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

STATE OF SOUTH CAROLINA,

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.

Case No. 1:16-cv-00391-JMC

DEFENDANTS' OPPOSITION TO SOUTH CAROLINA'S MOTION FOR RECONSIDERATION

INTRODUCTION

The Court was correct to hold that the Court of Federal Claims ("CFC") can provide an adequate remedy for South Carolina's monetary claim. *See* Opinion and Order ("Opinion"), ECF No. 56, at 10-17. That claim seeks to compel Defendants to make a payment allegedly owed under a money-mandating statute. The CFC can clearly remedy Defendants' failure to pay, if the CFC ultimately concludes that such failure is unlawful; that is what the CFC exists to do.

South Carolina's Motion for Reconsideration does not contest the Court's conclusion that the CFC can order assistance payments. Instead, the State's motion is premised on the argument that its claim to compel removal and its claim to compel payment are actually challenges to the same agency action. But those claims challenge two agency actions, not one. "Agency action," as used in the APA, refers to discrete actions only, and it includes inaction, defined as a failure to take a discrete agency action. The APA's only remedy for such inaction is an order compelling the discrete action that the agency is required to take. There are two discrete actions that South Carolina maintains Defendants were required to take: removing plutonium, and paying the assistance payment. It has sought two orders compelling those precise agency actions: an order to remove plutonium, and an order to pay assistance payments. As South Carolina concedes, an agency action (or inaction) for which another court can provide an adequate remedy is not reviewable under the APA. The allegedly unlawful failure to pay can be fully remedied by the CFC.

South Carolina's articulation of the agency action it is challenging, by contrast, neither satisfies the APA's definition of "agency action" nor aligns with the remedies it is seeking. South Carolina maintains that Defendants' failure to process defense plutonium into MOX, combined

with their failure to remove defense plutonium from SRS (but apparently not combined with their failure to make assistance payments), are part of the one overarching "agency action," and that all requests for relief stemming from that larger agency action must stay in the same court. But a general "failure to process or remove plutonium" is not a single, discrete action. Mot. for Rec., ECF No. 62-1, at 11. Its two sub-parts include an action—"process[ing] . . . plutonium"—that South Carolina has never tried to compel. And it omits an action—paying money—that South Carolina *is* trying to compel. If the inactions South Carolina were challenging involved only processing and removal, an order compelling those actions would not result in the payment of any money. The reality is far simpler, and it is confirmed throughout South Carolina's prior filings in this case: it is challenging two different inactions. The Court was therefore correct to conclude that South Carolina's request to compel payment is barred by 5 U.S.C. § 704.

Even if the "adequate remedy" limitation were not at issue, sovereign immunity would still bar South Carolina's request for money. The Tucker Act vests exclusive jurisdiction in the CFC to adjudicate monetary claims in excess of $10,000, including claims brought under money-mandating statutes and claims seeking relief that does not constitute "money damages," as that term of art is used in 5 U.S.C. § 702. The Tucker Act therefore impliedly forbids district courts from awarding that relief under the APA. In any case, South Carolina's monetary claim *does* satisfy § 702's definition of "money damages," because it seeks substitute, not specific, relief. The payment obligation it seeks to enforce is structured just like countless liquidated damages provisions, whose purpose is necessarily compensatory.

Finally, South Carolina cannot plead its way around the need for a waiver of sovereign immunity by invoking the *Larson-Dugan* exception. Claims against the public treasury are

inherently against the sovereign, not individual officers. The Court should deny South Carolina's Motion for Reconsideration.

I. The Court's Adequate Remedy Holding Was Correct

A. South Carolina's Removal and Monetary Claims Seek to Compel Two Different Agency Actions

The Administrative Procedure Act ("APA") provides claimants with two types of claims: claims to "*compel* agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (emphasis added), and claims to "*set aside* agency action, findings, and conclusions found to be" deficient for any number of reasons. *Id.* § 706(2) (emphasis added). South Carolina has not asked the Court to "set aside" any agency action in this case, *id.*; rather, as it has acknowledged, it seeks to "compel agency action unlawfully withheld." *Id.* § 706(1); *see* Mot. for Rec., ECF No. 62-1, at 9 ("[T]he 'agency action' at issue in this case is a 'failure to act.'"); 5 U.S.C. § 551(13) (defining "agency action" to include a "failure to act"). Under the APA, the "failure to act" that a plaintiff may challenge must be "a failure to take an *agency action*," as defined in § 551(13)—that is, both "a *discrete* action" and one that is "legally *required*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004) (emphases in original); *see also Village of Bald Head Island v. U.S. Army Corps of Engr's*, 714 F.3d 186, 193 (4th Cir. 2013) (those discrete actions consist of "determination[s]" only). Put simply, South Carolina may only seek to compel discrete agency actions that the Department was legally required to take.

The State seeks to compel two different agency actions: removal and payment. Those are the purportedly mandatory duties it has alleged. *See* Mot. for S.J., ECF No. 10-1, at 25, 26 ("shall . . . remove"; "shall . . . pay"). Those are the "failure[s] to act" of which it complains. 5 U.S.C. § 551(13). Those are the "agency action[s]" it argues are being "unlawfully withheld" and seeks to

"compel." 5 U.S.C. 706(1); Compl. at 27-28, ¶ 96 ("second cause of action" based on "50 U.S.C.A. § 2566(c)" seeking an order "requiring Defendants to immediately remove one [] metric ton of defense plutonium"); *id.* at 28, 31 ¶ 112 ("third cause of action" based on "50 U.S.C.A. § 2566(d)" seeking an order "requiring Defendants to pay" $100 million). And those agency actions are, quite plainly, not the same. One would involve the difficult processes of packaging, shipping, and re-storing or disposing of weapons-usable plutonium. *See* Gunter Declaration, ECF No. 38-2, at ¶¶ 19-38. The other would involve the payment of money. Thus, the basic premise of South Carolina's Motion for Reconsideration—that the "agency action" for both of its claims is the same, ECF No. 62-1, at 9-13—is wrong.

