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

JIM HODGES, Governor of the State of South Carolina, in his official capacity,	)	
Plaintiff,	)	Civil No. 1:02-1426-22
SPENCER ABRAHAM, Secretary of the Department of Energy, in his official capacity, and the UNITED STATES DEPARTMENT OF ENERGY,	)	
Defendants.	)	

FEDERAL DEFENDANTS' ANSWER AND COUNTERCLAIM

COMES NOW federal defendants, Spencer Abraham, in his official capacity as Secretary of the Department of Energy; and the United States Department of Energy, by and through counsel, to hereby answer and assert defenses to the claims and allegations set forth in the Complaint for Declaratory and Injunctive Relief (May 1, 2002) of plaintiff, Governor Jim Hodges. Federal defendants ("DOE") hereby state as follows:

INTRODUCTION

1. The allegations in the first sentence constitute plaintiff's characterization of his case to which no response is required. To the extent that a response is required, federal defendants deny the allegations therein. DOE denies the remaining allegations in paragraph 1.

2. Federal defendants aver that the allegations in paragraph 2 are too vague for DOE to form a belief as to the truth of the matter asserted. To the extent that a response is required, Federal Defendants deny the allegations therein.

8.

3. The allegations in paragraph 3 constitute plaintiff's characterization of the Record of Decision ("ROD") for the Surplus Plutonium Disposition Program, issued on April 19, 2002, at 67 Fed. Reg. 19,432, which speaks for itself and is the best evidence of its contents. DOE denies any characterization that is inconsistent with the language of this ROD.

4. The allegations in paragraph 4 constitute plaintiff's characterization of the ROD for the Surplus Plutonium Disposition Program, issued on April 19, 2002, at 67 Fed. Reg. 19,432, which speaks for itself and is the best evidence of its contents. DOE denies any characterization that is inconsistent with this ROD.

JURISDICTION AND VENUE

5. The allegations in paragraph 5 are legal conclusions to which no response is required. To the extent that a response is required, federal defendants deny the allegations therein.

6. The allegations in paragraph 6 are legal conclusions to which no response is required. To the extent that a response is required, federal defendants deny the allegations therein.

7. The allegations in paragraph 7 are legal conclusions to which no response is required.

8. The allegations in paragraph 8 are legal conclusions to which no response is required. To the extent that a response is required, federal defendants deny the allegations therein.

PARTIES

9. Federal defendants admit the allegations in the first sentence. The remaining allegations in paragraph 9 are legal conclusions to which no response is required.

10. Federal defendants admit the allegations in paragraph 10.

11. Federal defendants admit the allegations in paragraph 11.

FACTUAL BACKGROUND

12. Federal defendants admit the allegations in paragraph 12.

13. Because plaintiff attempts to describe about causal relationships between substances without specifying their particular concentration in the natural environment, federal defendants have insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first, second, third, and fourth sentences. DOE admits the remaining allegations in paragraph 13.

14. Because plaintiff attempts to describe about causal relationships between substances without specifying their particular concentration in the natural environment, federal defendants have insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first, second, and third sentences. DOE admits the remaining allegations in paragraph 14.

15. Federal defendants admit the allegations in paragraph 15.

16. The allegations in paragraph 16 constitute plaintiff's characterization of the ROD for the Interim Management of Nuclear Materials Final Environmental Impact Statement ("FEIS"), issued on December 19, 1995 and published at 60 Fed. Reg. 65,300, which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with this ROD.

17. Federal defendants deny the allegations in the second sentence. The remaining allegations in paragraph 17 constitute plaintiff's characterization of the ROD for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic FEIS, issued on January 21, 1997 and published at 62 Fed. Reg. 3,014, which speaks for itself and is the best evidence of its contents. DOE denies any characterization that is inconsistent with this ROD.

18. The allegations in paragraph 18 constitute plaintiff's characterization of the immobilization process as described in the ROD for the Storage and Disposition of Weapons-Usable

Fissile Materials Final Programmatic FEIS, issued on January 21, 1997 and published at 62 Fed. Reg. 3,014, which speaks for itself and is the best evidence of its contents. Federal Defendants deny any characterization that is inconsistent with this ROD.

