IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATE OF SOUTH CAROLINA, Plaintiff - Appellee, v. UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY; RICK PERRY, in his official capacity as Secretary of Energy; NATIONAL NUCLEAR SECURITY ADMINSTRATION; and LISA E. GORDON- HAGERTY, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants - Appellants.	)	No. 18-1684 1:18-cv-01431-JMC

SOUTH CAROLINA'S RESPONSE IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL

The State of South Carolina opposes Appellants' second and renewed request for a stay pending resolution of the appeal of the district court's June 7, 2018 order (Preliminary Injunction Order) enjoining the final agency action of the Department of Energy (DOE) to terminate construction of the mixed-oxide fuel fabrication facility (MOX Facility)

located in South Carolina and maintaining the status quo until the district court can decide the merits of this case.

As a threshold matter, the Appellants previously sought to stay the district court's order and that motion was denied by this Court. There has been no change in circumstance that warrants an alternative result, and the Appellants offer no justification or rationale for this second, renewed motion. Having briefed and argued this matter, on an expedited basis, there is no urgency that warrants acting prior to issuance of a final opinion and ruling from this Court.

The motion also should be denied on its merits because Appellants have fallen well short of clearing the high bar necessary for a stay and the irreparable harm that the State will suffer if the termination of the MOX Facility is not enjoined during the pendency of this suit.

DOE's only complaint is that it will have to continue expending appropriated funds for the ***very*** purpose for which Congress appropriated and authorized the funds. In other words, the only "harm" alleged by Appellants is that the status quo has to be maintained until a final ruling or judgment is entered in this matter.

At bottom, the sole purpose of the motion to stay is to deny any meaningful judicial review of these issues. Should the stay be granted and the preliminary injunction lifted, DOE will terminate the MOX Facility—the very action the State is challenging—and regardless of any future decision by the district court or this Court, the damage will be irrevocably done. Although Appellants are keenly aware of this inevitable consequence, they disingenuously argue that the termination is not permanent because there is a negligible chance the Project could be restarted. Therefore, as more fully explained below, this Court should deny Appellants' Second Motion to Stay Pending Appeal.

The Motion to Stay Lacks Merit

"A stay is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Id.* at 433-34; *see Winston–Salem/Forsyth County Bd. of Educ. v. Scott,* 404 U.S. 1221, 1231, (1971) (Burger, C.J., as Circuit Justice) (holding that a stay is considered "extraordinary relief" for which the moving party bears a "heavy burden"). In determining whether the moving party has met that exacting burden, courts consider "(1) whether the stay applicant has

made a strong showing that [it] is likely to succeed on the merits [of its appeal]; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation and internal quotation marks omitted); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (same). Here, Appellants fail to even mention these requirements for a stay, let alone demonstrate that each have been met.

Defendants will not suffer irreparable harm without a stay.

Appellants' motion for stay also fails because Appellants have not demonstrated—and cannot demonstrate—that they will suffer irreparable harm without a stay. *But see Long*, 432 F.2d at 979 ("[A] party seeking a stay ***must*** show . . . that he will suffer irreparable injury if the stay is denied." (emphasis added)). The only "harm" Appellants allege is that DOE will have to continue to construct the MOX Facility and expend appropriated funds to do so during the pendency of this suit. But that is not irreparable harm; that is simply the ***status quo***. *Pashby v. Delia,* 709 F.3d 307, 320 (4th Cir. 2013) (defining the status quo as

"last uncontested status between the parties which preceded the controversy.").

Through the Congressional appropriation and authorizations for fiscal year 2018, as well as Section 2566, "Congress has instructed [DOE] to continue construction of the MOX Facility this fiscal year and already appropriated funds for that specific purpose." PI Order 31; *see* Consolidated Appropriations Act, 2018 (CAA FY18), Pub. L. 115-141, § 309(a) ("Funds provided by this Act for [the MOX Project] and any funds provided by prior Acts for such Project that remain unobligated, may be made available ***only*** for construction and project support activities for such Project." (emphasis added)). The Preliminary Injunction Order only maintains the "last uncontested status between the parties"—the expenditure of appropriated funds on the exact purpose for which the funds were appropriated by Congress and mandated to be utilized. Simply put, there is no harm to Appellants in having to comply with the law and congressional mandate during the pendency of this litigation.

