

# SOUTH CAROLINA GOVERNOR'S NUCLEAR ADVISORY COUNCIL MEETING

October 15, 2018

S.C. ATTORNEY GENERAL MOX LITIGATION UPDATE

# Pending Cases

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*State of South Carolina v. United States of America et al*, Fourth Circuit Court of Appeals,  
Appeal No. 18-1148

*State of South Carolina v. United States of America*, Court of Federal Claims,  
Case No. 18-38c

*State of South Carolina v. United States of America et al*, Fourth Circuit Court of Appeals,  
Appeal No. 18-1684

*State of South Carolina v. United States of America et al.*  
Appeal No. 18-1148

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Case Background

- Complaint filed on February 9, 2016, in federal District Court for the District of South Carolina.
- State's Claim: The Department of Energy (DOE) failed to remove one metric ton of defense plutonium from South Carolina by January 1, 2016, in violation of 50 U.S.C.A. § 2566(c).
- State's Requested Relief: Injunction to require DOE to remove defense plutonium from South Carolina

*State of South Carolina v. United States of America et al.*  
Appeal No. 18-1148

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Case Status

- District Court ruled in favor of South Carolina and issued an injunction requiring DOE to remove one metric ton of defense plutonium from South Carolina no later than December 31, 2019.
  - Also required DOE to submit progress reports every six months setting forth the projected date for removal of the defense plutonium, status of any review pursuant to the National Environmental Policy Act (NEPA), and any impediments to DOE's compliance with the injunction.
- DOE appealed to the Fourth Circuit Court of Appeals.
- Oral argument was heard on September 27, 2018.

*State of South Carolina v. United States of America et al.*  
Appeal No. 18-1148

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Case Status (continued)

- On June 13, 2018, DOE submitted a progress report stating that it has devoted “significant resources and attention” to complying with the District Court’s injunctive order and that it believed it was possible to meet the District Court’s December 31, 2019 deadline.
  
- In July 2018, DOE completed its “Supplemental Analysis for the Removal of One Metric Ton of Plutonium from the State of South Carolina to Nevada, Texas, and New Mexico” pursuant to NEPA.
  - DOE has stated that a plan was developed to remove one metric ton of programmatic defense material from SRS and ship it to the Device Assembly Facility (DAF) at the Nevada National Security Site (NNSS) outside of Las Vegas, Nevada, the Pantex Plant outside of Amarillo, Texas, and Los Alamos National Laboratory in New Mexico.
  
- DOE’s next required progress report is due in December.

# *State of South Carolina v. United States of America*

## Case No. 18-38c

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### Case Background

- Complaint filed on August 7, 2017, in United States Court of Federal Claims.
- State's Claim: DOE failed to provide the \$1 Million per day (up to \$100 Million per year) economic and impact assistance payments owed since January 1, 2016, in violation of 50 U.S.C.A. § 2566(d).
  - Payments are owed because DOE did not (1) timely build the MOX Facility and process defense plutonium or (2) remove one metric ton of defense plutonium from South Carolina each year.
- State's Requested Relief: Payment of full statutory amount owed.

*State of South Carolina v. United States of America*  
Case No. 18-38c

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Case Status

- Fully briefed before Court of Federal Claims.
  - Cross-motions for summary judgment are pending.
- Waiting on ruling from the Court of Federal Claims.
- Appeal to Federal Circuit Court of Appeals likely will follow any decision.

# *State of South Carolina v. United States of America et al.,* Appeal No. 18-1684

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## Case Background

- Complaint and Motion for Preliminary Injunction filed on May 25, 2018, in federal District Court for the District of South Carolina.
- State's Claim: DOE's decision to terminate construction of the MOX Facility based on the "certification waiver" issued by Secretary Perry on May 10, 2018, violated NEPA and was arbitrary and capricious.
- State's Requested Relief: Preliminary and Permanent Injunction to prevent DOE from terminating construction of the MOX Facility until DOE complied with the law.



# *State of South Carolina v. United States of America et al.,* Appeal No. 18-1684

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## Case Status

- On June 6, 2018, the District Court ruled in favor of South Carolina and issued a preliminary injunction preventing DOE from terminating construction of the MOX Facility.
  - District Court found that the State was likely to succeed on the merits of its claim that DOE's decision to terminate the MOX Facility violated NEPA and was arbitrary and capricious.
- DOE appealed to the Fourth Circuit Court of Appeals, sought a stay of the District Court's preliminary injunction, and sought expedited consideration of the appeal.
  - Fourth Circuit denied the stay request and granted the request for expedited consideration.
- Oral argument was heard on September 27, 2018.

*State of South Carolina v. United States of America et al.,*  
Appeal No. 18-1684

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Case Status (continued)

- Questions from Fourth Circuit Court of Appeals at oral argument focused on issue of “standing” rather than merits of State’s claims.
- After oral argument, DOE filed a renewed motion to stay the District Court’s preliminary injunction.
- Fourth Circuit Court of Appeals granted motion for stay on October 9, 2018.
  - Foreshadows ultimate decision by Court of Appeals to reverse District Court.
- State intends to pursue all legal avenues to ensure DOE follows the rule of law.