19. The allegations in paragraph 19 constitute plaintiff's characterization of information found at 62 Fed. Reg. 3026, which speaks for itself and is the best evidence of its contents. Federal Defendants deny any characterization that is inconsistent with 62 Fed. Reg. 3014.

20. The allegations in paragraph 20 constitute plaintiff's characterization of the ROD for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic FEIS, issued on January 21, 1997 and published at 62 Fed. Reg. 3,014, which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with this ROD.

21. The allegations in paragraph 21 constitute Plaintiff's characterization of the Amended ROD for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic FEIS, issued on August 13, 1998 and published at 63 Fed. Reg. 43, 386, which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with this ROD.

22. Federal defendants admit the allegations in paragraph 22.

23. The allegations in paragraph 23 constitute plaintiff's characterization of the ROD for the Surplus Plutonium Disposition FEIS, issued on January 11, 2000 and published at 65 Fed. Reg. 1608, which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with this ROD.

24. The allegations in paragraph 24 constitute plaintiff's characterization of the ROD for the Surplus Plutonium Disposition FEIS, issued on January 11, 2000 and published at 65 Fed. Reg.

1608, which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with this ROD.

25. The allegations in paragraph 25 constitute plaintiff's characterization of Conference Report No. 749, 105th Cong. Sess. 110 (Sept. 25, 1998), which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with this Conference Report.

26. Federal defendants admit the allegations in paragraph 26.

27. Federal defendants admit the allegations in paragraph 27.

28. The allegations in paragraph 28 constitute plaintiff's characterization of the Amended ROD for the Interim Management of Nuclear Materials FEIS, issued on January 26, 2001 and published at 66 Fed. Reg. 7888, which speaks for itself and is the best evidence of its contents. Federal Defendants deny any characterization that is inconsistent with this Amended ROD.

29. The allegations in paragraph 29 constitute plaintiff's characterization of the November 21, 2001 letter from the Defense Nuclear Facilities Safety Board ("DFNSB") to the Secretary of Energy, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with said letter. DOE also avers that, in the same letter to which plaintiff refers, DFNSB determined that "KAMS is adequate for double-stacked container storage for an interim period, subject to a continuing effort by DOE to resolve the issues identified in this report."

30. Because plaintiff does not describe the particular 1999 "document" to which he refers, the allegations in paragraph 30 are too vague for federal defendants to form a belief as to the truth of the matter asserted. To the extent that a response is required, DOE denies the allegations therein. Further, Federal Defendants aver that the K-Area Material Storage (KAMS) is safe for storage of

plutonium, and that a 1999 KAMS Safety Analysis Report prepared by the Westinghouse Savannah River Company stated that the release of any plutonium is "beyond extremely unlikely."

31. The allegations in paragraph 31 constitute plaintiff's characterization of a January 23, 2002 DOE press release, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this press release and also deny that the "change" to which plaintiff refers was or is significant.

32. Federal Defendants deny the allegations in paragraph 32, except to admit that the changes described in the January 23, 2002 DOE press release, if ultimately implemented, could result in treatment of a larger amount of plutonium by MOX technology.

33. The allegations in paragraph 33 constitute Plaintiff's characterization of a document entitled "Report to Congress: Disposition of Defense Plutonium at Savannah River Site," which speaks for itself and is the best evidence of its content. Federal Defendants deny any characterization that is inconsistent with said document.

34. The allegations in paragraph 34 constitute plaintiff's characterization of the contents of the document entitled "Report to Congress: Disposition of Defense Plutonium at Savannah River Site," which speaks for itself and is the best evidence of its content. Federal Defendants deny any characterization that is inconsistent with the contents of said document.

35. The allegations in paragraph 35 constitute plaintiff's characterization of DOE's February 2002 Supplement Analysis for Storage of Surplus Plutonium Materials in the K-Area Material Storage Facility at the Savannah River Site, which speaks for itself and is the best evidence of its content. Federal Defendants deny any characterization that is inconsistent with said document.

36. The allegations in paragraph 36 constitute plaintiff's characterization of DOE's February 2002 Supplement Analysis for Storage of Surplus Plutonium Materials in the K-Area

Material Storage Facility at the Savannah River Site, which speaks for itself and is the best evidence of its content. Federal Defendants deny any characterization that is inconsistent with said document.

