IN THE UNITED STATES DISTRICT COURT
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.	)	Civil Action No. 1:16-00391-JMC

THE STATE OF SOUTH CAROLINA'S

REPLY IN SUPPORT

OF ITS MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Regulations

Other Authorities

ARGUMENT

At its base, the Federal Defendants' argument is that the State of South Carolina cannot enforce the statutory relief provided by Congress to the State for the Federal Defendants knowing and willful decisions not to fulfill the intent of Section 2566. They seek to force the State to choose between collecting the penalties owed and obtaining removal of defense plutonium from the State, both of which are explicitly required by Congress in Section 2566. To reiterate a point the State has already made, that position of the Federal Defendants, and the conclusion in the Order, that the State may need to abandon one of its two rights in order to have a chance of enforcing the other, constitutes a paradigm instance of a situation in which the district court must retain "jurisdiction [over the whole case] to award complete relief." *Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988). The purpose of Section 2566 is to protect the State from the exact conduct that the Federal Defendants engaged in, and now the Federal Defendants seek this Court's imprimatur for the conduct undercutting the statutory protections afforded the State.

I. THE COURT OF FEDERAL CLAIMS CANNOT PROVIDE AN ADEQUATE REMEDY FOR THE LEGAL WRONGS SUFFERED BY THE STATE BECAUSE OF THE FEDERAL DEFENDANTS' AGENCY ACTION.

The State seeks reconsideration and modification of this Court's October 31, 2016, Order (ECF No. 56) on the basis that the Order erred by applying the "adequate remedy" analysis under Section 704 of the APA on a claim-by-claim basis rather than focusing on the "agency action" at issue in the case. Mem. in Supp. of Mot. for Recons. (ECF No. 62-1) at 3-16. Had this Court applied the appropriate analysis focused on the "agency action" at issue, this Court would have determined it has jurisdiction over all of the State's requests for relief because the Court of Federal Claims cannot provide an adequate remedy for all of the legal wrongs suffered by the State

resulting from the Federal Defendants' "agency action," *i.e.*, their failure to process or remove defense plutonium. *Id.*

In their Opposition (ECF No. 67), the Federal Defendants never dispute that this Court erred by applying a claim-specific adequate remedy analysis, nor do they do dispute that the analysis must focus on the "agency action" at issue in the case. Rather, and although previously arguing that payment of the penalties was only the "consequence" (and, in fact, the only consequence) for their failure to process or remove defense plutonium, the Federal Defendants now contend that "payment" is really one of two "agency actions," along with "removal," and that these two "agency actions" are separate and distinct from both each other and the processing of defense plutonium. Opp'n (ECF No. 67) at 4. However, this newfound position misconstrues what constitutes "agency action" for purposes of the APA and conflates the relief requested in this case with the "agency action" at issue. This contention also is based on two faulty premises: (1) that the State seeks money damages through an "order compelling Defendants to pay it $100 million;" and (2) the State is making a "programmatic attack" because the Federal Defendants' decision not to process or remove defense plutonium does not, according to the Federal Defendants, constitute "discrete action." Neither contention is true.

A. The "agency action" in this case subject to judicial review under the APA is the Federal Defendants' decision not to process or remove defense plutonium from the State of South Carolina.

Section 704 of the APA subjects final "agency action" for which there is no other adequate remedy to judicial review. "Agency action" is statutorily defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C.A. § 551 (emphasis added). As clarified by the Supreme Court, "agency action" "mark[s] the consummation of the agency's decisionmaking process," and is action "by which

rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (emphasis added).