South Carolina tries to gloss over this difference by focusing on programmatic delays at a high level of generality. It describes the supposedly unified "agency action" in this case as being "the failure to meet the MOX production objective . . . or to remove plutonium from South Carolina." *Id.* at 9; *see also id.* at 13 ("failure to process or remove plutonium"). But South Carolina has never sought—nor could it—to compel Defendants to process plutonium or "meet the MOX production objective." Section 2566 does not make processing delays illegal, and South Carolina has not even tried to identify a mandatory processing duty. *See Southern Utah Wilderness Alliance*, 542 U.S. at 63 (mandamus available only for "the ordering of a precise, definite act about which an official had no discretion whatsoever") (quotes and alterations omitted). Therefore, even if a processing delay constituted a "failure to act" as a general matter, 5 U.S.C. § 551(13); *but see Village of Bald Head Island*, 714 F.3d at 194, it is not the one South Carolina has challenged.

The distinction between the two agency actions being challenged is further illustrated by the remedies South Carolina is seeking. The APA provides a limited set of remedies: courts can

"set aside" agency action already taken, they can "compel" agency action not yet taken, and, in certain circumstances, they can remand an agency action back to the agency. 5 U.S.C. § 706(1), (2); *see Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (discussing remand without vacatur). Nowhere does the APA provide a damages remedy. It is therefore unclear, if "failure to process or remove plutonium" were the only action being challenged, ECF No. 62-1, at 11, 13 & n.6, how the Court's setting aside, compelling, or remanding that action could lead to the payment of any money. And yet South Carolina undeniably seeks an order compelling Defendants to pay it $100 million. Compl. at 28, 31 ¶ 112. The only way for it to seek such an order through the APA is by challenging the Department's failure to pay. MSJ Br., ECF No. 10-1, at 27 (asking Court to "compel the unlawfully withheld action, *i.e.*, payment to the State"). But a failure to pay is exactly the type of agency action for which the CFC exists to provide an adequate remedy.

Even if South Carolina tried to challenge overall delays in MOX production and removal, its challenge would be foreclosed by *Southern Utah Wilderness Alliance*, which precludes "broad programmatic attack[s]." 542 U.S. at 64 (citing *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 890-94 (1990)). The Fourth Circuit has similarly barred challenges to an agency's overall "operat[ion of] a program." *Village of Bald Head Island*, 714 F.3d at 193-94.[1] A general failure to "process or remove plutonium," ECF No. 62-1, at 13, simply "does not constitute 'agency action' within

[1] The Fourth Circuit has further explained that an APA plaintiff can only seek to compel "an agency's *determination* of rights and obligations" in a "circumscribed and discrete" setting. *Village of Bald Head Island*, 714 F.3d at 193-94. A plaintiff *cannot* challenge "ongoing real world physical actions, even at a localized level," because "the APA's use of the term 'agency action' in § 706(1) limits judicial review to discrete determinations of rights and obligations." *Id.* at 194-95. Even if § 2566(c)(1) imposed a mandatory removal obligation, Defendants have made their determination for how to remove defense plutonium from SRS. *See* Record of Decision, ECF No. 38-1 (decision to remove six metric tons of defense plutonium from SRS through down-blending and disposal at WIPP); Dep't of Energy, *Final Surplus Plutonium Disposition Supplemental Environmental Impact Statement*, DOE/EIS-292-S2, Apr. 2015 (NEPA analysis). South Carolina has not sought to "set aside" that determination. 5 U.S.C. § 706(2).

the meaning of the APA." *Village of Bald Head Island*, 714 F.3d at 194. South Carolina argues that, under the APA, it is enough to allege a general programmatic delay—a disjunctive "failure to process *or* remove plutonium," without regard to timing or quantity—and then ask the Court to impose multiple "legal consequences" by ordering the agency broadly to "comply with the statutory requirement." ECF No. 62-1, at 11. That is not how the APA works. As the Supreme Court and Fourth Circuit have made clear, a court may only compel a "discrete action" that the agency was "legally required" to take. *Southern Utah Wilderness Alliance*, 542 U.S. at 62-63 (emphases omitted); *Village of Bald Head Island*, 714 F.3d at 193-95. Here, the "discrete" and "legally required" failures to act South Carolina has challenged are (1) a failure to remove one ton of defense plutonium, and (2) a failure to pay $100 million. In contrast, the failure to meet the production objective is an *element* of those claims—a condition necessary to give rise to South Carolina's claimed right to compel *other* actions: removal and payment.

