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

MEMORANDUM IN SUPPORT

OF MOTION FOR RECONSIDERATION

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INTRODUCTION

In its Order dated October 31, 2016, this Court correctly found that it has jurisdiction over the State of South Carolina's (State) requests for declaratory and injunctive relief regarding the Federal Defendants' decision to not act, dispose of, or remove plutonium as statutorily required by subsection (c) of 50 U.S.C.A. § 2566 (Section 2566). In addition, this Court correctly determined that the Administrative Procedures Act (APA) waives the Federal Defendants' sovereign immunity with respect to these requests for relief.

The State respectfully submits, however, that this Court erred in misapplying the APA's narrow "adequate remedy" exception to find that it was without jurisdiction to provide all aspects of the relief requested. The State seeks equitable relief to remedy the agency action (*i.e.*, the failure to process or remove defense plutonium) made unlawful by subsections (c) and (d) of Section 2566. The Court erroneously concluded that it lacked jurisdiction over the relief sought related to subsection (d) even though it pertains to the same agency action on the same facts, and even though this Court found that the same questions of statutory interpretation likely must be answered with respect to all of the requests for relief. Moreover, it is undisputed that the Court of Federal Claims (CFC) cannot order the removal of plutonium from South Carolina. Thus, the Order creates a situation in which neither this Court nor the CFC can award complete relief for the Federal Defendants' unlawful agency action. *But see Bowen v. Massachusetts*, 487 U.S. 879 (1988) (holding that district courts have jurisdiction to review agency action and provide complete relief in situations like that presented in this case). The State therefore respectfully requests that this Court amend the Order to find that it has jurisdiction over this entire matter because, as explained more fully below, the Court's finding that it lacked jurisdiction to award equitable relief under subsection (d) of Section 2566 is based on errors of law and works an injustice against the State.

APPLICABLE LAW

Rule 54(b), FRCP, provides that "any order . . . may be revised at any time before entry of a judgment adjudicating all of the claims and all the parties' rights and liabilities." *See Nationwide Mutual Fire Ins. Co. v. Superior Solution, LLC*, C/A No. 2:16-cv-423-PMD, 2016 WL 6648705, at *2 (D.S.C. 2016) ("An interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment."); *Cohens v. Maryland Dep't of Human Resources*, 933 F. Supp. 2d 735, 741 (D. Md. 2013) ("Resolution of the motion is committed to the discretion of the district court . . . and the goal is to reach the correct judgment under law."). Rule 54(b), FRCP, motions are "not subject to the strict standards applicable to motions for reconsideration of a final judgment[,]" but "district courts in the Fourth Circuit generally look to Rule 59(e)'s standards for guidance." *Superior Solution*, C/A No. 2:16-cv-423-PMD, 2016 WL 6648705, at *2 (internal citations and quotation marks omitted). Additionally, "a court may consider the reasons in [Rule 60(b), FRCP,] when deciding whether to grant relief under Rule 54(b)." *Cohens*, 933 F. Supp. 2d at 741. "The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *Equal Employment Opportunity Comm'n v. McLeod Health, Inc.*, C/A No. 4:14-cv-3615-BHH, 2016 WL 6823371, at *2 (D.S.C. 2016) (internal citation and quotation marks omitted).

Under Rule 59(e), a court may "alter or amend the judgment if the movant shows . . . that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). Rule 59(e) relief is warranted "if the court has misapprehended the facts, a party's position or the controlling law." *Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009). Rule 59(e) relief also is appropriate when there is "a mistaken

decision by the court of issues outside those presented for determination." *See Selvidge for and on Behalf of Selvidge v. United States*, 1995 WL 89016, at *1 (D. Kan. 1995).

Under Rule 60(b), FRCP, a court may grant relief from a judgment or order for: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or misconduct by the opposing party; (4) voidness; (5) satisfaction; or (6) any other reason that justifies relief.

ARGUMENT

I. THE COURT HAS MISAPPREHENDED THE ADMINISTRATIVE PROCEDURES ACT AND THE RELEVANT CASE LAW.

Having correctly found that this Court has jurisdiction over the State's requests for relief related to subsection (c) of Section 2566, this Court also should have found that it has jurisdiction over the State's requests for relief related to subsection (d) of Section 2566. This Court's holding to the contrary derives primarily from its adoption and application of a claim-specific analysis to determine whether the CFC could provide an "adequate remedy" for purposes of Section 704 of the APA. Such an analysis is contrary to the plain language and purposes of the APA and contradicts the relevant case law, all of which require this Court to focus on the "agency action" at issue in the case to determine whether the CFC could provide an "adequate remedy," not the individual claims or requests for relief.