Indisputably, the Federal Defendants' decision not to process or remove defense plutonium is "agency action" under the APA. This inaction by the Federal Defendants determined their obligation under subsection (c) of Section 2566 to remove one ton of defense plutonium from the State by January 1, 2016, and the failure to remove or process defense plutonium determined their obligation under subsection (d) to make the penalty payments. This same inaction also determined the Federal Defendants' obligation to remove an additional ton of defense plutonium from the State "each year" under subsection (d) of Section 2566. Accordingly, this inaction is the "determination" that has "direct and appreciable legal consequences" and, therefore, constitutes "agency action" under the APA. *Id*. at 1169, 520 U.S. at 178; Mem. in Supp. of Mot. for Recons. (ECF No. 62-1) at 9-13. And until their most recent submissions to the Court, the Federal Defendants agreed. *See* Fed'l Defs. Reply in Supp. of Mot. to Dismiss (ECF No. 33) at 7 ("Congress told the Department to process MOX by certain dates or begin removing defense plutonium from SRS, and instructed that if it did not, it would have to pay the assistance payment subject to appropriations."); Fed'l Defs. Mot. to Dismiss (ECF No. 17) at 15-17 (arguing that the Federal Defendants' failure to process or remove defense plutonium has a legal "consequence": the penalty payments).[1]

[1] The Order discussed the Federal Defendants' "broad-sweeping structural argument about the relationship between § 2566(c)(1) and § 2566(d)(1)" and recognized that the Federal Defendants' position was that the penalty payments were the consequence of the failure to process or remove defense plutonium. Order at 28-29 ("Reduced to essentials, Defendants argue that any failure to meet subsection (c)(1) requirement to remove one ton of plutonium from SRS by January 1, 2016 deadline only has one remedy: the economic and impact assistance payments outlined in subsection (d)(1) . . . In other words, Defendants contend that, under both (c)(1) and (d)(1), only one ton of plutonium need ever be removed and that such removal precludes enforcement of the economic and impact assistance payments."). The Federal Defendants now contend, however, that

Contrary to the Federal Defendants' new position, the "failure to pay," by itself, does not constitute "agency action" for purposes of the APA because this failure to act, by itself, determines no rights or obligations or has a legal consequence. *Bennett*, 520 U.S. at 178. It is only when the "failure to pay" is considered in conjunction with the Federal Defendants' decision not to process or remove the defense plutonium per the statute do legal consequences attach under subsection (d) of Section 2566. Simply put, for purposes of determining the relevant "agency action" under the APA, the "failure to pay" is intertwined with, and cannot be disconnected from, the failures to process or remove defense plutonium.

Accordingly, the "agency action" at issue in this case for all the State's requests for relief and that is subject to judicial review under the APA is the Federal Defendants' failure to process or remove defense plutonium. As requested by the State, pursuant to Section 706 of the APA, this Court should "decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms" of this failure to process or remove defense plutonium and then order whatever relief deemed appropriate as the result of such review. 5 U.S.C.A. § 706; Compl. ¶15, Prayer for Relief.

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the Court was wrong in its description of their position—although they provide no cogent explanation as to why. Fed'l Defs. Suppl. Br. (ECF No. 63) at 7-8 n.3. In fact, on the one hand, the Federal Defendants continue to contend that the only "judicially-enforceable remedy for delays in the MOX program lies in § 2566(d), not § 2566(c)," but, on the other hand, the Federal Defendants contend that the removal of the one ton of defense plutonium that is required to be removed pursuant to subsection (c) of Section 2566 would not "de-trigger" the penalty payments under subsection (d). *Id*. These contentions are completely at odds with each other. The only thing that is clear is that the Federal Defendants will say whatever it takes to avoid having to take responsibility for their failure to comply with federal law. This is most evident by their claim that "removal" and "payment" have nothing to do with each other, except, of course, if they can be construed together in a way that would deprive the State of full and adequate relief. *See* Opp'n (ECF No. 67) at 7-8 & n.3.

B. The State did not seek an "order compelling Defendants to pay it $100 million" in the Complaint as a claim in and of itself.

The primary basis for the Federal Defendants' contention that the "failure to pay,' by itself, constitutes "agency action" is the Federal Defendants' mistaken belief that the State sought an "order compelling payment of $100 million" in the Complaint. Opp'n (ECF No. 67) at 6. Because the State, according to the Federal Defendants, sought such an order, the Federal Defendants contend that the "failure to pay," by itself, must therefore be the "agency action" at issue. *Id*. But nowhere in the Complaint does the State request an "order compelling Defendants to pay it $100 million." And such an assertion by the Federal Defendants evidences a complete misunderstanding of the State's Complaint.

