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

STATE OF SOUTH CAROLINA, Plaintiff; and SOUTHERN CAROLINA REGIONAL DEVELOPMENT ALLIANCE Intervenor-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-cv-00391-JMC

SOUTHERN CAROLINA REGIONAL DEVELOPMENT ALLIANCE'S REPLY TO STATE OF SOUTH CAROLINA'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE AS PARTY PLAINTIFF

Southern Carolina Regional Development Alliance (the "Alliance") replies to Plaintiff State of South Carolina's (the "State's") response in opposition to the Alliance's motion to intervene (ECF No. 11, hereinafter "Response") as follows:

1. The State's after-the-fact motion for summary judgment does not render the Alliance's intervention untimely or prejudicial.

The State asserts that the Alliance's intervention motion is "not timely enough." Response at 9. However, because the Alliance's intervention motion was filed even prior to the Defendants' responsive pleading, it is difficult to imagine how the motion could be any more timely. The State asserts that intervention is untimely because the State filed a motion for summary judgment on April 6, 2016, a week after the Alliance's intervention motion and prior to any responsive pleading by Defendants. The State, however, may not claim that its subsequent motion for summary judgment renders the Alliance's intervention motion untimely. At the time of the Alliance's motion to intervene, there was no pending motion, no pending or completed discovery, no scheduling order, and indeed no appearance in the case by any party other than the State. The Alliance's intervention motion was timely.

The State also appears to assert "timeline for disposition" as the basis for its claim that the State would be "prejudiced" by the Alliance's intervention. Response at 10. The State speculates that resolving the Alliance's intervention motion will take longer than resolving the substantive merits of the case, *i.e.* the State's summary judgment motion. *Id.* at 11. This seems unlikely, however, because the State's summary judgment motion was filed after the Alliance's intervention motion. Moreover, as discussed more fully below and in the Motion to Intervene, the Alliance has standing to assert its proposed claims against Defendants, and it will be more efficient for the Court and the parties to address the claims in this case by allowing intervention rather than requiring the Alliance to file a separate lawsuit. The State has not articulated a legally cognizable prejudice sufficient to preclude intervention by the Alliance.

2. The Alliance may sue to enforce the federal statute at issue in this litigation; the State does not have "sole, statutory standing"

The Alliance is an adjacent landowner to SRS, whose purpose is economic development (the very sort of economic development Congress found the MOX Facility would provide once fully realized). The Alliance is also the Lead Organization for the South Carolina Promise Zone which includes Barnwell County and Allendale County, the counties in which the majority of land comprising SRS is located. *See* Motion to Intervene, ECF No. 6, at pp.3-4; ECF No. 6-2. However, the State claims the Alliance "cannot show that it possesses an interest in the subject matter of this action" and "is no different than … other citizens of in the State."[1] The State asserts that it and it alone may assert a claim alleging non-compliance with the plutonium disposition statute, 50 U.S.C. § 2566. Under this view, the State could file a dismissal with prejudice tomorrow, and SRS's neighboring community would have no remedy whatsoever for the indefinite storage of defense plutonium in contravention of federal statute. Indeed, under the State's reasoning, if the State had never brought suit, those immediately impacted by the Defendants' statutory violation would be left without redress.

In fact, 50 U.S.C. § 2566 is silent on who may seek to enforce its provisions. Because there is no limitation in the statute itself, a cause of action extends to plaintiffs whose interests fall within the zone of interests protected by the statute invoked. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388, 188 L. Ed. 2d 392 (2014) ("the zone-of-interests limitation … 'applies unless it is expressly negated' [by the statute]"). While the State claims that 50 U.S.C. § 2566 confers an interest only upon the State, the very case cited by the

[1] *See* Response at 5. While the State invites this Court to make a "pre-Rule 12" finding as to the Alliance's standing, under the guise of a denial of intervention, the Court should decline this invitation. *See CGM, LLC v. BellSouth Telecommunications, Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (Article III standing and statutory standing appropriately addressed under Rules 12(b)(1) and 12(b)(6)).

State addressing the statute suggests that neighboring landowners are indeed within the zone of interests of the statute. *See Aiken Cty. v. Bodman*, 509 F. Supp. 2d 548, 554 (D.S.C. 2007) ("Aiken County may have made a showing that they, as neighboring landowners to the SRS, are 'arguably' within the 'zone of interests' that the suspension provisions contained in 50 U.S.C. § 2566(b)(4) are designed to protect."). In *Bodman*, the court determined that neighboring landowner Aiken County lacked standing only because there was "no final agency action."

