

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

STATE OF SOUTH CAROLINA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:16-00391-JMC
)	
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.)	
)	

**THE STATE OF SOUTH CAROLINA’S RESPONSE IN OPPOSITION
TO MOTION TO STAY PROCEEDINGS ON
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

The Federal Defendants have submitted a Motion to Stay Proceedings on Plaintiff’s Motion for Summary Judgment (ECF No. 20) seeking to stay all proceedings on the State’s pending Motion for Summary Judgment (ECF No. 10) until the Court rules on the Federal Defendants’ Motion to Dismiss (ECF No. 17). The State respectfully submits that the Federal Defendants have not met their burden to demonstrate a need for a stay, and both judicial economy and the prejudice to South Carolina if such stay is granted weigh heavily in favor of denying the stay request.

BACKGROUND

On February 9, 2016, the State filed its Complaint (ECF No. 1) in this Court because of the Federal Defendants' failure to comply with the clear requirements of 50 U.S.C.A. § 2566 (Section 2566) and their corresponding violation of the United States Constitution. All relevant and material facts with respect to the Federal Defendants' current and ongoing non-compliance with Sections 2566(c) and (d) are undisputed. The Federal Defendants have never disputed that they have not removed plutonium from the State by January 1, 2016, and that they have not paid the economic and impact assistance penalty and fine. The only issues for the Court to resolve are legal in nature (*i.e.*, that the statute means what it says).

Accordingly, on April 6, the State filed its Motion for Summary Judgment (ECF No. 10) seeking timely adjudication of the State's causes of action related to these two sections of the statute. The timing of the State's Motion for Summary Judgment was largely precipitated by the fact that, in the time since the Complaint was filed, the Federal Defendants sought to terminate the MOX Facility and program while simultaneously arranging to import more plutonium to South Carolina in the immediate future. The Federal Defendants also had yet to provide any indication to South Carolina that they intended to comply with Section 2566, nor had they provided South Carolina or the Court with any reason for their non-compliance.

On April 21, the Federal Defendants requested a 30-day extension to respond to the Motion for Summary Judgment (ECF No. 14). The State objected (ECF No. 15). The Court granted the 30-day extension on April 21, extending the response date until May 25 (ECF No. 16). On April 25, the Federal Defendants filed a Motion to Dismiss (ECF No. 17) based on Rule 12(b)(1) and (6). Eleven days after receiving the 30-day extension to file a response to the Motion for Summary Judgment, on May 2, the Federal Defendants filed the instant Motion to

Stay. On May 17, South Carolina and the Federal Defendants filed a joint motion (ECF No. 28) extending South Carolina's instant response in opposition until May 24 and the Federal Defendants' response in opposition to summary judgment until June 10. The Court granted those extensions on May 18 (ECF No. 29). On May 23, 2016, the Federal Defendants filed their Reply in Support of the Motion to Dismiss (ECF No. 33).

ARGUMENT

This Court has the inherent authority “under [its] general equity powers and in the efficient management of [its] docket[]” to grant or deny a request for a stay. *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). “[P]roper use of this authority calls for the exercise of judgment which must weigh competing interests and maintain an even balance.” *Id.* (internal quotation marks and citations omitted). Accordingly, “[t]he party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.” *Id.* Indeed, “[t]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.” *Id.* (quoting *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)).

South Carolina's position regarding the Motion to Stay is very simple. The only issues to resolve with respect to the Federal Defendants' compliance or non-compliance with Section 2566 are legal in nature and largely have been already briefed by the parties.¹ All that is left for the Court to have full and complete briefing prior to the June 30 hearing is the Federal Defendants' response to the State's Motion for Summary Judgment, which the Federal

¹ It is undisputed that if Section 2566 requires the Federal Defendants to (1) remove plutonium from the State by the deadlines set forth in the statute and (2) pay the penalties and fines, the Federal Defendants have not complied with the statute because the Federal Defendants, as they acknowledge, have failed to do either.

Defendants have effectively conceded in their second Motion to Extend that by June 10, they can prepare and file (by that time, they will have had over two months to respond to the Motion for Summary Judgment), and a reply by the State to this response. This would cause little or no hardship for the Federal Defendants to file their response on June 10, as scheduled and per their second extension of time for such filing. The State's reply to that response would be due on or about June 20. The Court therefore would have all information necessary to decide all the currently pending motions prior to the motions hearing scheduled on June 30.