To be sure, the State certainly does not dispute that it requests an order to compel the Federal Defendants to comply with Section 2566 in the Complaint, along with all other forms of relief available to it and that could be provided by this Court under the APA. However, the Federal Defendants fail to understand what the State actually sought to compel. At the time of the filing the Complaint (*i.e.*, February 9, 2016, or the 40th day of 2016),[2] despite the requirements of Section 2566, the Federal Defendants had done nothing—they had not processed defense plutonium, had not removed any defense plutonium, and had not made any of the daily penalty payments. They also had not provided the State any reason for their lack of action. Accordingly, through the Complaint, the State sought judicial review under the APA of the Federal Defendants' inaction as

[2] This is the point in time in which jurisdiction is determined. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 ("It has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'") (*quoting Mollan v. Torrance*, 22 U.S. 537, 539 (1824)); *Curlett v. Madison Indus. Services Team, Ltd.*, 2012 WL 3257816, at *2 (D. Del. 2012) ("[T]he court assesses jurisdiction upon the factual reality at the outset of the case."). The fact that the entire $100 million subsequently became due because of the Federal Defendants' prolonged failure to process or remove defense plutonium does not mean the State only sought $100 million instead of, what it actually sought, compliance with Section 2566.

well as declaratory and injunctive relief to compel the Federal Defendants' compliance with Section 2566.[3] Compl. ¶¶13-15 (addressing APA and scope of review under Section 706 of APA available to the State); *see also* Compl. Prayer for Relief ¶A (seeking a declaration and order requiring the Federal Defendants to comply with Section 2566).

Importantly, and contrary to the Federal Defendants' repeated assertions, the State did not seek just "an order compelling Defendants to pay it $100 million" in the Complaint. Rather, the State recognized that, in accordance with the plain language of subsection (d) of Section 2566, the Federal Defendants could have complied with the statutory requirements for the remaining 60 days of the first 100 days of 2016 by either processing the defense plutonium, removing the defense plutonium, or making the daily penalty payments. 50 U.S.C.A. § 2566(d)(1); Compl., Prayer for Relief ¶C (mirroring language of subsection (d) of Section 2566 and requesting penalties only "until the earlier of the first 100 days of calendar year 2016 or the date the Defendants remove an additional one (1) metric ton of defense plutonium or defense plutonium materials from the State pursuant to Section 2566(d).").

The fundamental mistake the Federal Defendants make in their analysis is to treat the Complaint as only requesting payment of the $100 million in penalties and treat the failure to process or remove defense plutonium as mere "conditions" to payment or "elements" of the

[3] The Federal Defendants' assertion that "South Carolina has not asked the Court to 'set aside' any agency action in this case," Opp'n (ECF No. 67) at 4, is wrong. The State has expressly sought the full judicial review available under Section 706 of the APA, which, as set forth in the Complaint, involves the Court deciding all relevant questions of law, interpreting the applicable statutory provisions, and determining the meaning and applicability of the terms of agency action, and also, if necessary, "compel[ing] agency action unlawfully withheld" or "hold[ing] unlawful and set[ting] aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or in excess of statutory jurisdiction or authority, or without observance of procedure required by law." Compl. ¶15. In other words, the Federal Defendants' decision to do nothing to comply with the statute should be set aside as well as their erroneous conclusion that appropriations are not available for the payment of the penalties.

requested relief rather than as actions that could be taken by the Federal Defendants to comply with Section 2566. *See* Opp'n (ECF No. 67) at 7. But, as dictated by Congress and previously recognized by the Federal Defendants, the Federal Defendants had the choice to either process or remove the defense plutonium to avoid making the penalty payments (and still had that choice when the Complaint was filed).[4] *See* Fed'l Defs. Mot. to Dismiss (ECF No. 17) at 2 ("Congress left it to the agency to decide whether to remove defense plutonium or pay the financial penalty, in the event that the MOX production objective was not achieved by certain dates."), 23 ("As the text and structure of the statute make clear, and as the legislative history amply confirms, Congress left the choice the agency to remove defense plutonium or, failing that, make the specified assistance payment, subject to appropriations."). And the Federal Defendants can provide no explanation for why one "failure to act" is merely a condition or element of the State's requests for relief, but then the other "failures to act," by themselves, constitute "agency actions." The Federal Defendants cannot dictate what constitutes "agency action" for purposes of the APA just because they decided to do nothing at all.