37. Because plaintiff does not describe the "numbers" to which he alludes, the allegations in paragraph 37 are too vague for federal defendants to form a belief as to the truth of the matter asserted. To the extent that a response is required, DOE denies the allegations therein.

38. Federal defendants deny the allegations in paragraph 38, except to admit that a document dated April 4, 2002 and prepared by Kaiser-Hill Company included a chart that placed the heading "No Disposition Pathway" next to "3130 kgs" of Special Nuclear Materials and another chart that listed alternative disposition paths for the 3130 kgs, one of which is MOX fuel. Further, DOE avers that there are approximately 3.13 metric tons of bulk materials (containing approximately 1.1 metric tons of plutonium) at Rocky Flats previously slated for immobilization.

39. The allegations in the first sentence constitute plaintiff's characterization of a March 12, 2002 letter from the United States Nuclear Regulatory Commission ("NRC") to Duke Cogema Stone and Webster, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with said letter. DOE also denies the allegations in the second sentence, except to admit that the NRC is responsible for licensing the MOX facility at the Savannah River Site.

40. The allegations in the first sentence constitute plaintiff's characterization of his internal concerns and beliefs to which no response is required. Federal defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. To the extent that a response is required, DOE denies the allegations in paragraph 40.

41. The allegations in paragraph 41 constitute plaintiff's characterizations of an April 11, 2002, letter from Secretary Abraham to plaintiff, which speaks for itself and is the best evidence of

its contents. Federal defendants deny any characterization that is inconsistent with said letter.

42. The allegations in paragraph 42 constitute plaintiff's characterizations of an April 11, 2002, letter from Secretary Abraham to plaintiff, which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with said letter.

43. The allegations in paragraph 43 constitute plaintiff's characterizations of an April 11, 2002, letter from Secretary Abraham to plaintiff, which speaks for itself and is the best evidence of its contents. Federal defendants deny any characterization that is inconsistent with said letter.

44. The allegations in paragraph 44 constitute plaintiff's characterization of a draft amended ROD for the Surplus Plutonium Disposition Program faxed to Plaintiff by DOE on April 11, 2002, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this draft amended ROD.

45. The allegations in paragraph 45 constitute plaintiff's characterization of a draft amended ROD for the Surplus Plutonium Disposition Program, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this draft amended ROD.

46. The allegations in paragraph 46 constitute plaintiff's characterization of a draft amended ROD for the Surplus Plutonium Disposition Program, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this draft amended ROD.

47. The allegations in paragraph 47 constitute plaintiff's characterization of an April 11, 2002, letter from plaintiff's chief counsel to DOE 's General Counsel, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with said letter.

48. The allegations in paragraph 48 constitute plaintiff's characterization of an April 12, 2002, letter from Secretary Abraham to plaintiff, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with said letter.

49. The allegations in paragraph 49 constitute plaintiff's characterization of an April 12, 2002, letter from Secretary Abraham to plaintiff, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with said letter.

50. The allegations in paragraph 50 constitute plaintiff's characterization of an April 12, 2002, Order issued by the NRC as a result of the re-licensing proceeding of Duke Energy Corporation's McGuire and Catawba nuclear facilities, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with said order.

51. The allegations in paragraph 51 constitute plaintiff's characterization of an April 12, 2002, Order issued by the NRC as a result of the re-licensing proceeding of Duke Energy Corporation's McGuire and Catawba nuclear facilities, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with said order.

52. Federal defendants admit the allegations in the first sentence. DOE denies the allegations in the second sentence, except to admit that the April 19, 2002, Amended ROD differed from the draft amended ROD to which plaintiff refers in paragraph 44 above. The remaining allegations in paragraph 52 constitute plaintiff's characterization of the April 19, 2002, Amended ROD, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this Amended ROD.

53. The allegations in the first sentence contain characterization of a communication by Secretary Abraham of which federal defendants are unaware. To the extent that a response is required, DOE denies the allegations therein. The remaining allegations in paragraph 53 constitute plaintiff's characterization of the Amended ROD, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this Amended ROD.