Not only are the challenged inactions different, they are also allegedly "unlawful[]" for different reasons. 5 U.S.C. § 706(1). The two challenges are based on different statutory provisions, which contain different legal elements, whose factual elements partly diverge, and whose alleged violations are independent of each other's. The claimed removal obligation is imposed by § 2566(c), whereas the claimed payment obligation is imposed by § 2566(d). *Compare* Compl. at 27-28 (removal claim), *with id.* at 28-31 (monetary claim).[2] The claimed removal

[2] In its summary judgment brief, South Carolina for the first time claimed that § 2566(d)(1) also imposed a removal obligation. *See* ECF No. 10-1, at 32. As explained below, that new allegation does not change the adequate remedy analysis for South Carolina's request to compel payment. *See infra* Part I.C. And as explained in Defendants' prior briefing, that claim is not properly before the court for a number of reasons. *See* MSJ Opp., ECF No. 41-1, at 33-34.

obligation is triggered by a failure to reach the MOX production objective by *2014*, whereas the claimed payment obligation is triggered by a failure to reach the MOX production objective by *2016*. *Compare* 50 U.S.C. § 2566(c)(1), *with id.* § 2566(d)(1). The claimed removal obligation is violated by a failure to remove one ton of plutonium *before* January 1, 2016, whereas the claimed payment obligation is prolonged by a failure to remove one ton of plutonium *after* January 1, 2016. *Compare* 50 U.S.C. § 2566(c)(1), *with id.* § 2566(d)(1)(B). The claimed payment obligation can be limited by reaching the production objective after the trigger date, whereas the claimed removal obligation cannot. *Compare* 50 U.S.C. § 2566(d)(1)(A), *with id.* § 2566(c)(1). The claimed payment obligation is "subject to the availability of appropriations," whereas the claimed removal obligation is not. *See id.* The claimed removal obligation must be carried out "consistent with [NEPA]," while the claimed payment obligation contains no such limitation. *See id.* Because the elements are different, a violation of one does not necessarily entail a violation of the other; put differently, South Carolina's success or failure on one claim will not dictate its success or failure on the other. Even the claims' production-objective elements are decoupled, because the "MOX production objective" is a rate which, based on changes in the speed of processing, could be met as of 2014 but not 2016, or as of 2016 but not 2014. *See id.* § 2566(h)(1) (defining the "MOX production objective" as "an average rate").[3]

[3] This is not to say that the claims are unrelated for purposes of 28 U.S.C. § 1500, whose analysis occurs at a higher level of generality. *See, e.g.*, *Resource Investments, Inc. v. United States*, 785 F.3d 660, 666 (Fed. Cir. 2015) (explaining that the "inquiry under § 1500 looks to res judicata principles as of 1868," which included both "the act or contract test, and the evidence test") (citing *Aurora City v. West*, 74 U.S. (7 Wall.) 82 (1868)). The parties have agreed that the Court need not definitively resolve any questions about the operation of § 1500. *See* U.S. Supp. Br., ECF No. 63, at 6; Mot. for Rec., ECF No. 62-1, at 10 n.3, 26. The parties also agree that if the Court lacks jurisdiction over South Carolina's action to compel payment, it should dismiss that action without prejudice. *See* ECF No. 63, at 6-9; ECF No. 64, at 4-7.

South Carolina is thus seeking to compel two different "agency actions"—removal and payment—based on different legal provisions, with different elements, and potentially different outcomes.[4] The Court of Federal Claims is perfectly capable of compelling payment, as this Court has held and South Carolina has not challenged. *See* Opinion and Order, ECF No. 56, at 13-15. Such payment therefore does not constitute a "failure to act" "for which there is no other adequate remedy in a court." 5 U.S.C. §§ 551(13), 704. The Court correctly held that it is not reviewable under the APA.

By contrast, in the cases South Carolina relies on, plaintiffs challenged singular agency actions, where one APA order "compel[ling]" or "set[ting] aside" the action would necessarily result in both monetary and nonmonetary relief. For instance, in *Bowen*, the plaintiff only sought to set aside two disallowance orders. *Bowen v. Massachusetts*, 487 U.S. 879, 887-88 (1988); *see* 5 U.S.C. § 551(13) (defining "agency action" to include "an agency . . . order . . . or denial thereof"). There was no separate claim for money. The district court had "simply 'reversed' the Board's [disallowance] decision[s]" without ordering "that any payment be made." *Id.* at 888. Any separate claim for money brought in the CFC would have had to challenge the exact same disallowance decisions. Thus, the disallowance decision was the only "agency action" for the court to "set aside," 5 U.S.C. § 706(2), and the only payment that could result was tied to setting aside that decision. The plaintiff's entitlements to monetary and nonmonetary relief thus raised *identical* legal questions—*i.e.*, whether the disallowance order was "unlawful," *id.* § 706(2)—

[4] Needless to say, South Carolina is wrong to suggest that Defendants "do not dispute" that only one agency action is being challenged, ECF No. 62-1, at 10, or that the Court has somehow already decided "that the same agency action is at issue for all of the State's requests for relief." *Id.* at 18. All Defendants or the Court has done is acknowledge that both claims arise out of delays in the MOX program. To acknowledge that relationship is not to say that those claims seek to compel the same agency action.

whose answers had to be the same. Here, by contrast, South Carolina's monetary and removal claims challenge different agency inactions, rest on different statutory provisions, require different legal analyses, and depend, at least in part, on different facts; the two challenges' outcomes are independent of each other.[5]

B. South Carolina's Right to Seek Removal in District Court Does Not Create the Right to Seek Payment in District Court

South Carolina may not lump together, for purposes of § 704, its request to compel payment with its request to compel removal. In order to "compel" an "agency action" under § 706(1), a plaintiff must establish that the same "agency action" is "reviewable" under § 704. And § 704 only provides for review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. It does not allow for review of *non*-final agency action, or review of agency action for which there *is* an adequate remedy elsewhere, simply because the plaintiff has *also* challenged a different agency action that may meet § 704's criteria. That kind of bootstrapping would contravene the basic principle of federal adjudication that jurisdiction and a cause of action must exist for each challenge individually.