Moreover, even if the expenditure of appropriated funds in compliance with congressional mandate and the district court's order could constitute some "harm" to the Appellants, "mere injuries, however

substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable harm warranting a stay. *Long*, 432 F.2d at 979 (internal quotation marks and citation omitted). Indeed, in *Long*, as a result of the lower court's order, the defendant City of Baltimore was required to build new public facilities, purchase equipment, and hire additional employees at a claimed substantial cost to the defendant and the taxpayers. *Id.* at 978. These requirements also were likely to result in the General Assembly of Maryland convening a special session to make ***additional*** "appropriations to meet the increased costs attributable to [the lower court's] order." *Id.* at 979. But this Court found that to be insufficient to constitute irreparable harm and denied the requested stay in that case. *Id.* Here, DOE would simply be expending currently available appropriations for the very purpose in which they were authorized and appropriated.

Moreover, per DOE, any funds expended this year also would primarily be for "installing pipe, electrical conduit, [and] HVAC duct," Raines Decl. ¶11, all of which likely would be needed regardless of whether the current facility is used for the MOX Project or some other purpose in the future.

Therefore, because Appellants failed to demonstrate any irreparable harm, let alone sufficient irreparable harm to warrant a stay, the motion to stay must be denied.

The State has standing.

The district court correctly held that the State has standing to challenge DOE's final agency action to terminate the MOX Facility without first complying with the numerous legal requirements imposed by Congress that must be met prior to taking such action. PI Order 8-11.

"Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016). Further, the Court held that a "violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Robins*, 136 S. Ct. 1540, 1549.

Here Congress has said that the "State of South Carolina [has] a compelling interest in the safe, proper, and efficient operation of the plutonium disposition facilities at the Savannah River Site." Bob Stump National Defense Authorization Act of Fiscal Year 2003, Pub. L. 107-314, § 3181.

Moreover, South Carolina, as a sovereign, has standing to protect its interest, especially if it is a procedural right and there is a chance the agency may change its mind. The Supreme Court has held that a State has standing to challenge the EPA regarding climate change rule to protect its citizens and interests and "to preserve its sovereign territory," and further that a litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518-21 (2007).

Termination of the MOX Project leaves no legally approved pathway for disposition,[1] rendering South Carolina the *de facto*,

[1] The Appellants have repeatedly represented to the Court that no alternative disposition pathway has been selected nor is required to be selected prior to terminating construction of the MOX Facility. Reply Br. at 1, 4, 5, 7, 12, 13.

indefinite home to defense plutonium with no disposition pathway. This violates the Congressional intent and mandate that the waiver be conditioned on a selected alternative for disposition to replace the MOX Facility. *See* 2018 NDAA, § 3121(b)(1)(B) (requiring an alternative option satisfy the requirements of the NNSA's Business Operating Procedure dated March 14, 2016 (BOP-03.07), which requires the selection of an alternative). The requested relief will cause DOE to reconsider and take a "hard look" at alternatives and options, and thus under Supreme Court precedent South Carolina has standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 ("[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.").

Appellants' argument that the State does not have standing to maintain its NEPA challenge is without merit and directly contradicted by this Court's prior decision in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002).

In *Hodges*, the Governor of South Carolina, in his official capacity, challenged pursuant to NEPA the actions of DOE with respect to the storage of defense plutonium at SRS. *Id.* at 442-43. Like here, DOE argued the Governor lacked standing to pursue his NEPA challenge. *Id.* This Court flatly rejected that argument and specifically found:

> It is uncontroverted that at least one state highway runs through SRS, and that several streams and wildlife habitats are located near SRS. In these circumstances, the Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage from the DOE's activities at SRS. Governor Hodges therefore has a concrete interest that NEPA was designed to protect; as such, . . . he possesses the requisite standing to enforce his procedural rights under NEPA.

Id. at 445.

Here, the State is challenging the DOE's decision to terminate the MOX Facility and leave South Carolina as the indefinite repository of defense plutonium without first conducting the requisite NEPA analyses. The harm associated with the failure to conduct the requisite analyses today includes the unquestioned increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue state or terrorists seeking to acquire weapons-

grade plutonium that has been stored on site. *See Hodges*, 300 F.3d at 444-45 ("[I]ndividuals living next to [a federal project requiring NEPA analysis] possess standing to challenge a failure to comply with NEPA.") (citing *Lujan*, 504 U.S. at 572 n.7).

The State has standing to litigate the arbitrary and capricious decision of the Appellants that cause harm to the State and their failure to take the requisite "hard look" required by law.

Conclusion

For the foregoing reasons, Appellants' Motion for Stay Pending Appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,959 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Century 14-point or larger font.

s/Randolph R. Lowell
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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Randolph R. Lowell
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