Because the Alliance is within the zone of interests protected by 50 U.S.C. § 2566, it may bring a lawsuit suit against Defendants for noncompliance with the statute's mandates. Requiring the Alliance to bring a separate lawsuit rather than intervening in this existing action, which addresses the same statute and the same defendants, defies notions of judicial economy and risks inconsistent rulings. The Alliance should therefore be permitted to intervene.

3. The Court should not presume that the Alliance's legitimate, local, and concrete interests will be advanced by the State.

The State argues that it (and it alone) will litigate the Alliance's interests in this action. But such a presumption is neither warranted nor proper.

a. Prior settlement by State failed to achieve removal or processing of plutonium at SRS

The State has litigated this very dispute with the Defendants quite recently (in 2014) and the resolution of that lawsuit resulted in neither the removal of one metric ton of plutonium from SRS, nor the attainment of the MOX production objective, nor the required economic and impact assistance, by the statutory deadlines. In short, the resolution did not result in compliance with 50 U.S.C. § 2566. (The State's prior lawsuit was dropped in May 2014 after an announcement that Defendants would continue construction of the MOX Facility through September 2014, *i.e.* four months). In light of the history of litigation, the Court should not presume that in *this*

litigation the State will adequately represent the interests of the Alliance or achieve compliance with the statute, rather than accept something less than full compliance with 50 U.S.C. § 2566 by the Defendants. Indeed, the Alliance's local, particular interests would be impaired if resolution of this action does not achieve compliance with 50 U.S.C. § 2566.

b. The Alliance has local, concrete interests including property interests.

The State dismisses the divergent interests of the Alliance and the State – the Alliance's local, concrete interests, including its interests as an adjacent property owner to SRS vs. the State's more general interest – as a "distinction without a difference" which is "irrelevant to the enforcement" of the plutonium disposition statute. Response at 8. But this type of difference has been recognized as meaningful where a state or other governmental entity attempts to exclude a would-be intervenor in a suit against the federal government under a claim of *parens patrie*. *See, e.g., Alabama v. U.S. Army Corps of Engineers*, 229 F.R.D. 669, 674 (N.D. Ala. 2005) ("Alabama Power has demonstrated that its interest, in fact, differs from that of Alabama. Alabama's interests are general and concern the management of all the water resources in the … river basins. Alabama represents all its citizens, including citizens upstream and downstream from Alabama Power's operations."). Courts have also recognized that the general interests of the State do not necessarily subsume more concrete, local interests. *See, e.g., Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 1001 (8th Cir. 1993) (denial of intervention reversed because "counties' interests in land are narrower interests not subsumed in the general interest Minnesota asserts in protecting fish and game," and landowners' interests "are narrower and more parochial interests than the sovereign interest the state asserts in protecting fish and game."); *cf. South Dakota v. Ubbelohde*, 330 F.3d 1014, 1023–25 (8th Cir.2003) ("Given that the [*parens patriae* governmental entity] is asked to balance multiple interests... it cannot adequately

represent the interests of downstream users in this case."); *Georgia v. Army Corps of Eng'rs*, 302 F.3d 1242, 1259 (11th Cir.2002) (holding that Southeastern Federal Power Customers met its "minimal" burden of showing that a federal government entity would not adequately protect its interests).

Undoubtedly, the indefinite storage of weapons-usable nuclear materials at SRS is not an issue that affects South Carolina or its citizens in a uniform manner regardless of location, like federal regulation of health care, federal taxation, or the federal minimum wage. Plutonium is a radioactive element for which even small quantities of exposure is dangerous to human health. The harm presented by permanent storage of defense plutonium, whether through diminished property values, crippled economic development, or potential human health effects, is acutely local in nature – and this litigation concerns a specific place identified in the governing statute by name: SRS.

The differences between the interests of the Alliance and the State weigh in favor of allowing intervention because the differences could result in the State pursuing this litigation or attempting to resolve this dispute in a manner not aligned with the interests of the Alliance. The need for intervention is magnified in this situation due to the broad the range of possible outcomes of this litigation (whether by Court order or agreement of the parties). The Alliance should be allowed to intervene to protect its unique interests

c. The Alliance and the State disagree on the interpretation of the required economic and impact assistance payments.