[5] Other cases invoked by South Carolina are of no help. In *Syngenta Crop Protection, Inc. v. EPA*, 444 F. Supp. 2d 435 (M.D.N.C. 2006) (cited Mot. for Rec. at 9), the court concluded that adequate remedies existed for a non-APA mandamus claim, *id.* at 452, and that declaratory relief claims can proceed despite the existence of adequate remedies, *id.* at 453. In *Delaware Div. of Health & Soc. Servs. v. HHS*, 665 F. Supp. 1104 (D. Del. 1987) (cited Mot. for Rec. at 13 n.6, 19 n.6), the court concluded the exact same thing as *Bowen* would hold a year later: that it could review a single Medicaid disallowance decision and "set aside" that decision if necessary. *Id.* at 1114-18; *see also id.* at 1120 ("[T]he Board's [disallowance] opinion must be reversed."). In *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (cited Mot. for Rec. at 16, 18), the Fourth Circuit held that plaintiffs bringing a pre-enforcement challenge to the Affordable Care Act's individual mandate did not have an adequate remedy in a tax refund action, because "plaintiffs are not seeking a tax refund; they ask for no monetary relief." *Id.* at 366. In *National Center for Manufacturing Sciences v. United States*, 114 F.3d 196 (Fed. Cir. 1997), the requested relief would have required the Air Force "to expand the existing contractual relationship or to create a new one," *id.* at 202, unlike here, where the requested relief would only compel payment. In *Hammond v. United States*, 2014 WL 1277892 (D.S.C. Mar. 27, 2014), no adequate remedy defense had been raised, and the Court did not discuss § 704.

Courts have recognized this principle in a number of contexts. In the context of § 704's other requirement—that a plaintiff challenge "final agency action"—courts routinely dismiss challenges to non-final agency action despite the presence of challenges to final agency action in the same lawsuit, even when those challenges are factually related. For example, in *Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632 (6th Cir. 2004) (Sutton, J.), a plaintiff brake manufacturer challenged an agency's letter concluding that the manufacturer's brakes did not meet certain safety standards. Despite the fact that all three actions were closely related, the Sixth Circuit separately analyzed the finality of the agency's (1) interpretation of the safety standard, (2) conclusion that the plaintiff's brakes failed to satisfy it, and (3) decision to issue the letter. *See id.* at 638. As the Sixth Circuit concluded, § 704 required a close look at which discrete actions the plaintiff was seeking to set aside. The court concluded that the third action was "final" for § 704 purposes, but that the first two were not. *Id.* at 644 (interpretation), 640 (conclusion), 647 (decision). It therefore dismissed the first two while proceeding to the merits on the third. The plaintiff's right to challenge a final agency action did not create the right to challenge a related non-final agency action.

The same principle is a hallmark of Article III standing. Like reviewability under the APA, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 (1996). Instead "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *In re MI Windows & Doors, Inc.*, 2012 WL 5384922, at *2 (D.S.C. Nov. 1, 2012) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). In both contexts, this principle prevents a plaintiff from "demonstrat[ing] harm for one particular inadequacy," and then, by merit of that one inadequacy, seeking "to remedy *all* inadequacies." *Lewis*, 518 U.S. at 357. In other words, South Carolina's right to seek an order compelling removal does not give it the right to seek an order

compelling payment. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.").

Allowing South Carolina to bootstrap its payment claim into federal court on the coattails of its removal claim would transform the APA's reviewability limits into mere pleading requirements. If a plaintiff suing for money could avoid the limits of § 704 simply by pleading additional, nonmonetary claims, then plaintiffs could always avoid the "adequate remedy" bar: Every plaintiff seeking payment under a money-mandating statute could simply allege that the statute *also* required some form of nonmonetary relief, and thereby create district-court jurisdiction over its monetary claim. Courts have repeatedly rejected attempts to evade the CFC through such artful pleading, as this Court has recognized. *See* Opinion at 12; *Consol. Edison Co. of N.Y. v. United States*, 247 F.3d 1378, 1385 (Fed. Cir. 2001).

South Carolina's claim to compel removal under § 2566(d)(1)(B) illustrates this danger perfectly. That claim plainly has no merit: no fair reading of the statutory text could impose a mandatory yearly removal obligation under (d)(1)(B), any more than it could impose a yearly obligation to achieve the MOX production objective under (d)(1)(A); South Carolina has offered zero extra-textual support for its reading; and South Carolina did not even allude to such a claim in its Complaint. *See* MSJ Opp., ECF No. 41-1, 33-34. And yet, under South Carolina's theory, its simply having *pled* a § 2566(d)(1)(B) removal challenge—the claim's mere *existence*—would be enough to create APA reviewability for its § 2566(d)(1) payment challenge. *See* Mot. for Rec., ECF No. 62-1, at 11, 14; MSJ Reply, ECF No. 42, at 11-12. If that were the law, the plaintiffs in *Suburban*, *Consolidated Edison*, *Kanemoto*, *ARRA Energy*, and *Brazos* could all have defeated the

APA's adequate remedy limitation simply by pleading a nonmonetary challenge, no matter how implausible.[6] *See* Mot. for Rec. 7-8 (arguing that those cases only involved adequate remedies because the CFC could remedy "all" pleaded wrongs and resolve "every" alleged legal issue).