In short, what constitutes the "agency action" at issue in a case is determined by looking at what action by a federal agency results in "legal consequences." Here, for all requests for relief, that "action" is the decision not to process or remove defense plutonium, and the "legal consequences" are the statutorily imposed obligations under subsections (c) and (d) of Section 2566 to remove defense plutonium and now—because the Federal Defendants effectively chose

[4] This Court cannot assume or take as a given that the Federal Defendants did not have such a choice and could only make the penalty payments, especially for purposes of deciding the legal issues of jurisdiction and sovereign immunity. By statute, and for over ten years, the Federal Defendants had the choice to process or remove the defense plutonium to avoid making the penalty payments. Mem. in Supp. of Mot. for Summ. J. (ECF No. 10-1) at 9-19. Whatever factual excuses they now claim for why they decided to do neither have nothing to do with this jurisdictional issue.

to—make the penalty payments. Because the Court of Federal Claims cannot address all of these legal consequences, it cannot provide an adequate remedy, and thus, this Court has jurisdiction for all the State's requests for relief.

C. The failure to process or remove defense plutonium is "discrete" agency action and the State is not making a "programmatic attack."

Another fatal flaw in the Federal Defendants' position is that it is based on their erroneous contention that the decision not to process or remove defense plutonium is not a "discrete" agency action, and thus, the State is making a "programmatic attack." Opp'n (ECF No. 67) at 6-7. However, "programmatic attacks" are made when there is no standard in which to judge the agency's action. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990). That is clearly not the case here because the standard is in the statute and is straightforward: the Federal Defendants must process the defense plutonium or remove the defense plutonium by certain deadlines. If they do not, the statute provides that they must immediately remove defense plutonium and make the penalty payments. The State is not seeking judicial review of the Federal Defendants' entire plutonium disposition program or any other program that is left to Congress. Rather, the State is seeking judicial review of their decision not to process or remove defense plutonium and then order the relief necessary to ensure their compliance with subsections (c) and (d) of Section 2566—in other words, order them to simply do <u>something</u> that complies with Section 2566. *Fed'l Trade Comm'n. v. Anderson*, 631 F.2d 741, 750, (D.C. Cir. 1979) ("A citizen may be entitled to a court ruling that an agency exercise its discretion even though the court cannot say which way the discretion is to be exercised.").

II. CONGRESS INTENDED FOR JUDICIAL REVIEW OF THE FEDERAL DEFENDANTS' ACTION RELATED TO SECTION 2566 BE CONDUCTED IN FEDERAL DISTRICT COURT.

Under the Federal Defendants' theory in support of their argument that the Court of Federal Claims provides the State an "adequate remedy," Congress purportedly intended that

> (1) South Carolina would have to go to two separate courts—the Court of Federal Claims and the district court—to obtain the full statutory relief provided by one statute, *i.e.*, Section 2566; and
>
> (2) South Carolina would never be able to simultaneously seek all of the relief provided by Section 2566.

Opp'n (ECF No. 67) at 13-15. That is, under the Federal Defendants' theory, even if South Carolina's reading of Section 2566 is correct, and one metric ton of defense plutonium should already have been removed from the State pursuant to subsection (c) and South Carolina should already have received the penalties pursuant to subsection (d), Congress intended for the State to have to choose which relief it wanted to seek—relief it should already have pursuant to a federal statute and that the Federal Defendants can avoid by simply ignoring their duty and doing nothing. However, Congress could not have, and did not, intend such an absurd result.[5]

It is indisputable that Section 2566 was enacted to protect South Carolina and provide the State with specific forms of relief should the Federal Defendants fail to process or remove defense plutonium. *See* Order at 23. There also is no dispute that the State is entitled to judicial review under the APA with respect to its requests for relief related to subsection (c) of Section

[5] Indeed, if the absurd result of Federal Defendants' position is accepted, then the Federal Defendants already have won a significant victory because they have apparently gained the power—once held by Congress and exercised by Congress through the enactment of Section 2566—to establish and dictate the Nation's defense plutonium disposition program and schedule. *But see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the law making power to the Congress alone…"); *Id.* at 940, 343 U.S. at 690 ("The function of making laws is peculiar to Congress, and the Executive cannot exercise that function to any degree.").