Because of this fundamental error, the Order, unless corrected, would create needless additional litigation by forcing the State to seek relief on a single cause of action from another court (in the best case scenario) even though this Court appropriately has the jurisdiction and authority to provide all of the relief requested by the State. *See Bowen*, 487 U.S. at 911 ("As long as [the lower court] had jurisdiction under § 702 to review the disallowance orders of the Secretary,

it also had the authority to grant the complete relief authorized by § 706. Neither the APA nor any of our decisions required the Court of Appeals to split either of these cases into two parts.").

The Court also has turned what was intended by Congress to be a narrow exception to the "broad spectrum of judicial review of agency action" created by the APA into an unnecessarily complicated obstacle to judicial review of the Federal Defendants' illegal conduct. *Ohio River Valley Envtl. Coalition, Inc. v. Kempthorne*, 473 F.3d 94, 100 (4th Cir. 2006) ("The [adequate remedy] exception that was intended to avoid [ ] duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.") (quoting *Bowen*, 487 U.S. at 903-04).

A. The Court's Improper Jurisdictional Analysis.

Contrary to this Court's Order, the determination of whether the CFC could provide an "adequate remedy" for purposes of the APA waiver of sovereign immunity under Section 704 is not made on a claim-by-claim basis. Instead, the determination must focus on the "agency action" at issue in the case. Section 704 of the APA provides that "final agency action for which there is no adequate remedy in a court [is] subject to judicial review." 5 U.S.C.A. § 704 (emphasis added). This focus on "agency action" also is found in Section 706 of the APA, which provides that, as "the reviewing court," the district court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," and then "compel agency action unlawfully withheld" or "hold unlawful and set aside agency action" found "not in accordance with law." 5 U.S.C.A. § 706 (emphasis added); *see Bowen*, 487 U.S. at 911-12.

Nothing in the plain language of the APA requires or supports this Court's claim-specific analysis with respect to the "adequate remedy" determination. *See In re Rowe*, 750 F.3d 392, 396

(4th Cir. 2014) ("The starting point for any issue of statutory interpretation is the language of the statute itself. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."). Nor does the case law relied upon by this Court support such an analysis. In fact, this Court's claim-specific "adequate remedy" analysis is derived from an erroneous reading of the D.C. Circuit decisions in *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992) and *Sharp v. Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986).

The Court relies on the *Transohio* and *Sharp* decisions for the proposition that it must consider "the State's claims individually" to answer the question of whether the CFC can provide an "adequate remedy." Order at 10. However, the *Transohio* and *Sharp* courts conducted the claim-by-claim analysis only with respect to answering the question under Section 702 of the APA of whether "any other statute expressly or impliedly forbids the relief which is sought." *See Transohio*, 967 F.2d at 609 (discussing claims individually only to determine whether they fall within the "expressly or impliedly forbids the relief sought" exception to the APA waiver of sovereign immunity); *Sharp*, 798 F.2d at 1523-24 (same). In the APA versus Tucker Act analysis, this question arises when there is a contract claim at issue because the CFC has exclusive and expressed statutory jurisdiction over contract claims against the federal government. The claim-by-claim analysis is needed because, if a claim is founded on a contract, it must be heard in the CFC and cannot be heard in a district court under the APA. *Transohio*, 967 F.2d at 609 ("As a result, we have declared that § 702 of the APA does not waive sovereign immunity for contract actions against the government. Section 702 'is by its terms inapplicable if 'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,' and the Tucker

Act and Little Tucker Act impliedly forbid such relief.'") (emphasis added) (quoting *Sharp*, 798 F.2d at 1523).