54. The allegations in the first sentence contain plaintiff's characterization of a "guarantee" by Secretary Abraham of which federal defendants are unaware. To the extent that a response is required, DOE denies the allegations therein. DOE denies the remaining allegations in paragraph 54.

55. The allegations in paragraph 55 constitute plaintiff's characterization of the Amended 2002 ROD, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with the Amended ROD.

56. The allegations in paragraph 56 constitute plaintiff's characterization of the Amended 2002 ROD, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this Amended ROD.

57. The allegations in paragraph 57 constitute plaintiff's characterization of an April 24, 2002, Federal Register notice issued by the NRC, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this Federal Register notice.

58. Federal Defendants admit the allegations in the first sentence. DOE denies the allegations in the second sentence, except to admit that the Rocky Flats Environmental Technology Site (RF) is comprised of approximately 6,265 acres with an industrial area of approximately 700

facilities and structures occupying approximately 384 acres surrounded by a buffer zone. Federal defendants deny the allegations in the third sentence, except to admit that RF is owned by the United States and operated by Kaiser-Hill, L.L.C. under a cost-plus-incentive fee contract.

59. Federal defendants deny the allegations in the first sentence, except to admit that in August 1997, DOE designated RF as DOE's first large Accelerated Closure Pilot Site. DOE denies the allegations in the third sentence, except to admit that in August 1997, DOE announced its goal of accelerating the date for closure of the RF site from 2010 to 2006.

60. Federal defendants admit the allegations in the first sentence. The allegations in the second sentence constitute plaintiff's characterization of the DOE announcement referenced in the first sentence in paragraph 60, which speaks for itself and is the best evidence of its content. DOE denies any characterization that is inconsistent with this DOE announcement.

61. The allegations in paragraph 61 constitute plaintiff's characterization of the DOE announcement referenced in the first sentence of paragraph 60, which speaks for itself and is the best evidence of its content. Federal defendants deny any characterization that is inconsistent with this DOE announcement.

62. The allegations in paragraph 62 constitute plaintiff's characterization of a contract executed by DOE and Kaiser-Hill on January 24, 2002, which speaks for itself and is the best evidence of its content. DOE denies any characterization that is inconsistent with the contract executed by DOE and Kaiser-Hill on January 24, 2002.

63. Federal defendants admit the allegations in paragraph 63 and aver that Robert Card, current Under Secretary of DOE, is the past President and CEO of Kaiser-Hill Company.

64. The allegations in paragraph 64 are legal conclusions to which no response is required. To the extent that a response is required, DOE denies the allegations therein.

65. Federal defendants admit the allegations in paragraph 65.

66. The allegations in paragraph 66 constitute plaintiff's characterization various correspondence and other communications between Secretary Abraham and plaintiff, which speak for themselves and are the best evidence of their content. DOE denies any characterization that is inconsistent with these communications.

67. Federal defendants deny the allegations in the first sentence and admit the remaining allegations in paragraph 67.

68. Federal defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 68.

69. Federal defendants deny the allegations in paragraph 69, except to admit that the DT-22 container will not meet the requirements of the "dynamic crush tests", which applies for certain proposed contents of a transport package. DOE denies the allegations in the second sentence, except to admit that in early 2000, the RF Field Office requested a national security exemption to use the DT-22 container to ship certain classified items. Further, DOE avers that on May 15, 2002, DOE's Assistant Secretary for Environmental Management announced that DOE would not use DT-22 containers for shipping 125 items from Rocky Flats.

70. Federal defendants deny the allegations in paragraph 70, except to admit that a national security exemption to use the DT-22 container to ship certain classified items was issued on November 27, 2000. DOE avers that on May 15, 2002, DOE's Assistant Secretary for Environmental Management announced that DOE would not use DT-22 containers for shipping 125 items from Rocky Flats.

71. Federal Defendants incorporate by reference all responses previously set forth herein.

72. The allegations in paragraph 72 are legal conclusions to which no response is

required.

