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

STATE OF SOUTH CAROLINA, Plaintiff, v. UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY; DR. ERNEST MONIZ, in his official capacity as Secretary of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; and LT. GENERAL FRANK G. KLOTZ, in his official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security; Defendants.	)	Civil Action No. 1:16-00391-JMC

THE STATE OF SOUTH CAROLINA'S RESPONSE IN OPPOSITION TO MOTION FOR EXTENSION OF TIME

The Federal Defendants have submitted a Motion for Extension (ECF No. 14) seeking a 30-day extension of time to file a response to the State's pending Motion for Summary Judgment (ECF No. 10). The State respectfully submits that the Motion for Extension should only be granted in conjunction with a briefing schedule for both the State's pending Motion for Summary Judgment and the Federal Defendants' (forthcoming) Motion to Dismiss.

Typically the State's counsel would be amenable to extensions of time requested by opposing counsel. However, in light of the urgency of resolving the issues of the Federal

Defendants' compliance with the applicable statute (50 U.S.C.A. § 2566 (Section 2566)) and to prevent the State of South Carolina from becoming the *de facto* repository for plutonium (which is the current path of the Federal Defendants), the State requests that the Court provide for the timely adjudication of these issues. Indeed, in the time since this case was filed in February of this year, the Federal Defendants have sought to eliminate the MOX Facility and program, while at the same time arranging to import more plutonium to the Savannah River Site. Delay in the adjudication of this case will work a severe prejudice against the State.

Counsel for the State and the Federal Defendants consulted regarding the extension and could not reach an agreement on the path forward. The State understands that on Monday, April 25, the Federal Defendants will file a Motion to Dismiss, which the Federal Defendants argue should delay resolution of the merits of the State's claims—an argument that should be rejected and the Court should adopt a briefing schedule along the lines set forth below.[1] *See* ECF No. 14 at 3-4.

The Federal Defendants' forthcoming Motion to Dismiss will seek adjudication of legal issues. The State's Motion for Summary Judgment seeks adjudication of legal issues. There is no

[1] For over a decade, the Federal Defendants have tried to resist any suggestion that their actions or inactions regarding the MOX Facility and program should ever be enforceable in court. As reflected in the State's Memorandum in Support of its Motion for Summary Judgment, when the Secretary and DOE promised South Carolina that they would construct and operate the MOX Facility and agree to consequences for failing to meet milestones (such as removal of the defense plutonium and providing the State the economic and impact assistance), the one thing the Secretary and DOE refused to voluntarily agree to was a consent decree that would make such commitments enforceable *in this Court* through contempt. ECF No. 10-1, State Mem. in Supp. of Mot. for Summ. J. at 7-8. When the commitments were codified in Section 2566, however, Congress provided that the State of South Carolina has a right to enforce Section 2566 before this Court, as it recognized the State's ability to obtain equitable injunctive relief. The Department of Justice also previously acknowledged and admitted before this Court that the State could bring a claim to enforce Section 2566. *See Aiken County v. Bodman*, 509 F. Supp. 2d 548, 551 n.2 (D.S.C. 2007) ("The statute implies that the State of South Carolina may sue the Department of Energy, which counsel for the DOE conceded at the hearing on this matter. . . .") (emphasis added).

reason the two motions cannot be briefed and argued at the same time (The State proffers a proposed briefing schedule below). It is in the best interests of the parties and the Court to conserve judicial resources by simultaneously briefing these legal issues and having them decided at the same time in what is really a simple and straightforward case.

The Federal Defendants' arguments against simultaneous briefing are unavailing. As a threshold matter, the Federal Defendants' motion conveys to the Court it will not include or attach any exhibits or reference any materials outside the four corners of the pleadings should its motion to dismiss be based on Rule 12(b)(6), FRCP. To do otherwise would covert the motion to dismiss into a motion for summary judgment, *see* Rule 12(d), FRCP, thus rendering the motion a cross-motion for summary judgment with Federal Defendants acknowledging that they will indeed file a response to the State's pending Motion for Summary Judgment.

Furthermore, the Federal Defendants only citation to a case in this district (or this circuit) is to the *Saylors* case in nominal support of their position that the briefing of the summary judgment motion must be delayed until after the motion to dismiss is ruled upon. *Saylors v. Hartford*, No. CA 6:11-1414-HMH, 2011 WL 3704010 (D.S.C. Aug. 23, 2011). However, *Saylors* actually supports simultaneous briefing, as the summary judgment motion was filed and a response filed *before* the Court granted the motion to dismiss, thus demonstrating that both motions were fully briefed prior to ultimate adjudication. *See Saylors*, ECF Nos. 10 (Motion to Dismiss), 17 (Motion for Summary Judgment), 25 (Response to Motion for Summary Judgment), 26 (Response to Motion to Dismiss).