2566. *Id.* at 17-19. Congress, of course, was aware of the provisions of the APA and their applicability at the time it enacted Section 2566 (including the *Bowen* decision) and therefore was aware that any suit to enforce the Federal Defendants' obligations under subsection (c) would have to be brought in federal district court. *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law[.]"). Moreover, Congress included language in Section 2566 that specifically recognized that judicial review by a federal district court of actions and issues related to Section 2566 may be necessary. Mem. in Supp. of Mot. for Recons. (ECF No. 62-1) at 22-23 (discussing 50 U.S.C.A. § 2566(d)(3)). It therefore makes no sense that Congress would have intended for South Carolina to have to go to a different court to seek specific relief under subsection (d) of Section 2566 just because such specific relief may result in the payment of money, especially when the relief sought arises out of the same "agency action" under the APA for which the State's requests for relief related to subsection (c) are based. *See* discussion *supra* Section I.A.

The Federal Defendants' claims that this absurd result is dictated by the so-called "limits" of APA review or that the "existence of § 1500 assumes" such a result have no merit. Opp'n (ECF No. 67) at 13-15. The APA was designed to open up avenues for judicial review of agency action, not close them. *Citizens Committee for Hudson Val. v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970) ("There can be no question at this late date that Congress intended by the Administrative Procedure Act to assure comprehensive review of 'a broad spectrum of administrative actions'....") (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). This is exactly what the Supreme Court in *Bowen* held when it found that providing district courts with jurisdiction over claims for specific relief—even those that may result in the payment of money—was consistent with the APA's purpose of "remov[ing] obstacles to judicial review of agency action under subsequently enacted

statutes." *Bowen*, 487 U.S. at 904. To interpret the APA in a manner that would prevent a single court from reviewing a federal agency's noncompliance with a single statute is completely inconsistent with this purpose.

The Federal Defendants' position also is not supported by the "existence" of Section 1500, which relates only to the jurisdiction of the Court of Federal Claims and the purpose of which solely is to prevent the Federal government from having to face "redundant litigation." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011). The mere existence of Section 1500 does not mean that Congress intended for a plaintiff to have to go to two courts (and at different times) to obtain the full relief presently required by one statute, especially when that statute was enacted for the purpose of protecting that very plaintiff.

III. THE STATE IS NOT SEEKING MONEY DAMAGES, NOR ARE ITS REQUESTS FOR RELIEF FORBIDDEN BY THE TUCKER ACT.

A. This Court has jurisdiction over all specific monetary relief EXCEPT damages claims to compensate for past injuries, which are within the jurisdiction of the Court of Federal Claims.

The question of jurisdiction turns on the nature of the "economic and impact assistance" payment. Quite simply, if the Court determines the payment is anything other than compensation for past injuries, *i.e.*, a damage claim, then this Court has jurisdiction under the APA to award monetary relief as a consequence of enforcing the action to which the State is entitled under law.[6]

The Federal Defendants argue that whenever a claim against the Federal Government under statute or contract could result in payment over $10,000 that the Court of Federal Claims has

[6] Notably, the Fourth Circuit case cited by the Federal Defendants for the notion of all-encompassing jurisdiction at the Court of Federal Claims was decided "because this essentially is a contract claim against the federal government for monetary relief in excess of $10,000, the Claims Court has exclusive jurisdiction…." *Portsmouth Redevelopment & Hous. Auth. v. Pierce*, 706 F.2d 471, 475 (4th Cir. 1983) (emphasis added). With a contract claim, the monetary relief is damages to compensate for past injury and breach to make one whole.

exclusive jurisdiction. But this is not the law. Nor do the cases offered by the Federal Defendants support that proposition.[7] For example, the *Hoffler* case offered by the Federal Defendants to supposedly support such an idea actually held that the district court had jurisdiction over the claim under the APA. Opp'n (ECF No. 67) at 17; *Hoffler v. Hagel*, 122 F.Supp.3d 438 (E.D.N.C. 2015). Other cited cases are military discharge cases involving backpay,[8] which are specifically within the jurisdiction of the Court of Federal Claims, and ancillary claims such as reinstatement.

Instead, the Supreme Court has been clear—jurisdiction in the Court of Federal Claims under the Tucker Act, even under a statute, requires a recovery of damages. The Supreme Court has held that "a statute creating a Tucker Act right [must] be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003) (emphasis added); *United States v. Testan*, 424 U.S. 392, 398, 400 (1976) ("[T]he asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage

[7] As explained by the Federal Circuit, the "statutes that could adequately be enforced by suit under the Tucker Act … are statutes 'that provide compensation for specific instances of past injuries or labors….'" *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 201 (Fed. Cir. 1997) (quoting *Bowen*, 487 U.S. at 901 n.31).

[8] As the U.S. Department of Justice previously explained to the D.C. Circuit, backpay "has traditionally been understood at common law as 'damages,' not 'specific relief,'" for which the "classic remedy … is money damages…." *Tootle, Appellant, v. Sec'y of the Navy, Appellee*, 2005 WL 3699858 at 26-27 (Appellee Br.) (D.C. Cir. 2005) (quoting *Hubbard v. Adm'r, U.S. Envtl. Prot. Agency*, 982 F.2d 531 (D.C. Cir. 1992) (*en banc*)). The Back Pay Act, 5 U.S.C.A. § 5596, is in turn enforceable under the Tucker Act in the Court of Federal Claims when the amount in controversy exceeds $10,000.

Indeed, the Federal Defendants reliance on the *Tootle* opinion is puzzling. A servicemember case, *Tootle* held that the district court had jurisdiction over the claim. Moreover, the Federal Defendants' state that the *Tootle* court paid no attention to *Bowen* or the APA. Opp'n (ECF No. 67) at 19. However, a review of the briefing—including the Federal Government's own brief—reveals that *Bowen* and the limits of the Court of Federal Claims' jurisdiction under the Tucker Act were central to the dispute.

sustained.'") (emphasis added) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

The Federal Circuit has undertaken an analysis in delineating the jurisdictional reach of damages (Court of Federal Claims) versus monetary relief (district court), and its analysis leads to the inevitable conclusion that the State's Complaint falls squarely under the APA and this Court's jurisdiction. *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196 (Fed. Cir. 1997).

The Federal Circuit looked at *Bowen* and its prior decision in *Katz v. Cisneros*, 16 F.3d 1204, 1207-09 (Fed. Cir. 1994), in which it similarly held that a developer's suit could be brought in district court because the plaintiff was seeking "payments to which it alleges it is entitled pursuant to federal statute and regulations; it [did] not seek money as compensation for a loss suffered." *See also Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed. Cir. 1993) (district court had jurisdiction over matter to order payment of money when it is money to which a party is entitled under a statute). As the Federal Court noted in *Alaska Airlines*, the touchstone for the analysis is whether the "statute[] establish[es] legal entitlement to money," and if it does then APA jurisdiction in the district court is appropriate. 8 F.3d at 797. In *National Center for Manufacturing*, the Federal Circuit affirmed that if a party is "seeking funds to which it claims it is entitled under a statute; it is not seeking money in compensation for losses that it has suffered or will suffer as a result of the withholding of those funds" and APA jurisdiction in the district court is proper. *Nat'l Ctr. for Mfg. Scis.*, 114 F.3d at 200.

In this case, Section 2566, based on the Federal Defendants own decisions and choices, entitles the State to the penalty payments for the Federal Defendants' failure to remove or process defense plutonium in accordance with the statutory deadlines. The statutory entitlement to monetary relief is enforceable under the APA in this Court.

B. The payments under Section 2566 are penalties and fines rather than liquidated damages.

Congress enacted Section 2566 to protect the State from becoming the dumping ground for defense plutonium. The fines and penalties were meant to incentivize compliance, and the Federal Defendants now seek to escape accountability and the consequences for failing to remove or process the defense plutonium.