In contrast, the CFC does not have exclusive jurisdiction—whether expressed or implied—for requests for relief founded upon a federal statute, like those made by the State.[1] *See Transohio*, 967 F.2d at 609 ("While holding that Tucker Act jurisdiction is not exclusive for claims founded upon the Constitution, federal laws or regulations, this Court and others have interpreted the Tucker Act as providing the exclusive remedy for contract claims against the government, at least *vis a vis* the APA.") (emphasis in original omitted). As specifically held in *Transohio* and *Sharp*, unlike contract claims, requests for relief based on a federal statute may be brought in either district court or the CFC. *Transohio*, 967 F.2d at 610 ("The lesson of *Sharp*, we think, is straightforward: under § 702 and the Tucker Act, litigants may bring common-law contract claims only as actions for money damages in the Claims Court, but they may bring statutory and constitutional claims for specific relief in federal district court.") (emphasis added); *see* June 30, 2016 Hr'g Tr. 49:5-7 (Counsel for the State: "[W]hat the courts universally say are contract disputes are generally held to be exclusive [under] the Tucker Act. Statutory claims are not."). Therefore, while the claim-specific analysis is necessary to address issues of "exclusive jurisdiction" under Section 702

[1] The Court also cites *Jan's Helicopter Serv. v. F.A.A.*, 525 F.3d 1299, 1304 (Fed. Cir. 2008) and *Tootle v. Sec. of the Navy*, 446 F.3d 167 (D.C. Cir. 2006), in support of the proposition that the Tucker Act provides the CFC "exclusive jurisdiction" over the State's requests for relief under subsection (d) of Section 2566. However, both of these cases make clear that the CFC only has "exclusive jurisdiction" for "money damage" claims. Moreover, neither of these cases involved a situation in which there were multiple requests for declaratory and injunctive relief, only one of which could result in payment of money. *Jan's Helicopter* was a case in which exclusive jurisdiction was properly held to exist because the only relief sought was monetary. In *Tootle*, on the other hand, it was held that the CFC did not have jurisdiction because the complaint was not in essence one for money damages. *Tootle*, 446 F.3d at 169. In other words, *Jan's Helicopter* held that the CFC had exclusive jurisdiction in a case involving only money, and *Tootle* conversely held that there was no such exclusive jurisdiction where the relief was essentially not one for money.

of the APA, Section 704 does not require or support such an analysis with respect to whether the CFC could provide an "adequate remedy" for purposes of the APA waiver of sovereign immunity.

A review of the other cases relied upon by this Court confirms that the "adequate remedy" determination focuses on the "agency action" at issue and not the specific claims or requests for relief. And in all of the cases that found the CFC could provide an "adequate remedy," a monetary payment, regardless of the label applied to it, would afford complete and adequate relief to the plaintiff for all requests for relief arising out of the "agency action" at issue. For example, in *Suburban Mortgage Associates, Inc. v. U.S. Department of Housing*, the court made the Section 704 "adequate remedy" determination by looking not at the plaintiff's various claims or requests for relief but rather to the "true nature" or "thrust" of the case, which the court determined was the agency's alleged breach of a contract. 480 F.3d 1116, 1124, 1127 (Fed. Cir. 2007). Because all of the "wrongs" resulting from this alleged agency action could be completely "assuaged" by money, the *Suburban* court found that an adequate remedy was available under the Tucker Act in the CFC. *Id*.

Similarly, in *Consolidated Edison Co. of New York, Inc. v. U.S. Department of Energy*, the court found that an adequate remedy was available in the CFC because "every legal issue" the plaintiff sought to resolve in the district court related to the agency's action "could be decided in a suit before the Court of Federal Claims." 247 F.3d 1378, 1385 (Fed. Cir. 2001) (emphasis added). Likewise, in *Kanemoto v. Reno*, the court found that an adequate remedy was available in the CFC because "[a]ll of [plaintiff's] claims are predicated on the government's denial of the statutory amount of restitution and at bottom seek only payment of the $20,000." 41 F.3d 641, 646 (Fed. Cir. 1994) (emphasis added); *see also ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 24 (2011) ("[N]either party contests or challenges the premise that a money judgment in favor of

plaintiffs in this court would provide them with a complete and adequate remedy for the relief currently sought."); *Brazos Elec. Power Co-op., Inc. v. U.S.*, 144 F.3d 784, 787 (Fed. Cir. 1998) ("Thus, the only significant consequence of Brazos obtaining the 'equitable relief' that it requests would be that it would obtain monetary damages from the federal government.") (emphasis added).