73. The allegations in paragraph 73 are legal conclusions to which no response is required.

74. The allegations in paragraph 74 are legal conclusions to which no response is required.

75. Federal defendants admit the allegations in the first sentence. The remaining allegations in paragraph 75 constitute plaintiff's characterizations of the ROD for the Surplus Plutonium Disposition EIS, issued on January 11, 2002 and published at 65 Fed. Reg. 1608, which speaks for itself and is the best evidence of its content. Federal Defendants deny any characterization that is inconsistent with this ROD or EIS.

76. Paragraph 76 is denied.

77. The allegations in paragraph 77 constitute plaintiff's characterization of DOE's April 19, 2002, Amended ROD for the Surplus Plutonium Disposition Program, which speaks for itself and is the best evidence of its content. DOE denies any characterization that is inconsistent with this Amended ROD.

78. Paragraph 78 is denied.

79. Paragraph 79 is denied.

80. Paragraph 80 is denied.

81. Federal defendants incorporate by reference all responses previously set forth herein.

82. The allegations in paragraph 82 are legal conclusions to which no response is required.

83. Paragraph 83 is denied.

84. Paragraph 84 is denied.

85. Federal defendants incorporate by reference all responses previously set forth herein.

86. The allegations in paragraph 86 constitute plaintiff's characterizations of the January 21, 1997, ROD and the August 13, 1998, Amended ROD for the Storage and Disposition of Weapons-Usable Fissile Materials, which speak for themselves and are the best evidence of their content. DOE denies any characterization that is inconsistent with this ROD and Amended ROD.

87. Paragraph 87 is denied.

88. Paragraph 88 is denied.

89. Federal Defendants incorporate by reference all responses previously set forth herein.

90. The allegations in paragraph 90 are legal conclusions to which no response is required.

91. Paragraph 91 is denied.

92. The allegations in paragraph 92 constitute plaintiff's characterizations of unspecified RODs concerning the shipment of surplus plutonium to SRS. Federal Defendants aver that all RODs concerning the shipment of surplus plutonium to SRS speak for themselves and are the best evidence of their content. DOE denies any characterization that is inconsistent with the RODs concerning the shipment of surplus plutonium to SRS.

93. Paragraph 93 is denied.

94. Federal defendants incorporate by reference all responses previously set forth herein.

95. The allegations in paragraph 95 are legal conclusions to which no response is required. To the extent that a response is required, DOE denies the allegations therein.

96. Paragraph 96 is denied.

97. Federal Defendants incorporate by reference all responses previously set forth herein.

98. Paragraph 98 is denied. DOE also avers that DOE's Assistant Secretary for

Environmental Management announced on May 15, 2002, that DOE would not use DT-22 containers for shipping 125 items from Rocky Flats.

99. Federal Defendants hereby deny each and every allegation not previously and expressly admitted herein.

COUNTERCLAIM

100. The Governor of South Carolina ("Governor") has announced that he has decided to use physical means, if necessary, to stop the United States' planned shipments of surplus federal plutonium into South Carolina. Defendants and counterclaim-plaintiffs, the Department of Energy and Spencer Abraham, the Secretary of Energy, bring this counterclaim seeking a declaration that any attempt by the Governor, or by any person or entity acting in concert or participation with him, to carry out his decision to stop such shipments by physical means would violate the Constitution of the United States.

Jurisdiction and Venue

101. This action arises under the Constitution of the United States, Article I, Section 8, Clause 3 (Commerce Clause); Article I, Section 8, Clauses 11, 12, 13, and 14 (war and armed forces); Article II, Section 2, Clause 1 (Commander in Chief); Article II, Section 2, Clause 2 (foreign relations); Article II, Section 3, Clause 3 (foreign relations); Article IV, Section 3, Clause 2 (Property Clause); and Article VI, Clause 2 (Supremacy Clause). It also arises under the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011, et seq., and regulations adopted thereunder; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq.

102. This Court has jurisdiction over this counterclaim under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1345 (United States as plaintiff).

103. This Court also has supplemental jurisdiction over this counterclaim under 28 U.S.C.

§ 1367(a), in that the counterclaim is so related to the claims in plaintiff's complaint as to form part of the same case or controversy under Article III of the United States Constitution.

104. Venue lies in the District of South Carolina under 28 U.S.C. § 1391(b), in that the counterclaim arises within this District and the plaintiff (i.e., the defendant under the counterclaim) resides in this District.