The fundamental premise underlying the entirety of Section II of the Opposition is that the "economic and assistance payment" which the Federal Defendants owe the State is somehow a "damages" claim. If this Court finds the statutory penalty is a "damage," then since damages are excluded from APA jurisdiction and within Tucker Act jurisdiction, a portion of this case should be filed with the Court of Federal Claims. However, if this Court determines that the "economic and assistance payment" is anything other than a "damage," such as a fine or penalty or specific monetary relief (*i.e.*, entitled to payment by statute, as opposed to a compensation for injury, *i.e.*, a damage) as a consequence of the Federal Defendants' actions or inactions under Section 2566, then this Court has jurisdiction to require the Federal Defendants to comply with Section 2566.

The term "economic and impact assistance" is unique to this statute and the State's research (and, apparently, the Federal Defendants' as well) reveals no other use of that term in the federal code or regulations. Because the term is unique and Section 2566 does not utilize the words "fine,"[9]

[9] Black's Law Dictionary defines a "fine" as including a "civil penalty payable to the public treasury." Black's Law Dictionary, FINE (10th ed. 2014).

"penalty,"[10] "[liquidated] damage,"[11] or "compensation,"[12] it is susceptible to multiple interpretations. In this case, the State offers an interpretation that the payment is in the nature of a fine and penalty. The Federal Defendants, on the other hand, argue the payment is compensation for damages and the sum certain a liquidated damage. Opp'n (ECF No. 67) at 21.

The best contextual argument is that once the Federal Defendants fail to take certain actions, such as removing or processing the defense plutonium, the Federal Defendants are obligated to pay $1 million per day for each day the defense plutonium is not removed or processed (up to 100 days). Thus, the payment is an incentive to remove or process the defense plutonium to avoid the punitive payments.[13] The payments are akin to a late payment penalty, as the obligation to remove or process the defense plutonium remains (as the underlying payment obligation remains) and the payment penalty is additive to try and incentivize compliance—which the Federal Defendants have admitted and conceded. Fed'l Def's Reply in Supp. of Mot. to Dismiss (ECF No.

[10] Black's Law Dictionary defines a "penalty" as including "a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss)" and a "statutory penalty" as a "penalty imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for violation of a statute's terms without reference to any actual damages suffered." Black's Law Dictionary, PENALTY (10th ed. 2014).

[11] Black's Law Dictionary defines a "liquidated damage" as including "[a]n amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches." Black's Law Dictionary, DAMAGES (10th ed. 2014).

[12] Black's Law Dictionary defines "compensation" as including "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory, compensation makes the injured person whole." Black's Law Dictionary, COMPENSATION (10th ed. 2014).

[13] "A penalty is a sum which a party … agrees to pay or forfeit in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach…." Black's Law Dictionary, PENALTY (10th ed. 2014) (quoting Charles T. McCormick, *Handbook on the Law of Damages* § 146, at 600 (1935)); *see* 24 *Williston on Contracts* § 65:1 (4th ed.) ("a liquidated damages clause is designed to substitute a sum agreed upon by the parties for any actual damages suffered as a result of a breach, it, too, must be calculated to compensate, rather than to punish a breach").

33), at 9 n.3 ("As intended by Congress, the assistance payment … provides a strong incentive for the Department to remove plutonium—an 'ace in the hole,' as South Carolina's congressman put it.") (quoting Congressman John Spratt).

One of the criteria in determining whether a payment obligation is a penalty or a liquidated damage is "whether the parties intended liquidated damages or a penalty." *Safeco Credit v. United States*, 44 Fed. Cl. 406, 413 (Fed. Cl. 1999) (emphasis added). Here, the only legislative history and intent is that the payments are fines and penalties imposed upon the Federal Defendants when they fail to achieve Section 2566's primary purpose of removing or processing defense plutonium. Mem. in Supp. of Mot. for Summ. J. (ECF No. 10-1) at 13-14 (detailing the extensive legislative history characterizing the payments as "penalties" and "fines").