This kind of pleading end-run is not available precisely because requests to "compel" different "agency action" entail separate § 704 analyses, as South Carolina admits. *See* ECF No. 62-1, at 8 (Court must "look[] to the 'agency action' that is at issue . . . to determine whether the CFC could provide the State an 'adequate remedy' for purposes of Section 704 of the APA."). As with the § 2566(c)(1) removal claim, any § 2566(d)(1)(B) removal claim would challenge a different "failure to act," and thus seek to "compel" a separate agency action—removal—than the monetary claim. 5 U.S.C. §§ 551(13), 706(1). Thus, even if a claim for removal under § 2566(d)(1)(B) were adequately pled—which it was not, *see* ECF No. 41-1, 33-34—it would not impact the adequate remedy analysis for the payment claim. The CFC can provide an adequate remedy for the second challenge, even if this Court decides to entertain the first.

C. South Carolina's Concerns for Judicial Economy Are Misplaced

South Carolina argues that concerns for judicial economy should militate against litigating its monetary claim in the CFC. *See* Mot. for Rec., ECF No. 62-1, at 16-23. But that is precisely

[6] For example, the plaintiff in *Suburban* could have alleged any number of nonmonetary violations of the statute that allegedly mandated payment. *See Suburban Mortgage Assoc., Inc. v. HUD*, 480 F.3d 1116, 1119 (Fed. Cir. 2007) (describing claim under 12 U.S.C. § 1715w); 12 U.S.C. § 1715w(d)(3), (g), (h), (j) ("shall" duties not involving payment). The plaintiff in *Consolidated Edison*, who challenged certain fees used to fund a nuclear decontamination project, could have added challenges to the conduct of that project, which the CFC could not have adjudicated. *See Consol. Edison*, 247 F.3d at 1380-81. The plaintiff in *Kanemoto*, who sought payment out of a trust fund, could have added a claim challenging the administration of that fund under the same statutory scheme. *See Kanemoto v. Reno*, 41 F.3d 641 (Fed. Cir. 1994); 50 U.S.C. § 4214 (imposing "shall" duties on the administration of the trust fund). The plausibility of these claims would not matter, under South Carolina's theory; the mere fact that they were pled and could not be resolved by the CFC would have defeated the adequate remedy defense, even if they sought to compel actions other than payment.

the result Congress has mandated by limiting the agency actions plaintiffs can challenge and the relief they can seek through the APA. *See* 5 U.S.C. §§ 702, 704. The "duplication" Congress sought to avoid through § 704 was the duplication of avenues for judicial review, *see Darby v. Cisneros*, 509 U.S. 137, 146 (1993), not the bifurcation of lawsuits challenging multiple agency actions. In fact, the very existence of 28 U.S.C. § 1500 *assumes* that some factually related lawsuits will have to be brought in two separate courts. *See, e.g., United States v. Tohono O'Odham Nation*, 563 U.S. 307, 311-12 (2011) (explaining the origins of § 1500); *Resource Investments, Inc. v. United States*, 785 F.3d 660, 663 (Fed. Cir. 2015) (describing parallel APA and CFC actions stemming from the same permit denial). Congress created the Court of Federal Claims "to ensure that a central judicial body adjudicates most claims against the United States Treasury," *Kidwell*, 56 F.3d at 284 (describing this "interest in uniformity"), a purpose that frequently overrides a plaintiff's desire to keep multiple challenges in the same court. That legislative judgment is not subject to modification here.

Nor does it implicate the APA's presumption in favor of judicial review, as South Carolina suggests. *See* ECF No. 62-1, at 17. The presumption it invokes only applies when "no specific method of judicial review is prescribed by statute." *Id.* (quotations omitted). Here, judicial review in the CFC is prescribed by statute. *See* 28 U.S.C. § 1491(a)(1). It is true that § 1500 can sometimes force a plaintiff to choose between different remedies, but that, too, is a policy judgment Congress is entitled to make. *See Keene Corp. v. United States*, 508 U.S. 200, 217-18 (1993) ("We enjoy no liberty to add an exception to remove apparent hardship.") (quotes and alterations omitted); *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924) (collecting cases);

Ministerio Roca Solida v. United States, 778 F.3d 1351, 1357 (Fed. Cir. 2015) ("[I]t is irrelevant that" the operation of § 1500 "would work a hardship in the form of incomplete relief.").

South Carolina's final judicial economy argument is that it would be inefficient for this Court and the CFC to resolve similar factual and legal issues. *See* Mot. for Rec. 19 ("the CFC likely would be required to interpret subsection (c)"); *id.* at 19 n.12 (noting the "interplay" between different aspects of the MOX program); *id.* at 22 (suggesting that both courts would have to answer "the same type of questions—even identical questions"). That contention is wrong both in principle and in practice. It is wrong in principle because the limitations on APA adjudication contained in § 702 and § 704 do not allow for exceptions where another court will have to resolve similar issues. Again, § 1500 is premised on that very situation. *See also Trusted Integration*, 659 F.3d at 1167-68 (allowing closely related claims to go forward simultaneously in CFC and district court). The contention is wrong in practice because this Court and the CFC will have to answer wholly separate legal questions and partially separate factual questions—and most of the factual issues are undisputed.[7] *See supra* pages 7-8 (describing divergent legal and factual analyses); MSJ Opp., ECF No. 41-1, at ix-xi (undisputed facts); U.S. Supp. Br., ECF No. 63, at 7 n.3.[8]

[7] In its Opinion, the Court expressed concern that, years from now, both this Court and the CFC could have to decide whether one removed metric ton of defense plutonium satisfied subsection (c)(1), subsection (d)(1), or both. Opinion at 29. But that concern could not impact a CFC lawsuit filed anytime soon—it is undisputed that Defendants have not removed one metric ton since January 1, 2016—nor is this issue likely *ever* to arise in the CFC, because § 2566(d)(1)(B)'s one-ton de-trigger ends in 2021. *See* Gunter Decl., ECF No. 38-2, at 7-8 ¶ 18 (explaining removal timeline). At any rate, this possibility obviously cannot create subject-matter jurisdiction where § 702 and § 704 withhold it, so it is not relevant to South Carolina's reconsideration motion.