The Response gives great emphasis to the Alliance's claim that it is an appropriate beneficiary of economic and impact assistance payments related to the non-realization of the economic benefits of the MOX Facility and the failure to remove defense plutonium from SRS.

See Response at 1 ("[The Alliance's] purpose in intervening is to get money from the State [sic]"); *id.* at 11 ("[The Alliance] really simply seeks to collect monies from the State [sic]."); *id.* at 13 ("In short, the purpose of the intervention by the Alliance is to seek a federal court order requiring the State [sic] to give money to a private citizen").

The Alliance disagrees with the State's characterization of its interests, which are fully set forth in the Alliance's motion to intervene, *see* ECF No. 6 at pp.3-4, and the Alliance's proposed complaint, *see* ECF No. 6-1 at 2-3. However, the State is correct that the Alliance's interests on the issue of federal economic and impact assistance payments are not adequately represented by the State, as discussed more fully below. The State cannot reasonably assert that it will represent the Alliance's interests in this regard, and the Alliance's interests would be impaired if intervention is denied.

e. The statute does not require economic and impact assistance payments to the State as a *body politic*.

Throughout the Response, the State flatly asserts that it is the sole statutory beneficiary of economic and impact assistance payments from Defendants for failure to either meet the MOX production objective or remove one metric ton of plutonium from SRS. The Alliance disagrees with the State's interpretation of 50 U.S.C. § 2566 in this regard, and it would be inappropriate to resolve this issue in the context of this motion to intervene.

As a preliminary matter, if the MOX production objective is not met, the statute calls for DOE to "remove from the *State of South Carolina*, for storage and disposal *elsewhere*… not less than 1 metric ton of defense plutonium or defense plutonium materials." 50 U.S.C. § 2566(c) (emphasis added). In this provision, the term "State of South Carolina" manifestly describes a geographical location (rather than a body politic), as indicated by the contrary term "elsewhere," and by the fact that the State as a body politic does not possess plutonium which could be

removed. In the next subsection, the statute calls for economic and impact assistance payments to "the State of South Carolina," the very same term used in the preceding subsection to describe a location. 50 U.S.C. § 2566(d). A reasonable interpretation of the economic and impact assistance provision of 50 U.S.C. § 2566(d) is that these payment obligations may be satisfied by payments to the area in South Carolina impacted by the *de facto* permanent storage of defense plutonium. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479, 112 S. Ct. 2589, 2596, 120 L. Ed. 2d 379 (1992) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning").

Indeed, as quoted by the State in its summary judgment memorandum, the Defendants appear to have previously interpreted this provision to require economic and impact assistance to the area actually impacted, *i.e.* the area of SRS, not to the State as a body politic:

> [The statute] directs the Secretary to take certain actions if that schedule is not being met, which depending on the circumstance may include …*payment of economic assistance to SRS* from funds available to the Secretary.

ECF No. 10-1 at 16 (quoting DOE, *Am. ROD for SPD EIS* (April 24, 2013)(emphasis added).

Finally, the payments directed by the statute are not "fines" or "penalties" as described by the State at times in its intervention response. *See, e.g.,* Response at 5, 13. If the payments mandated by the statute were designated by Congress as "fines" or "penalties", the State would have a more colorable argument, as fines are almost always payable to a government entity. *See* Black's Law Dictionary, 8th Ed. (2004) at 664 (defining "fine" as "[a] pecuniary criminal punishment or civil penalty payable to the public treasury"). But Congress did not characterize the payments required by 50 U.S.C. § 2566 as "fines" or "penalties"; these payments are "economic and impact assistance payments." 50 U.S.C. § 2566(d). These payment obligations

may be satisfied by payments to the area in South Carolina impacted by the storage of defense plutonium and non-realization of the MOX Facility. This interest of the Alliance is clearly not adequately represented by the State, and, like the Alliance's other interests, would be impaired without the Alliance's intervention as a party-Plaintiff in this action.

CONCLUSION

For the reasons set forth above, Southern Carolina Alliance respectfully requests that the Court grant it Intervention of Right, or, in the alternative, Permissive Intervention.

HAYNSWORTH SINKLER BOYD, P.A.

By: s/S. Ross Shealy

Robert Y. Knowlton (DSC No. 2380)
S. Ross Shealy (DSC No. 10733)
1201 Main Street, Suite 2200 (29201)
Post Office Box 11889
Columbia, South Carolina 29211
(803) 799-3080
Attorneys for Southern Carolina Regional Development Alliance

April 28, 2016