Parties

105. Defendant and counterclaim-plaintiff, the Department of Energy ("DOE") is an executive department of the United States having overall statutory responsibility for the Nation's nuclear defense programs, domestic energy programs, radioactive-waste programs, and energy research and development programs.

106. Defendant and counterclaim-plaintiff, Spencer Abraham, the Secretary of Energy, is the head of the Department of Energy, and is responsible for its overall supervision and direction.

107. Plaintiff and counterclaim-defendant, Jim Hodges, is the Governor of the State of South Carolina, and is sued in his official capacity.

Factual Allegations

I. Authority of the Department of Energy

108. Among its duties, the Department of Energy is statutorily responsible for the integrity and safety of the Nation's nuclear weapons, and for the management, processing, and disposition of nuclear materials. 42 U.S.C. §§ 7112, 7132, 7133, 7274m, 7274n, 7274p; 50 U.S.C. § 2341.

109. The end of the Cold War has created a legacy of surplus plutonium from nuclear weapons, which must be either stored or disposed of. DOE has immediate responsibility for the management, processing, and disposition of that surplus plutonium.

110. DOE is working to modify its system for managing, processing, and disposing of surplus weapon-grade plutonium, in order to reduce costs, expedite closure and cleanup of certain sites and facilities in its nuclear complex, and enhance the security of this plutonium.

II. The U.S.-Russia Agreement on Disposition of Plutonium

111. In September 2000, the United States and the Russian Federation entered into a reciprocal agreement to dispose of certain weapon-grade plutonium ("U.S-Russia Agreement").

112. In the U.S.-Russia Agreement, the United States and the Russian Federation each committed to dispose of no less than thirty-four (34) metric tons of plutonium (Article I, paragraph 1).

113. The Department of Energy is responsible for carrying out the commitments of the United States, under the U.S.-Russia Agreement, to dispose of certain weapon-grade plutonium.

114. Carrying out the commitments of the United States under the U.S.-Russia Agreement will entail transporting certain weapon-grade plutonium from various locations within the United States to other locations within the United States, including across state lines.

III. Transfer of Plutonium to the Savannah River Site

115. The Savannah River Site ("SRS") is a DOE facility located within South Carolina. The facility occupies approximately 310 square miles.

116. At SRS, the Department of Energy carries out many of its responsibilities for the production, management, and disposition of nuclear materials, including plutonium. SRS houses extensive facilities for the production, management, and disposition of nuclear materials.

117. Approximately two metric tons of plutonium are already stored at SRS.

118. In furtherance of the commitments of the United States under the U.S.-Russia Agreement, DOE intends to construct at SRS a facility to convert weapon-grade plutonium to mixed

uranium oxide-plutonium oxide ("MOX"), which can be used as fuel in nuclear reactors.

119. Both to improve its system for managing, processing, and disposing of surplus weapon-grade plutonium, and in anticipation of construction of the MOX conversion facility, DOE intends to transport a portion of the nation's surplus plutonium to SRS.

120. The shipment of this plutonium to SRS is currently scheduled to begin on or after June 15, 2002.

121. The vehicles to be used in DOE's shipment of plutonium to SRS are owned by the United States, and the personnel who conduct every such shipment are federal officers.

122. The DOE vehicles used in its shipment of plutonium, known as Safe, Secure Trailers and Safe Guard Transporters, are specially designed eighteen-wheel tractor-trailers with reinforced cargo features. The SSTs are built by private commercial entities under contract with DOE.

123. The shipment of plutonium is to be carried out pursuant to stringent federal guidelines and procedures designed for safe passage.

124. Private commercial entities perform various functions at SRS under contract with DOE, and certain of those entities will be involved in managing and processing the surplus plutonium that DOE intends to ship to SRS.

IV. Actions of Governor Hodges

125. Plaintiff and counterclaim-defendant Jim Hodges, currently the Governor of South Carolina ("Governor"), has stated publicly that he intends to use physical means, if necessary, to stop DOE's planned shipment of additional plutonium into South Carolina, including by blockading any roadway used for such shipment with the assistance of the South Carolina Highway Patrol.