[8] South Carolina advances a few additional arguments in the "judicial economy" portion of its brief. First, it points out that 50 U.S.C. § 2566(d)(3) contemplates an injunction that might impede either processing or removal. *See* Mot. for Rec. at 22. But § 2566(d)(3) merely tolls deadlines; it does not purport to alter the normal APA standards for judicial review. There is nothing "inconsistent" or "inefficient" about the CFC being the one to assess whether another court's injunction has indeed prevented processing or removal.

II. In Any Case, There Is No Waiver of Sovereign Immunity for the Monetary Claim

Even if § 704 did not bar the monetary claim, § 702 does. As the Federal Circuit has explained, "the application of any one" of § 702's limitations "is enough to deny a district court jurisdiction under the APA." *Suburban Mortgage Assoc., Inc. v. HUD*, 480 F.3d 1116, 1126 (Fed. Cir. 2007). And even if the Court does not apply "a claim-specific analysis to determine" reviewability under § 704, ECF No. 62-1, at 3, South Carolina rightly concedes that the Court must conduct a "claim-by-claim analysis" to assess whether § 702 provides a waiver of sovereign immunity, *id.* at 5. The Court has held the same. *See* Order and Opinion, at 10 ("As a preliminary matter, '[t]o resolve the sovereign immunity and jurisdiction questions, [the court] must consider [the State]'s claims individually.'") (quoting *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 609 (D.C. Cir. 1992)). This claim-specific imperative stems from the text of the APA's sovereign immunity waiver, which limits the "relief" that a plaintiff can seek through the APA. 5 U.S.C. § 702; *compare id.* § 704 (limiting the "agency action" that is "reviewable" under the APA).

Section 702 limits the relief available under the APA in two ways: district courts may not hear claims seeking "money damages," and they may not hear claims for which another statute

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Mot. for Rec. at 23. *Cf. Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002) (suit by South Carolina to enjoin transport of defense plutonium to SRS filed just before § 2566's enactment).

Second, South Carolina argues that it can assert a monetary claim under 28 U.S.C. § 1355(a), without relying on the APA. Mot. for Rec. at 23. But that statute does not "constitute a waiver of the United States's sovereign immunity." *Coastal Rehab. Servs., P.A. v. Cooper*, 255 F. Supp. 2d 556, 561 (D.S.C. 2003); *see Ousley v. Gritis*, 1998 WL 796732, at *2 (D. Nev. Oct. 6, 1998) (collecting cases). Nor does it provide a cause of action to "enforce" anything against the federal government. "The *Government* 'enforces' fines, penalties, or forfeitures against a private citizen." *Elliot v. United States*, 96 Fed. Cl. 666, 671 (2011) (emphasis added). The statute only provides a cause of action for lawsuits against the federal government that seek "'recovery' . . . of a forfeiture or monies taken in the form of fines or penalties." *Id.* If it were otherwise, plaintiffs could circumvent the APA's limitations simply by styling claims under money-mandating statutes as claims seeking fines or penalties.

"expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Both of these limits bar South Carolina's monetary claim regardless of the § 704 analysis.

1. As an initial matter, the Tucker Act is a statute that "expressly or impliedly forbids the relief which is sought" in South Carolina's monetary claim. *Id.* § 702. The Supreme Court has explained that "[u]nder the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over nontort claims against the Government for greater than $10,000." *Clinton v. Goldsmith*, 526 U.S. 529, 539 n.13 (1999); *see Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 686 (2006) (describing "the statutory rule that claims brought against the United States and exceeding $10,000 must originate in the Court of Federal Claims"). The Fourth Circuit has likewise held that CFC jurisdiction for monetary claims over $10,000 is exclusive. *See Portsmouth Redevelopment & Housing Auth. v. Pierce*, 706 F.2d 471, 473 (4th Cir. 1983) ("The Tucker Act establishes three conditions which, if satisfied, vest subject matter jurisdiction exclusively in the Claims Court. The action must be against the United States, seek monetary relief in excess of $10,000, and be founded upon the Constitution, federal statute, executive regulation, or government contract."). District courts routinely dismiss monetary claims for this reason. *See, e.g.*, *Hoffler v. Hagel*, 122 F. Supp. 3d 438, 443 (E.D.N.C. 2015) ("Under the Tucker Act, the Claims Court has exclusive jurisdiction for nontort monetary claims for more than $10,000 against the United States."); *Alfred v. Mabus*, 2015 WL 3885730, at *3 n.2 (E.D.N.C. June 23, 2015) (same); *Deemer v. Bd. of Correction of Naval Records*, 2015 WL 4035236, at *2 (D. Colo. June 30, 2015) (holding that Tucker Act impliedly forbade APA claim for money premised on statute); *Fulbright v. McHugh*, 67 F. Supp. 3d 81, 92 (D.D.C. 2014) ("[T]his Court lacks jurisdiction to hear claims that are in actuality Tucker Act claims in excess of $10,000 because Congress has vested exclusive jurisdiction for those

claims in the CFC."); *Walker v. United States*, 1998 WL 637360, at *6 (E.D. La. Sept. 16, 1998) ("It has uniformly been held that, for claims exceeding $10,000, the Tucker Act vests exclusive jurisdiction in the Court of Federal Claims.") (italics omitted).