Together, these cases hold that the "adequate remedy" determination does not depend on the specific claims or requests for relief a plaintiff may bring, but that, as set forth in the plain language of Section 704, this determination should instead focus on the "agency action" at issue in the case. *See, e.g., Kanemoto*, 41 F.3d at 644 (stating that the APA waiver of sovereign immunity is unavailable only "where agency action is otherwise reviewable in court and an adequate remedy is available in connection with that review…") (emphasis added). These cases also confirm that the CFC only provides an adequate remedy when all the wrongs resulting from such agency action can be completely remedied by a monetary judgment.

Therefore, this Court should have looked to the "agency action" that is at issue in this case and not the "claims individually" to determine whether the CFC could provide the State an "adequate remedy" for purposes of Section 704 of the APA. The failure to do so is an error of law which the Court should amend.

B. The Proper Jurisdictional Analysis.

Under the plain language of the APA, the proper "adequate remedy" analysis consists of: (1) identifying the "agency action" at issue; (2) identifying the alleged "legal wrongs" suffered because of this agency action; and (3) determining whether there is another court that can provide a complete remedy or full relief for all of these alleged wrongs. *See* 5 U.S.C.A. § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."); 5 U.S.C.A. § 704 ("[F]inal agency action for which there is no adequate remedy in a court [is] subject

to judicial review."); *cf. Syngenta Crop Prot., Inc. v. U.S. Envtl. Prot. Agency*, 444 F. Supp. 2d 435, 452 (M.D.N.C. 2006) (providing that an adequate remedy "must be capable of affording full relief as to the very subject matter in question.") (quoting *Holmes v. U.S. Bd. of Parole*, 541 F.2d 1243, 1247 (7th Cir. 1976), *overruled on other grounds*).

1. *The Federal Defendants' Agency Action.*

Pursuant to the APA, "agency action" includes "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 set forth in the Complaint, the "agency action" at issue in this case is a "failure to act"—the failure to meet the MOX production objective (*i.e.*, to process plutonium) or to remove plutonium from South Carolina. Complaint (ECF No. 1) ¶¶ 90-94, 98-100. This is the "agency action" that was and is the culmination of years of decisions (or non-decisions) by the Federal Defendants and that is made legally significant and has legal consequences under both subsection (c) and (d) of Section 2566. This also is the "agency action" that determines whether, and to what extent, the Federal Defendants have an obligation to make penalty payments[2] to the State. And this is the "agency action" that now leaves South Carolina as the dumping ground for plutonium in direct contradiction to the requirements and purposes of Section 2566. Accordingly, this is the "agency action" that requires judicial review under the APA.

Indeed, this Court already has found that this failure to act on the part of the Federal Defendants is at the heart of the State's requests for removal and monetary relief with respect to

[2] There also can be no serious argument that the payment, set at a specific per-day amount and capped after 100 days, is not a penalty and constitutes "damages." There is no relationship between the statutory amount to be paid and the harm, damage, and injury suffered by the State for the Federal Defendants failure to comply with the statute, and the Federal Defendants have not offered any connection between the penalty amount and the injury. The only legislative history on the characterization of the payment is a "fine" or "penalty" and it cannot constitute "damages."

both subsection (c) and subsection (d) of Section 2566 by finding that all the State's requests for relief are based on the "same operative facts." Order at 25.[3] The only "facts" that are the same for all requests for relief are (1) the fact that the Federal Defendants have not yet met the MOX production objective and (2) the fact that they have not yet removed any plutonium from South Carolina.[4] These facts also are undisputed. *See* June 30, 2016 Hr'g Tr. 38:4-9 (Counsel for the Federal Defendants: "In terms of disputed facts which you asked about, [the Federal Defendants] agree that the MOX Facility hasn't been built yet, and so of course it hasn't – hasn't processed MOX at a rate of one ton per year. That's not in dispute. And it's also not in dispute that we haven't removed a ton of plutonium since 2014."); Fed'l Defs. Opp'n to State's Mot. for Summ. J. (ECF No. 38) at ix-x (same).

The Federal Defendants also do not dispute that the "agency action" at issue in this case is the failure to "process or remove plutonium from South Carolina." *See* Fed'l Defs. Mot. to Dismiss (ECF No. 17) at 15 ("A careful read of the statute makes clear that, while Congress hoped the Department would be able to process or remove plutonium from South Carolina by certain dates, it recognized that such actions might not be achieved, in which case the state's sole remedy was the assistance payment.") (emphasis added); