why Plaintiffs' Complaint should be dismissed with prejudice.

September 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filling to the following:

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MEMORANDUM OF LAW
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In further support of this Motion, Local Intervenors state as follows.

I. BACKGROUND

In 1982, the Virginia General Assembly enacted a statute that imposes a moratorium on uranium mining in the Commonwealth. In simple and straightforward language, the statute provides:

> Notwithstanding any other provision of law, permit applications for uranium *mining* shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium *mining* is established by statute.

Va. Code § 45.1.283 (emphasis added).

In 2007, a quarter-century after Virginia adopted this statute, Plaintiff Virginia Uranium, Inc. was formed and began lobbying efforts aimed at pressuring the Virginia General Assembly to repeal the law. Compl. at ¶¶ 9, 75. In 2009, the General Assembly's Coal and Energy Commission tapped the National Research Council of the National Academy of Sciences ("NAS") to study "the scientific, technical, environmental, human health and safety, and regulatory aspects of uranium mining and processing as they relate to the Commonwealth of Virginia."[1] Compl. at ¶ 77.

At that time, Plaintiffs recognized Virginia's rightful authority to regulate uranium mining. In a March 2011 opinion-editorial published in the Danville *Register & Bee* and elsewhere, Mr. Walter Coles, chairman of Plaintiff Virginia Uranium, Inc., pledged that Virginia Uranium was "prepared to work with the members of the General Assembly in 2012" on the issue, adding that Virginia Uranium has "unequivocally supported the efforts" of a state-commissioned study ever since "the Virginia Coal and Energy Commission tasked the National

[1] National Research Council, URANIUM MINING IN VIRGINIA: SCIENTIFIC, TECHNICAL, ENVIRONMENTAL, HUMAN HEALTH AND SAFETY, AND REGULATORY ASPECTS OF URANIUM MINING AND PROCESSING IN VIRGINIA, at 1 (National Academies Press 2012), *available at* http://www.nap.edu/catalog/13266/uranium-mining-in-virginia-scientific-technical-environmental-human-health-and-safety-and-regulatory-aspects-of-uranium-mining-and-processing-in-virginia (hereinafter "URANIUM MINING IN VIRGINIA: SCIENTIFIC, TECHNICAL, ENVIRONMENTAL, HUMAN HEALTH AND SAFETY, AND REGULATORY ASPECTS") (*last visited* Sept. 4, 2015).

Academy of Sciences to conduct such a study in 2009."[2] In a substantially similar letter published in the *Norfolk Virginian-Pilot*, Mr. Coles, writing again as Chairman of Virginia Uranium Inc., praised the "long and orderly process conducted by the state over the last three years that has involved numerous studies and public hearings."[3] Virginia Uranium stated it was "fully committed to heeding [the NAS's] findings - regardless of the outcome. . . . [I]f the NAS finds that uranium mining would entail unacceptable risks, we will not pursue lifting the moratorium in 2012. Period."[4]

In December 2011, the findings of the NAS's peer-reviewed study were presented to the Virginia Coal and Energy Commission.[5] News coverage of the report's release observed that the NAS had identified "steep hurdles" and "laid out a rough and risky, but not impossible, road to uranium mining in Virginia."[6] In January 2013, State Senator John Watkins introduced, but then withdrew, state legislation to repeal the moratorium. Compl. at ¶ 89. Now, Plaintiffs argue that the General Assembly and the Virginia Coal and Energy Commission "had no business asking that question [posed to the NAS] to begin with." Compl. at ¶ 5.

II. STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

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[2] *See* Walter Coles, "No End-Run Around The Study," *Danville Register & Bee* (Mar. 28, 2011) (hereinafter, "Coles, "No End-Run Around The Study") (A copy of Mr. Coles' opinion piece is no longer available on the website of the *Register & Bee* and is included with this Memorandum as Attachment A). *See also* Opinion Letter by Walter Coles, *South Hill Enterprise* (Mar. 29, 2011), *available at* http://www.southhillenterprise.com/opinion/article_3df9d621-27e4-50de-8f69-07ffeea412e2.html, (*last visited* Sept. 1, 201)5 (containing language virtually identical to what was published in the *Register & Bee*).

[3] Walter Coles, "Uranium Mining Company Renews Pledge To Protect Virginians," *Norfolk Virginian-Pilot*, 2011 WLNR 6497463 (Mar. 27, 2011).

[4] *See* Coles, "No End-Run Around The Study," *supra* note 2.

[5] *See* "Report Sees Potential Problems With Uranium Mining," *Richmond Times Dispatch* (Dec. 20, 2011), *available at* http://www.richmond.com/business/article_943c5d24-5794-5567-b043-ad8bcc8800fe.html, (*last visited* Sept. 1, 2015).

[6] *Id.*

Moreover, although the court must accept all of the complaint's factual allegations as true, this tenet "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." *Id.* at 678; *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, "a pleading that merely offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Trustees of Hackberry Baptist Church v. Womack*, 62 F. Supp. 3d 523, 526 (W.D. Va. 2014) (citing *Twombly*, 550 U.S. at 555).

III. ARGUMENT

Local Intervenors hereby adopt and incorporate by reference the Defendants' Motion to Dismiss and Memorandum in Support, Dkt Nos. 32 and 32-1. Local Intervenors also supplement their motion as follows.

A. Plaintiffs' Complaint Contains Fatal, Internal Inconsistencies That Would Unconstitutionally Require a Federal Court to Commandeer the Legislative and Administrative Processes of the Commonwealth.

Plaintiffs' Complaint contains a fatal paradox. The Complaint challenges Virginia's uranium mining statute as preempted as a matter of "exclusive[] federal regulatory jurisdiction," (Compl. at ¶ 105), but then seeks injunctive relief in the form of state-issued mining and mine-safety permits from the Virginia Department of Mines, Minerals and Energy. Compl. at ¶ 111. In other words, Plaintiffs concede that there is no federal agency, no federal department, and no federal regulatory process that could issue a permit for conventional uranium mining on private land. Accordingly, Plaintiffs seek the extraordinary and *unconstitutional* remedy of asking this federal Court to order state officials to "accept and process Plaintiffs' applications" for what would be state-issued permits. Compl. at ¶¶ 52-54, 111.

As the Commonwealth Defendants have ably explained, the Atomic Energy Act ("AEA") has long been acknowledged to leave regulation of conventional uranium mining on private lands to the states. *See* Defendants' Memorandum in Support of Motion to Dismiss, Dkt No. 32-1, at 11-13. Even accepting Plaintiffs' tortured reading of the AEA, the relief Plaintiffs seek would be patently unconstitutional, as it is nothing less than a "type of federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes. . . ." *New York v. United States*, 505 U.S.144, 175 (1992).

The Supreme Court has held that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. This is a matter of black-letter, constitutional law: "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." 505 U.S. at 178. *See also Printz v. United States*, 521 U.S. 898, 935 (1997) ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly.").

Plaintiffs' claim boils down to an argument that the Atomic Energy Act compels the Virginia Department of Mines, Minerals and Energy to regulate uranium mining and issue state mining and mine safety permits—a claim that is discredited by the text of the AEA, its legislative history, and the federal agencies' own interpretation of their authorities. *See* Defendants' Memorandum in Support of Motion to Dismiss, Dkt No. 32-1, at 5-13. But even more, it is a misinterpretation of the AEA that renders it unconstitutional. *See, e.g., USCOC of Virginia RSA#3, Inc. v. Montgomery County Board of Supervisors*, 245 F. Supp.2d 817, 833

(W.D. Va. 2003), *aff'd in part, rev'd in part on other grounds*, 343 F.3d 262 (4th Cir. 2003) (observing that *New York* and *Printz* stand for the proposition that a federal statute that "affirmatively required action on the part of the state officials" would be constitutionally impermissible).

The unconstitutionality of Plaintiffs' proposed remedy highlights the fatal flaw in their misinterpretation of the Atomic Energy Act. If Congress had wanted to compel conventional uranium mining in Virginia, it could have done so through a federal permitting program for conventional uranium *mining* on non-federal lands. *See, e.g., Virginia v. Browner*, 80 F.3d 869, 882 (4th Cir. 1996) (upholding portions of the federal Clean Air Act because "Virginia [was] not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia."). No such federal uranium mining program exists, which is precisely why Plaintiffs argue that they "need[] to obtain several permits from the Commonwealth's agencies" to "Mine Their Uranium." Compl. at ¶¶ 51-52. Plaintiffs seek an unconstitutional, federal order directing Virginia state officials to regulate. Compl. at ¶ 111. For this reason alone, the Complaint must be dismissed. *Printz*, 521 U.S. at 926 (The Supreme Court has "made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.").

B. <u>The Atomic Energy Act Does Not Preempt Virginia's Authority to Regulate Uranium Mining in the Commonwealth.</u>

Plaintiffs incorrectly allege that the AEA preempts Virginia's moratorium on uranium mining. Compl. at ¶ 110. The analysis of Plaintiffs' Complaint begins with a presumption against preemption. That is, whether a statute violates the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Grp., Inc.*,

505 U.S. 504, 516 (1992) (citing *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)); *Columbia Venture, LLC v. Dewberry & Davis, LLC,* 604 F.3d 824, 830 (4th Cir. 2010) ("[W]e must start with the general presumption that Congress did not intend to preempt state law.").

Against this backdrop, Federal laws may only preempt state enactments in one of three ways: (1) *express preemption*, when Congress expressly states in a federal statute its intention to preempt state law, (2) *field preemption*, when federal law completely occupies a field as to leave no room for state involvement and (3) *conflict preemption*, when a conflict between parallel state and federal laws makes compliance with both impossible. *See Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S.Ct. 1591, 1595 (2015) (holding that the federal Natural Gas Act did not preempt state-law antitrust claims); *Pacific Gas and Elec. Co. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190, 203 (1983). None of these three categories apply in this case.

1. Congress Has Not Expressly Preempted State Regulation of Conventional Uranium Mining on Private Lands.

Congress "may preempt state law by so stating in express terms." *Pacific Gas and Elec. Co. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190, 203 (1983). This has not occurred, and Plaintiffs do not argue that it has. In fact, contrary to the central tenets of their Complaint, Plaintiffs actually concede that uranium mining remains an area of state control. Compl. ¶ 37 ("Congress has left safety regulation of the [uranium] *mining* process to the States . . ."); Compl. at ¶ 51 ("States may regulate mining safety . . ."). States retain their authority to do exactly what Virginia's statute does: regulate uranium mining by imposing a moratorium on the activity.

Other courts considering the issue have also found that Congress has not declared its intention to regulate conventional uranium mining on private lands. New Mexico, a state with

decades of experience in uranium mining,[7] has considered this precise question. In 2002, the New Mexico Court of Appeals held that "the Atomic Energy Commission and the NRC have never regulated conventional uranium mining." *New Mexico Min. Comm'n v. United Nuclear Corp.*, 2002-NMCA-108, 133 N.M. 8, 10, 57 P.3d 862, 864 (Ct. App. N.M. 2002), *cert. denied*, No. 27,722 (Nov. 4, 2002). The court went on to observe that "UNC [United Nuclear Corp.] has not cited, and we have not found, any reported instance of the NRC requiring a license to engage in conventional mining of uranium ore." *Id*. *See also*, *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 685, n. 5 (10th Cir. 2010) (the Nuclear Regulatory Commission's "licensing requirement does not apply to conventional uranium mining"); *Barnson v. U.S.*, 816 F.2d 549, 554 (10th Cir. 1987) ("[U]ranium mining is not included within the scope of [the Atomic Energy Act]."); *Begay v. U.S.*, 591 F. Supp. 991, 1003 (D. Ariz. 1984) *aff'd*, 768 F.2d 1059 (9th Cir. 1985) ("The [Atomic Energy Commission does] not have regulatory authority over [uranium] mines located on private land and regulated by the states.).

The Complaint fatally acknowledges what other courts have held: Congress has not preempted state regulation of conventional uranium mining. Plaintiffs walk through several provisions of the AEA related to uranium milling and mill tailings management—but *not even one* of the provisions cited by Plaintiffs references conventional mining of uranium ore on private lands. Compl. at ¶¶ 33-51. The National Academy of Sciences Report cited approvingly by Plaintiffs (Compl. at ¶¶ 77-78) is blunt on this point: "There is no federal law that specifically

[7] *See* U.S. EPA, Region 6, Superfund Division, "The Legacy of Abandoned Uranium Mines in the Grants Mineral Belt, New Mexico," (Nov. 2011) (noting that "[f]rom 1944 to 1986, the extraction of nearly four million tons of uranium ore occurred on Navajo lands in Arizona, New Mexico, and Utah"), *available at* http://www.epa.gov/region6/6sf/newmexico/grants/uranium-mine-brochure.pdf. (*last visited* September 4, 2015).

applies to uranium mining on non-federally owned lands; state laws and regulations have jurisdiction over these mining activities."[8] The Complaint should be dismissed with prejudice.

2. Congress Has Not Occupied the Field of Uranium Mining on Private Lands.

Federal preemption may also exist when a Congressional scheme is so pervasive "as to make reasonable inference that Congress left no room to supplement it." *Pacific Gas*, 461 U.S. at 203. With regard to conventional uranium mining, this too has not occurred. The text of the AEA contains no reference to regulation of conventional uranium mining on non-federal lands, much less so wholly occupy the field as to preclude state regulation.

Having conceded that Virginia retains the right to regulate conventional uranium mining on private lands, Plaintiffs argue that questions about radiological issues from uranium milling and tailings management motivated the General Assembly to act. Compl. at ¶ 61. The language of the moratorium, however, only addresses mining—not milling or mill tailings. Moreover, the cases that Plaintiffs reference to support their strained interpretation of the AEA address federal law in the context of a nuclear facility, such as a nuclear power plant, which the Nuclear Regulatory Commission actively regulates. *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990); *Pacific Gas*, 461 U.S. 190; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The Supreme Court has made clear that outside of nuclear plant construction and operation, "the States retain their traditional responsibility in the field of regulating . . . other related state concerns." *Pacific Gas*, 461 U.S. at 205. Where the challenged state law involves the wholly distinct field of conventional uranium mining on private land—which the Nuclear Regulatory Commission is *not* regulating—then preemption does not apply.

[8] URANIUM MINING IN VIRGINIA: SCIENTIFIC, TECHNICAL, ENVIRONMENTAL, HUMAN HEALTH AND SAFETY, AND REGULATORY ASPECTS, *supra* note 1, at 223.

The bottom line is that *Pacific Gas* and its progeny apply the unexceptional rule that where the federal government has regulated in a way to occupy the field, state action may be preempted. But these cases do not hold that a state law would be preempted where the federal government has explicitly decided *not* to regulate and where the Plaintiffs are in fact seeking a court order directing the *state* government and its Department of Mines, Minerals and Energy to regulate in a manner prescribed by Plaintiffs.

3. The Atomic Energy Act and the Virginia Uranium Mining Statute Are Not In Conflict with One Another.

Finally, federal law may preempt a state law when it would be "impossible to comply with both the federal and state requirements." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). *See also Williamson v. Mazda Motor of America, Inc*. 562 U.S. 323, 336 (2011) (holding that federal motor vehicle safety standards for seatbelts did not preempt a state-law tort action "even though the state tort suit may restrict the manufacturer's choice" of seatbelt to install). Plaintiffs argue that it "is physically impossible to develop uranium in Virginia and simultaneously comply with both federal law, which regulates but allows the storing of uranium tailings and Virginia's law, which *effectively* bans storing uranium tailings." Compl. at ¶ 110 (emphasis added). But Plaintiffs fail to allege that the Virginia law *actually* bans the storing of uranium mill tailings.

This is because the mining ban prohibits mining *only*. It does not mention, regulate, or prohibit uranium milling or mill tailings management. Nothing in the Code of Virginia prohibits federally regulated milling of uranium. Va Code. §§ 45.1-272 *et seq.* Complying with the state's moratorium on mining has no bearing on whether Plaintiffs could mill uranium and store mill tailings in compliance with federal law. That is, nothing in the challenged statute prevents Plaintiffs from importing uranium ore from other states for milling in Virginia. Plaintiffs' claim for conflict preemption fails as a matter of law. *See Williamson*, 562 U.S. at 336.

IV. CONCLUSION

Plaintiffs' solitary claim for relief—that Virginia's statutory moratorium on uranium mining is preempted by federal law—must be dismissed. As noted at the outset of this Memorandum, Plaintiffs initially acknowledged the Commonwealth's authority to maintain or rescind a moratorium on uranium mining. In the Complaint, Plaintiffs concede that Congress, in the Atomic Energy Act, has left states in charge of regulating conventional uranium mining on private lands. Even more, Plaintiffs' prayer for relief actually seeks state-issued permits for uranium mining precisely because there is no federal regulatory process under the Atomic Energy Act or elsewhere under federal law for obtaining such permits.

Even assuming the facts as alleged by Plaintiffs to be true, these concessions are fatal. For the reasons outlined above and for the reasons articulated in the Defendants' Motion to Dismiss and Memorandum in Support, the Complaint fails to state a claim upon which relief may be granted.

Accordingly, Local Intervenors respectfully ask this Court to dismiss Plaintiffs' Complaint with prejudice.

September 4, 2015

Respectfully submitted,

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Attachment A

http://www2.godanriver.com/news/2011/mar/28/coles-no-end-run-around-study-ar-934081/

Published: March 28, 2011

Coles: No end-run around the study

By The Editorial Board

By Walter Coles

Because of irresponsible commentary in some area publications, I would like to reaffirm our company's position on the National Academy of Sciences' study of uranium mining in Virginia and the General Assembly's deliberations on whether to lift Virginia's moratorium on uranium mining.

Since the formation of Virginia Uranium Inc. in 2007, we have consistently said that the well-being of Virginia's residents and the sustainability of our environment are our foremost concerns. We all breathe the same air, drink the same water and enjoy the same majestic beauty of Virginia's environment. We will not undertake any actions that would in any way threaten these sacred treasures.

To ensure the protection of public health and the environment, we have consistently agreed with the need for an independent, scientific study of the potential impacts of uranium mining in Virginia.

Since the Virginia Coal and Energy Commission tasked the National Academy of Sciences to conduct such a study in 2009, we have unequivocally supported the efforts of the NAS. We have provided all of the resources, data and expertise at our disposal to ensure that the NAS has everything it needs to leave no stone unturned.

The NAS will release the findings of its study in December. We are fully committed to heeding those findings — regardless of the outcome. Our position on this has remained unchanged since the inception of the study. We are committed to this process and dedicated to following the conclusions of the study.

We sincerely hope the NAS will find that properly regulated uranium mining and milling can be conducted safely in Virginia. We do not believe there is anything irresponsible or inappropriate about making preparations for this possibility.

We are prepared to work with members of the General Assembly in 2012 to lift the moratorium on uranium mining if, and only if, the NAS concludes that this can be done with the highest regard for the well-being of people, livestock and the environment. This does not in any way undermine the NAS study, precisely because our plans are contingent upon just one possible outcome of the NAS study.

For those who may be concerned that lifting the moratorium would be a rush to mining uranium, we

assure you that, in fact, it would only be the first step in a very lengthy process that will take years before a single shovel enters the ground. Developing state regulations and obtaining the necessary permits will take years and allow ample opportunities for public comment, technical and scientific review and careful scrutiny by all stakeholders.

On the other hand, if the NAS finds that uranium mining would entail unacceptable risks, we will not pursue lifting the moratorium in 2012. Period.

Ironically, it has been the opponents of uranium mining who have consistently and vociferously undermined the NAS study, not Virginia Uranium. Mining opponents have characterized the NAS as corrupt, pro-nuclear and inadequate to the task of the study and have even lambasted the study itself as a waste of money and a rigged, foregone conclusion.

In an April 2009 letter to the Richmond Times-Dispatch, representatives of the three leading opponents of uranium mining in Virginia — the Southern Environmental Law Center, the Piedmont Environmental Council and the Virginia League of Conservation Voters — went so far as to say that they "did not want the study in the first place." Commonsense would suggest that these powerful, influential groups be held to account for their outright disregard for the NAS and its scientific-based study.

The bottom line is that neither our company nor the General Assembly will push to lift the moratorium if the NAS determines that uranium mining and milling cannot be done safely. We hope opponents of uranium mining will adopt the same reasonable approach if the NAS finds that mining can be done safely. We should all have full faith and confidence in the Academy to deliver an independent, scientifically based assessment, and we all should fully commit to abiding by its findings.

Coles, a resident of Chatham, is chairman of Virginia Uranium Inc.