Another criterion is that "the amount of damages must bear a reasonable relationship to actual damages that could be sustained in the event of a breach." *Safeco Credit*, 44 Fed. Cl. at 414 (emphasis added). A liquidated damage, must have a "reasonable relation" to the amount of damage. *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930). As the Fourth Circuit has elucidated:

> A provision in a contract calling for a sum to be paid upon its breach may well be called a penalty … where it is for an arbitrary amount irrespective of the damage sustained and showing no relation to actual damage done and which has no reasonable basis in the purposes or subject matter of the contract. On the other hand when the payment called for arises out of the nature of the contract and is designed as a fair measure of the harm done by its breach, it is not to be treated as a penalty….

Kirkland Distrib. Co. v. United States, 276 F.2d 138, 145 (4th Cir. 1960); *see* 24 *Williston on Contracts* § 65:1 (4th ed.) ("the law of most jurisdictions requires that a liquidated damages provision, in order to be enforceable, constitute the parties' best 'estimate of potential damages in

the event of a contractual breach where damages are likely to be uncertain and not easily proven'") (internal citations omitted).

The statutory payment is set at $1 million per day, and is payable for 100 days. The Federal Defendants offer no argument or theory on how this dollar figure and annual cap were arrived at or any reasonable or rational relation to any harm or injury or damage sustained by the State. Because there is none. It was an arbitrary amount set for an arbitrary number of days per year to try and incentivize the Federal Defendants to remove defense plutonium. In the absence of this rational connection, the economic and impact assistance payment cannot be a liquidated damage and is properly characterized as a fine or penalty.

C. Section 1355 affords this Court jurisdiction over the monetary relief and penalty payments.

The Federal Defendants' attempt to limit the application of Section 1355 to only civil forfeitures ignores the plain language of the statute. While civil forfeitures are certainly encompassed under the statute in subsections (b) through (d), subsection (a) specifically provides: "The district courts shall have original jurisdiction … of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress…." 28 U.S.C.A. § 1355 (emphasis added.) *Cf. Wayne ex rel. MYHUB Grp., LLC v. United States*, 95 Fed. Cl. 475, 478 (2010) ("Congress granted exclusive jurisdiction to federal district courts with respect to 'any action or proceeding for the recovery ... of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any act of Congress.'"). While courts have interpreted this to only allow for "the government" to bring claims for the benefit of the public treasury, which would preclude actions by private citizens, that it not the case here. In this case, the State of South Carolina—a government—is seeking to enforce a fine or penalty against the

United States for payment to the State's public treasury based on the plain language of an Act of Congress (Section 2566).[14] Clearly Section 1355 confers jurisdiction in this Court.

Further, because this is not a claim for monetary damages, but rather the enforcement of a fine or penalty, this is an action demanding the Federal Defendants do what the law already requires them to do. This is the essence of mandamus and APA—which waive sovereign immunity for exactly these circumstances where the Federal Defendants fail to comply with and obey the law. The Federal Defendants cannot claim sovereign immunity to shield them from plainly unlawful action.

CONCLUSION

At the end of the day, if this Court allows the Federal Defendants to split this case, handicapping the State in enforcing all of the statutory remedies Congress afforded, then this Court is eviscerating the very statute that was enacted to protect the State by providing the State all of those remedies. Section 2566 contemplates jurisdiction in this Court, and governing law waives sovereign immunity to allow enforcement by the State of all the statutory remedies available to it.

For the reasons set forth above and in the State's Memorandum of Law in Support of its Motion for Reconsideration, the Order should be amended and revised to apply the proper jurisdictional analysis under the APA and find that this Court has jurisdiction over, and that the Federal Defendants have waived their sovereign immunity with respect to, all of the State's requests for relief to remedy the Federal Defendants' unlawful inaction.

[14] Federal Treasury Regulations define a "fine or other penalty" as (1) paid to a (2) State as a (3) civil penalty (4) imposed by Federal law. 26 C.F.R. § 1.162–21(a). Notably, the Treasury Regulations also provide that "[c]ompensatory damages . . . paid to a government do not constitute a fine or penalty." 26 C.F.R. § 1.162–21(b)(2).

Respectfully submitted,

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