126. On April 22, 2002, upon the request and under the personal observation of the Governor, officers and state troopers of the South Carolina Highway Patrol, and other State

employees, rehearsed an attempt to stop DOE's planned shipment of plutonium, by setting up a roadblock across a highway entering the State.

127. The Governor's pages on the State's web site include photographs of the April 22 rehearsal, under the heading "Governor Prepares for Plutonium Shipments," followed by the date "April 22, 2002" (http://www.state.sc.us/governor/photos.html). The caption under one of those photographs states, "Governor Hodges, Col. Mike Kelly, and Boykin Rose review plan to turn back trucks carrying Plutonium."

128. The Governor has also authorized a television advertisement which states that he intends to stop DOE's planned shipment of additional plutonium into South Carolina, "even if it means a blockade." The advertisement, which has been broadcast under the Governor's authorization several times during the month of May 2002, includes one or more images of the April 22 rehearsal.

129. On May 8, 2002, counsel for the Department of Energy wrote to counsel for the Governor, asking whether the Governor would obstruct or impede the shipment of any surplus plutonium to SRS if this Court were to deny the Governor's motion for a preliminary injunction.

130. In response to the May 8 letter of counsel for DOE, counsel for the Governor stated, in a letter dated May 10, 2002:

> Unless a legally enforceable agreement is in place requiring the Department of Energy to convert and/or remove any plutonium shipped to South Carolina, the Governor expressly reserves the right to rely upon any and all lawful means available to him in his capacity, and under his authority, as the Governor of the State of South Carolina to prevent the Department of Energy from shipping any surplus plutonium to South Carolina.

131. The May 10 letter of counsel for the Governor did not state that the Governor would refrain from attempting to stop the shipment of plutonium to SRS, including by the use of physical

means, if this Court were to deny the Governor's motion for a preliminary injunction.

132. The Governor's announced intention to stop DOE's planned shipment of additional plutonium into South Carolina using physical means is based on his contentions regarding the health and safety hazards of radiation.

133. The Governor has stated that his decision to stop DOE's planned shipment of additional plutonium into South Carolina using physical means is based on the health and safety hazards of radiation.

134. The facts stated in paragraphs 125, 126, 128, 132, and 133 above are generally known within the territorial jurisdiction of this Court, or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

135. Any attempt to carry out the Governor's intent to stop DOE's shipment of plutonium would constitute unauthorized interference with the performance of a federal function.

136. Any use of physical means by the Governor, or by any person or entity acting in concert or participation with him, to attempt to stop any shipment of plutonium by the United States would, at a minimum, delay the progress of that shipment.

137. Any unplanned delay during a shipment of plutonium would create a risk of harm to the public, to the DOE personnel conducting the shipment, and to any persons responsible for the delay.

138. Any unplanned delay during a shipment of plutonium would provide an opportunity for other persons or entities, not associated with the Governor, to attempt to waylay or damage the federal vehicles, to extract or seize the plutonium contained therein, and otherwise to disrupt the shipment.

Causes of Action

I. Federal Immunity Against State Interference

139. Paragraphs 100 through 138 above are incorporated herein as if set forth in full.

140. The shipment of surplus plutonium by the Department of Energy, to the Savannah River Site in South Carolina, constitutes an activity of the United States authorized by the Atomic Energy Act and other federal statutes.

141. The Governor has repeatedly expressed his intent to stop DOE's shipment of surplus plutonium to SRS, using physical means.

142. The Governor has taken several affirmative steps toward carrying out his intent to stop DOE's shipment of plutonium using physical means.

143. Any attempt by the Governor, or by any person or entity acting in concert or participation with him, to stop the shipment of plutonium by the United States using physical means would interfere with the performance of lawful federal activities by federal officials, and would, therefore, violate Article VI, Section 2, of the United States Constitution (the Supremacy Clause).

II. Preemption by Virtue of the Atomic Energy Act

144. Paragraphs 100 through 143 above are incorporated herein as if set forth in full.

145. With certain minor and irrelevant exceptions, the Atomic Energy Act, 42 U.S.C. §§ 2011, et seq., establishes exclusive federal jurisdiction over the possession, control, and shipment of plutonium.