These cases did not limit their exclusivity holdings to contract claims, as South Carolina suggests. *See* ECF No. 62-1, at 5-6 & n.1. In fact, the Fourth Circuit explicitly stated that claims "founded upon . . . federal statute[s]" fell within the Tucker Act's exclusive jurisdiction.[9] 706 F.2d at 473. Nor have courts limited their exclusivity holdings to claims for "money damages," as used in § 702. *See* ECF No. 62-1, at 6 n.1. The cases cited above describe the CFC's exclusive jurisdiction as covering "*monetary* claims" generally, and they make clear that it is the *Tucker Act*, not § 702 of the APA, that makes the CFC's jurisdiction exclusive. The rationale for such exclusivity—that the Little Tucker Act allows concurrent jurisdiction while the Tucker Act does not, *see Christopher Village v. United States*, 360 F.3d 1319, 1332 (Fed. Cir. 2004)—is not consistent with limiting exclusivity to claims for "money damages" as that term is used in the APA. The scope of the Little Tucker Act's concurrent jurisdiction, which implies a lack of equivalent concurrent jurisdiction under the Tucker Act, clearly extends past contract claims or "money damages" as used in § 702. *See* 28 U.S.C. § 1346(a)(2) (granting the district courts concurrent jurisdiction over monetary claims for less than $10,000 "founded [] upon . . . any Act of Congress").

To be sure, courts occasionally use the phrase "money damages" to describe the CFC's exclusive jurisdiction. But in this context, that phrase does not refer to the term of art in § 702 of

[9] It is true that the CFC also has exclusive jurisdiction over contract claims, but that exclusivity goes farther, because it "impliedly forbids" even equitable claims against the government founded on contracts. *See, e.g., Wright v. Foreign Svc. Grievance Bd.*, 503 F. Supp. 3d 163, 180 (D.D.C. 2007).

the APA, because when courts determine whether a claim falls within the CFC's exclusive jurisdiction, they do not analyze whether the claim seeks specific or substitute relief—the "money damages" inquiry for § 702 under *Bowen*, 487 U.S. at 895; rather, they simply ask whether the claim primarily seeks money or something other than money. For instance, in *Tootle v. Secretary of Navy*, 446 F.3d 167 (D.C. Cir. 2006) (cited Opinion at 6), the D.C. Circuit described the CFC's exclusive jurisdiction as extending to claims for "non-tort money damages in excess of $10,000." *Id.* at 169. But in deciding whether the claim satisfied that description, the court's analysis turned solely on the question of whether the requested relief was "in essence" monetary or non-monetary. *See id.* at 169, 173-74. It did not cite *Bowen* or any of its progeny, discuss any part of *Bowen*'s analysis, or even mention § 702. Indeed, other decisions use "money damages" and "monetary relief" interchangeably, all the while evaluating their existence without regard to *Bowen*'s elaborate "money damages" inquiry. *Compare, e.g.*, *Kidwell v. Dep't of Army*, 56 F.3d 279, 284 (D.C. Cir. 1995) ("[A] claim is subject to the Tucker Act and its jurisdictional consequences if, in whole or in part, it explicitly or 'in essence' seeks more than $10,000 in *monetary relief* from the federal government."), *with id.* (discussing "complaints which 'at their essence' seek *money damages* from the government") (emphasis added). *See also Tootle*, 446 F.3d at 174 ("[T]he jurisdiction of the court turns on whether the complaint seeks *monetary* relief.") (emphasis added).

Finally, South Carolina seeks to distinguish the exclusivity cases the Court relied on by arguing that they did not involve "multiple requests for declaratory and injunctive relief" in addition to monetary claims. ECF No. 62-1, at 6 n.1. This argument is answered by South Carolina's own brief, which explains that a "claim-by-claim analysis is needed" where the CFC has exclusive jurisdiction, because if a claim falls within that jurisdiction, "it must be heard in the

CFC and cannot be heard in a district court under the APA." *Id.* at 5. In other words, if sovereign immunity bars a request for relief, it does not matter that a plaintiff pleads *other* requests for relief not barred by sovereign immunity. *See supra* Part I.B. The Court still lacks jurisdiction over the claim that lacks an immunity waiver.

2. In any event, South Carolina's monetary claim *is* one for "money damages" within the meaning of § 702. As Defendants explained in their Motion to Dismiss, South Carolina does not seek a payment to which it is categorically entitled no matter what—a payment which the statute's purpose is to provide—but rather a payment that is a substitute for other, primary goals. ECF No. 17, at 24; ECF No. 33, at 15-17; *see* Opinion at 13 ("§ 2566 conditions payment on certain contingent events"). Such a payment is properly viewed as substitute, not specific, relief.