The alleged inconvenience to the Federal Defendants from having to file one brief on June 10 is so minimal as to be virtually nonexistent. Again, the question the Federal Defendants have to answer in their response to the Motion for Summary Judgment is: What does Section 2566 require the Federal Defendants to do? In their Motion to Dismiss, which is effectively a cross-motion for summary judgment, and Reply in Support of the Motion to Dismiss, the Federal Defendants already have provided their answer to this question with respect to Section 2566(c): This statutory provision requires them to do nothing and instead only sets "goals."² With respect

² In their Motion to Stay as well as their Motion to Dismiss and Reply in Support of Motion, the Federal Defendants claim that the parties will have to "address the import of the removal process that is *already underway*" if the Court agrees with the State that Section 2566(c) actually imposes obligations on the Federal Defendants. Mot. to Stay (emphasis in original); Mot. to Dismiss at 10; Reply at 2-4. However, this statement—which tells this Court that defense plutonium is presently and currently being removed from the State, hence the present tense of the Federal Defendants' representation to this Court—is false. No defense plutonium removal "is already underway" from South Carolina. The Federal Defendants have merely proposed the idea of moving some defense plutonium to New Mexico's Waste Isolation Pilot Project (WIPP) sometime next decade—after processing at SRS—via a proposed dilution alternative to the MOX program, but the Federal Defendants lack the Congressional approval to follow through with this proposal or the proposed alternative, and in fact have acknowledged that they have not even completed "pre-conceptual design" for this option. State Mem. in Supp. of Mot. for Summ. J. Ex. 32 (ECF No. 10-34).

Regardless, a proposal to remove plutonium sometime next decade has no relevance to the question at issue here of whether the Federal Defendants removed one metric ton of plutonium from South Carolina by January 1, 2016 as required by Section 2566(c), or is

to Section 2566(d), the Federal Defendants acknowledge that it has at least one substantive requirement—make penalty payments—and their only claimed defense for failing to make these payments, *see* Mot. to Stay at 6, involves only legal questions, not factual ones. *See* State Mem. of Law at 28-31.³ Accordingly, the only issues remaining for the Federal Defendants to brief are legal in nature.

In contrast to the minimal inconvenience to the Federal Defendants, the potential harm and prejudice to South Carolina if the stay is granted is significant and multi-faceted. The position of the Federal Defendants is obviously to deny everything, including the effectiveness of the plainest statutory directives, while avoiding resolution of the merits for as long as possible through the use of preliminary motions and a stay request.

First, as previously mentioned by the Federal Defendants, they are currently working to import more defense plutonium into South Carolina from foreign nations. *See* ECF No. 17, Mot. to Dismiss at 5 & n.7. However, there currently is no approved or viable disposition pathway—except for the MOX program that the Federal Defendants are trying to kill—for any additional defense plutonium shipped to the State, and thus, as of now, any additional plutonium sent to the State will be here indefinitely. Moreover, the Federal Defendants disclaim any obligation to ever remove plutonium from the State and also have informed this Court that even if they were ordered by the Court to do so, such removal may be difficult. *See* Mot. to Stay at 8 n.1. Whether

removing plutonium in 2016 as required by Section 2566(d). Moreover, having briefed this argument already, *see* Reply at 2-4, it will take the Federal Defendants minimal effort to copy and paste this argument into their response to the Motion for Summary Judgment.

³ Like with Section 2566(c), the Federal Defendants disclaim their removal obligations under Section 2566(d)—*i.e.*, to remove 1 metric ton of plutonium **a year** from 2016-2021. However, this too is a legal question that can be answered by looking to the plain language, purpose, and legislative history of the statute. *See* State Mem. of Law at 13-14 & nn.7, 8; Mot. to Dismiss at 17 (citing discussion of Section 2566's yearly requirements in CBO Summary of Section 2566).

or not this is true, this demonstrates that the only potential immediate relief from the Federal Defendants' failure to comply with the removal obligations under Section 2566(c) and (d) may very well be the prohibition on shipments of additional plutonium into South Carolina requested by the State in the Complaint to specifically address this non-compliance until the Federal Defendants come into compliance with the statute. However, if the stay is granted and the Federal Defendants import plutonium into the State before the Court can adjudicate the State's Motion for Summary Judgment, the State would be deprived of the only potential immediate relief for the Federal Defendants' disregard of federal law. And it is simply inconceivable—and would be an insult to South Carolina, Congress, and the United States Constitution—for the Federal Defendants to be allowed to import additional defense plutonium into the State while simultaneously blatantly disregarding their statutory obligations to remove defense plutonium from the State.

CONCLUSION

For the reasons set forth above, the Federal Defendants have not met their burden to justify the requested stay and their Motion to Stay Proceedings on Plaintiff's Motion for Summary Judgment should be denied.

Respectfully submitted,

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