Moreover, in a typical case summary judgment is not necessarily appropriate before the conclusion of discovery. However, this is not a typical case and no discovery is required, placing simultaneous briefing squarely within the ambit of the Court's discretion to "regulate timing to fit

the needs of the case," per the 2010 Advisory Committee's Note to Rule 56, FRCP. As discussed below, the Federal Defendants' obligations under Section 2566 are clear and the Federal Defendants have no defense. The State simply asks this Court to compel the Federal Defendants to comply with the plain and unambiguous language of Section 2566.

Further, the Federal Defendants state that the forthcoming Motion to Dismiss will target, among other things, Count I related to their Violation of the Separation of Powers claim, which, as the Federal Defendants acknowledge, is not the subject of the pending Motion for Summary Judgment. ECF No. 14 at 2. In that respect, even should the Motion to Dismiss be granted, because that claim is not addressed in the Motion for Summary Judgment then the dismissal cannot impact or moot the pending summary judgment motion. Thus there is no reason to delay briefing on summary judgment when there is no overlap of the claims.

Nor can the Federal Defendants make any serious claim as to lack of jurisdiction by this Court. The plain language of Section 2566 makes clear that the State of South Carolina has a right to bring a claim to enforce the statute, including injunctive relief, which is only available in this Court. *See Aiken Cty. v. Bodman*, 509 F. Supp. 2d 548, 551, 551 n.2 (D.S.C. 2007) ("The statute implies that the State of South Carolina may sue the Department of Energy, which counsel for the DOE conceded at the hearing on this matter. . . .").

As the Motion for Summary Judgment demonstrates, the facts are undisputed and the statute is uncomplicated, and thus summary judgment is appropriate at this stage. *See Actions Involving the United States*, 10B Fed. Prac. & Proc. Civ. § 2733 (3d ed.) ("[A]s a general rule, summary judgment is appropriate in actions involving the United States when the record is clear that there is no genuine dispute as to any material fact. . . ."). There are simply no material facts that can be disputed regarding the Federal Defendants' failure to comply with the law. A

response to the motion should require little work from the Federal Defendants. Section 2566 imposed deadlines for the removal of defense plutonium or defense plutonium materials. Those deadlines could be satisfied through either: (1) reaching the MOX production objective (defined as processing one metric ton of plutonium) or (2) physically removing one metric ton of plutonium from the State.

Should the Federal Defendants fail to meet the MOX production objective by January 1, 2014, they MUST remove one metric ton of defense plutonium from the State by January 1, 2016.

Should the Federal Defendants fail to meet the MOX production objective by January 1, 2016, they MUST remove an additional one metric ton of defense plutonium from the State during the calendar year 2016 (and every subsequent year through 2021) and, for each of the first 100 days of each calendar year, they can elect to either remove the one metric ton of defense plutonium or pay an economic and impact assistance penalty of $1 million per day.

The undisputed facts are:

1. The Federal Defendants failed to meet the MOX production objective by January 1, 2014.
2. The Federal Defendants failed to remove one metric ton of defense plutonium by January 1, 2016.
3. The Federal Defendants failed to meet the MOX production objective by January 1, 2016.
4. The Federal Defendants have failed to remove any defense plutonium from the State during this calendar year.

5. The Federal Defendants have failed to provide economic and impact assistance payments to the State of South Carolina.
6. The Federal Defendants have decided not to remove any defense plutonium from the State during this calendar year and instead are transporting additional plutonium to the State.

The Federal Defendants have no valid defenses, answers, or responses to their undisputed failure to comply with Federal law. The State seeks adjudication of its claims in a quick and timely manner. This is a straightforward and simple case. This is also a case where justice delayed is justice denied, as more plutonium is being delivered to the State while the Federal Defendants are refusing to comply with Federal law regarding the disposition and removal of plutonium from the State.

The State therefore respectfully submits that the Federal Defendants' extension request **only be granted in conjunction with a briefing schedule** for both the pending State Motion for Summary Judgment and the Federal Defendants' (forthcoming) Motion to Dismiss as follows:[2]

- Federal Defendants' Response in Opposition to the Motion for Summary Judgment due no later than Monday, May 30;
- State's Response in Opposition to the Motion to Dismiss due no later than Monday, May 30;

[2] The State reserves its right to file for a preliminary injunction to prevent any future transfers of defense plutonium or defense plutonium materials into the State.

Moreover, the Federal Defendants have acknowledged they are only seeking an extension of time to respond to the summary judgment motion at this time. ECF No. 14 at 4. Therefore there should be no objection to a simultaneous briefing schedule at this point. The Federal Defendants have reserved their right to move to stay or amend the scheduling order with the briefing schedule for both motions.

- Federal Defendants' Reply in Support of its Motion to Dismiss due no later than Wednesday, June 15;
- State's Reply in Support of its Motion for Summary Judgment due no later than Wednesday, June 15.

This schedule actually provides the Federal Defendants with 54 days to respond to the Motion for Summary Judgment while only providing the State with 35 days to respond to the Motion to Dismiss. However, this matter is important enough to the State to forego equal response time to resolve this case in an expeditious manner.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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April 22, 2016
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