South Carolina's Motion for Reconsideration underscores the compensatory nature of this payment. The State claims that the payment of money is not "the very thing to which [it] was entitled" all along, *Bowen*, 487 U.S. at 895 (quotes omitted), but rather a "remedy" for a different set of inactions—"failing to timely remove or process the defense plutonium." Mot. for Rec. at 11; *see id.* 13 n.6 (describing its request for money as a "remed[y] for the Federal Defendants' . . . failure to timely remove or process plutonium"). By contrast, the specific monetary relief described in *Bowen*—based on "Federal grant-in-aid programs" and contracts involving "a promise to pay money," 487 U.S. at 895, 900—involved categorical payment promises, not remedies for failures to reach other goals. Indeed, focusing on statutory "shall pay" obligations specifically, the Court distinguished between "attempt[s] to compensate . . . for past injuries" and payments "to subsidize future state expenditures." *Id.* at 905 n.42. The economic and impact assistance payment clearly falls on the former side of that line. *See also* 5 U.S.C. § 5596(b)(1)

(Back Pay Act) (retroactive payment if contingencies occur); 37 U.S.C. § 242, *repealed*, 76 Stat. 498 (1962)) (retroactive payment if contingencies occur); 50 U.S.C. § 2566(d)(1) (retroactive payment if contingencies occur).

South Carolina's primary argument to the contrary is that the payment amount is not calculated based on the actual "harm, damage, and injury suffered by the State." Mot. for Rec. at 9 n.2. But such harm would be nearly impossible to calculate. Contracts frequently provide liquidated damages in exactly that situation. *See* 24 Williston on Contracts § 65:3 (4th Ed. 2016) ("[T]he fundamental purpose of a valid liquidated damages provision is to provide a reasonable measure of compensation [where] . . . the damages are indeterminable or will be otherwise difficult to prove."). Liquidated damages regularly accrue daily and come with caps on the total amount, but those features do not render them any less compensatory. *See, e.g., East Coast Repair & Fabrication, LLC v. United States*, 2016 WL 422491, at *61 n.96 (E.D. Va. Aug. 9, 2016) ("The Contract provided for liquidated damages for late delivery at the daily rate of $5,650, but included a 'cap' on the maximum permissible liquidated damages of ten percent of the original Contract price."); *Comstock Potomac Yard, L.C. v. Balfour Beatty Constr., LLC*, 694 F. Supp. 2d 468, 488 (E.D. Va. 2010) ("cap of $12,000 in liquidated damages per day"); *Old Dominion Elec. Co-op v. Ragnar Benson*, 2006 WL 2854444, at *2 (E.D. Va. Aug. 4, 2006) (describing "the daily amount of and the cap on liquidated damages"); 29 U.S.C. § 1132(g)(2)(C)(ii) (capping liquidated damages under ERISA plans at twenty percent of unpaid contributions).

Finally, South Carolina argues that because legislators have referred to the assistance payment as a "fine" or "penalty," it cannot be compensatory. Mot. for Rec. at 9 n.2. But the enacted text of the statute overrides isolated statements by individual legislators. *See Ratzlaf v.*

United States, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). And the enacted text makes clear that the payment is for South Carolina's benefit: It is called an "assistance payment," and it is explicitly tied to the "impact" of plutonium remaining at SRS. The payment South Carolina seeks is substitute relief, and therefore constitutes "money damages" under § 702. Even if the CFC could not provide an adequate remedy, and even if the Tucker Act did not bar jurisdiction, there would still be no waiver of sovereign immunity under the APA.

III. South Carolina's Monetary Claim Does Not Fit Any Exception to the Need for a Waiver of Sovereign Immunity

South Carolina's final argument is that the Court "failed to identify" the *Larson-Dugan* exception to sovereign immunity, which allows certain suits to restrain federal officials from *ultra vires* or unconstitutional activity to proceed without a waiver of sovereign immunity. Mot. for Rec. at 24-25. This argument bears little response. The monetary claim seeks payment of $100 million from the government treasury. That is the paradigm of a suit against the sovereign, not an individual official. *See, e.g.*, *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 277 (1997) ("We held that when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.") (quotes omitted); *Portsmouth Redevelopment & Housing Auth. v. Pierce*, 706 F.2d 471, 473 (4th Cir. 1983) (holding that a claim was against the United States, not an official, because "any monetary judgment recovered in this case would expend itself on the public treasury"). The *Larson-Dugan* exception does not overcome this basic rule. *See, e.g.*, *Danos v. Jones*, 652 F.3d 577, 583 (5th Cir. 2011) ("Even where the *Larson* exception to sovereign immunity applies, however, it does not extend to

monetary relief against the United States."); *Clark v. Library of Congress*, 750 F.2d 89, 104 (D.C. Cir. 1984) (categorically rejecting the use of the *Larson-Dugan* exception for monetary claims, explaining that "[e]ven if the Librarian's actions were both *ultra vires* and unconstitutional, sovereign immunity would still bar Clark's claims for monetary relief"). In *Larson* itself, the Supreme Court made clear that its exception was not available "if the relief requested" would require "the disposition of unquestionably sovereign property." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

CONCLUSION

For the foregoing reasons, South Carolina's Motion for Reconsideration should be denied.

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Respectfully submitted,

BENJAMIN C. MIZER
Assistant Attorney General
Civil Division

ERIC WOMACK
Assistant Director
Federal Programs Branch

BETH DRAKE
Acting United States Attorney

By: */s/ Barbara M. Bowens*
BARBARA M. BOWENS (#4004)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Telephone: (803) 929-3000

RAPHAEL O. GOMEZ
(D.C. Bar #305540)
Senior Trial Counsel
U.S. Department of Justice, Civil Division
Federal Programs Branch
P.O. Box 883

Washington, D.C. 20044
Telephone: (202) 514-1318
Facsimile: (202) 616-8460
raphael.gomez@usdoj.gov

SPENCER E. AMDUR
(Pennsylvania Bar #322007)
Trial Attorney
U.S. Department of Justice, Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 616-7420
Facsimile: (202) 616-8460
spencer.amdur@usdoj.gov

Attorneys for Defendants