

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BEYOND NUCLEAR, et al.,)	
Plaintiffs,)	
)	
v.)	No. 1:16-cv-01641 (TSC)
)	
U.S. DEPARTMENT OF ENERGY, <i>et al.</i> ,)	
Defendants)	
)	

JOINT MOTION FOR SCHEDULING ORDER

Through undersigned counsel, Plaintiffs Beyond Nuclear, Nuclear Information and Resource Service, Savannah River Site Watch, Citizens for Alternatives to Chemical Contamination, Lone Tree Council, Sierra Club, and Environmentalists, Inc. (“Plaintiffs”), jointly with Defendants U.S. Department of Energy, Ernest Moniz, Monica C. Regalbuto, David Huizenga, and Jack R. Craig, Jr. (“Defendants”), hereby move for entry of a scheduling order as described below. In support of this joint motion, counsel for Plaintiffs and Defendants state as follows:

1. Pursuant to the United States’ nuclear weapons nonproliferation policy, Defendants have agreed to accept shipments of certain radioactive material from Canada that contains highly enriched uranium (“HEU”) of U.S. origin. *See* U.S. Dep’t of Energy, Supplement Analysis – Foreign Research Reactor Spent Nuclear Fuel Acceptance Program (DOE/EIS-0218-SA-07) (2015), available at www.srs.gov/general/pubs/envbul/documents/EIS-0218-SA-07-2015.pdf. The shipments would consist of target residue material (“TRM”) generated from Canada’s production of radioactive medical isotopes and stored at Canada’s Chalk River Site, in Ontario. The TRM will be shipped overland by truck to DOE’s Savannah River Site in Aiken, South

Carolina. By agreement between the United States and Canada, the shipments were to begin in September, 2016.

2. On August 17, Plaintiffs filed the operative complaint in this action, invoking the court's jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *See* Amended Complaint for Declaratory and Administrative Relief, Preliminary and Permanent Injunctions ("Am. Compl.") ¶ 8 (ECF 4). Plaintiffs seek to enjoin Defendants "from permitting, allowing, or causing the import and transport" of the Canadian TRM to the Savannah River Site, *id.* ¶ 2, on the ground that Defendants' proposal to ship the material in liquid form violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, the Department of Energy Organization Act, 42 U.S.C. § 7112, and the APA. *Id.* at 47 (prayer for relief). Plaintiffs' requested relief could include, among other things, "temporary restraining orders and the issuance of preliminary and permanent injunctions to halt implementation of the project[.]" *Id.* ¶ 1.

3. Counsel for Plaintiffs and Defendants conferred by telephone on September 9, 2016, to discuss a potential briefing schedule that would provide for merits briefing on an expedited basis. Counsel for Defendants advised that Defendants are willing to postpone commencement of the Canadian TRM shipments for a brief period of time to allow for resolution of this case on expedited motions for summary judgment, without giving Plaintiffs cause or need to seek emergency or preliminary injunctive relief. The postponement would not be indefinite. Defendants are willing to defer commencement of the first of the Canadian TRM shipments to and including February 17, 2017, in order to ensure compliance with all legal and contractual obligations.

4. Accordingly, counsel for the parties have developed a proposed schedule to allow for resolution of the case prior to February 17, 2017. The proposal, set forth below, contemplates expedited, simultaneous briefing of cross-motions for summary judgment. *See Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 72 (D.D.C. 2014) (“In a case based solely on judicial review of agency action, the district court sits as an appellate tribunal and disposes of the case on cross-motions for summary judgment.”).

5. The schedule jointly proposed by the parties is as follows:

Defendants serve the administrative record on Plaintiffs and file a certified index of the administrative record with the Court:	October 14, 2016
Plaintiffs file their motion for summary judgment and Defendants file their cross-motion for summary judgment:	November 14, 2016
Plaintiffs file their response to Defendants’ cross-motion and Defendants file their response to Plaintiffs’ motion:	December 5, 2016
Plaintiffs file their reply in support of their motion and Defendants file their reply in support of their cross-motion:	December 19, 2016
The parties file the joint appendix:	January 4, 2017¹

6. The proposal aims to afford the Court sufficient time to review the cross-motions and issue a decision prior to the date Defendants have determined the Canadian shipments must commence. To that end, the parties have consulted the Court’s online calendar to identify

¹ The parties anticipate filing the joint appendix on CD/DVD unless the Court orders otherwise.

potential hearing dates. Based on the Court's calendar and taking into account federal holidays (including winter holidays, Martin Luther King, Jr., Day, and Inauguration Day), the parties respectfully propose a hearing date on **January 13, 2017**, in anticipation of a decision on or before **February 15, 2017**, to the extent the Court can accommodate that schedule.

7. Under the parties' proposal, Defendants' deadline to answer the complaint, presently October 31, 2016, would be tolled pending the Court's resolution of the cross-motions for summary judgment. Rule 56 of the Federal Rules of Civil Procedure provides that "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b). Therefore "a defendant is not required to respond in the form of an answer before making a motion for summary judgment[.]" *Jones v. U.S. Dep't of Justice*, 601 F. Supp. 2d 297, 302 (D.D.C. 2009) (quoting Fed. R. Civ. P. 56(b)). *See also id.* (a defendant's motion for summary judgment prior to answering the complaint "is substantively no different than filing a motion under Rule 12(b)(6) accompanied by matters outside the pleadings, which is then converted by operation of Rule 12(b) to one under Rule 56.").

8. The parties will endeavor to resolve any disputes that may arise through a meet and confer process to avoid undue delay and unnecessary burden on the Court.

For the reasons above, the parties respectfully request that the Court enter the schedule consistent with Paragraph 5 above and the proposed order attached. The parties further respectfully request consideration of the proposed hearing date of January 13, 2017, and a proposed date for a decision on or before February 15, 2017. A proposed form of a scheduling order is submitted herewith for the Court's convenience.

Respectfully submitted this 20th day of September 2016,

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/s/ Judith E. Coleman

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Judith E. Coleman