146. Any attempt by the Governor to stop the Department of Energy's shipment of surplus plutonium into South Carolina, using physical means, would interfere with the federal government's exclusive jurisdiction over the possession, control, and shipment of plutonium. Any such attempt would injure the United States in the exclusive exercise of its authority pursuant to the Atomic

Energy Act.

147. Any attempt by the Governor to stop the Department of Energy's shipment of surplus plutonium into South Carolina, using physical means, would be preempted by the Atomic Energy Act and would, therefore, be unconstitutional under the Supremacy Clause of the United States Constitution.

III. Interstate Commerce

148. Paragraphs 100 through 147 above are incorporated herein as if set forth in full.

149. The power to regulate interstate commerce is reserved to the federal government by Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause).

150. The shipment of surplus plutonium into South Carolina constitutes interstate commerce.

151. Any attempt by the Governor to stop the Department of Energy's shipment of surplus plutonium into South Carolina, using physical means, would discriminate against interstate commerce.

152. Any attempt by the Governor to stop the Department of Energy's shipment of surplus plutonium into South Carolina, using physical means, would unduly burden interstate commerce by:

(a) prohibiting the shipment of surplus plutonium to and within South Carolina;

(b) preventing the United States from processing surplus plutonium at its Savannah River Site; and

(c) restricting the United States' ability to work with surplus plutonium within the State of South Carolina.

153. The United States would be injured by the Governor's discrimination against, and undue burdens upon, interstate commerce.

154. Any attempt by the Governor to stop the Department of Energy's shipment of surplus plutonium into South Carolina, using physical means, would violate the Commerce Clause of the United States Constitution.

AFFIRMATIVE DEFENSES TO GOVERNOR HODGES' COMPLAINT

As affirmative defenses to plaintiff's complaint, Federal Defendants allege as follows:

1. The complaint fails to state a claim upon which relief might be granted.

2. Plaintiff lacks standing to maintain this action.

3. Plaintiff's claim regarding DOE's issuance of a national security exemption is moot.

REQUEST FOR RELIEF

WHEREFORE, defendants and counterclaim-plaintiffs, the Department of Energy and Spencer Abraham, the Secretary of Energy, respectfully pray that the Court:

(1) Enter judgment for defendants and dismiss this action with prejudice;

(2) Declare that any attempt by the Governor of South Carolina, or by any person or entity acting in concert or participation with him, to stop the Department of Energy's shipment of surplus plutonium into South Carolina using physical means, or to interfere with the shipment in any other way, (a) would violate the Supremacy Clause of the United States Constitution, both because such conduct would undermine the federal government's immunity from state interference and because the Atomic Energy Act preempts the Governor's actions; and (b) would violate the Commerce Clause of the United States Constitution;

(3) Assess the costs of this litigation against the plaintiff and counterclaim-defendant; and

(4) Grant defendants and counterclaim-plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

ROBERT F. DALEY, JR. (#6460)
Assistant United States Attorney
1441 Main St., Ste. 500
Columbia, SC 29201

GREGORY D. PAGE
MYESHA K. BRADEN
United States Department of Justice
Environment & Natural Resources Division

P.O. Box 663
Washington, DC 20044-0663
(202) 305-0446

Attorneys for Federal Defendants

May 24, 2002

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Answer and Counterclaim were served **via HAND DELIVERY**, on the 24 day of May, 2002, to the following:

Stephen Bates, General Counsel
Office of the Governor, State of SC
1100 Gervais Street
Columbia, SC 29211

I certify that true and correct copies of the foregoing Answer and Counterclaim were sent **via first class mail, postage prepaid**, on the 24th day of May, 2002, to the following:

William L. Want, Esq.
171 Church St., Ste. 300
Charleston SC 29401

Lionel S. Lofton, Esq.
Post Office Box 449
Charleston, SC 29402

Belinda Beard
Legal Assistant, Civil Division
U.S. Attorney's Office (D.S.C.)
1441 Main Street, Suite 500
Columbia, South Carolina 29201

cc: Lucy Knowles, Esq.
Marc Johnston, Esq.
John Cruden, Esq.
Lee Otis, Esq.
Steven Ferguson, Esq.
Scott Simpson, Esq.
Greg Page, Esq.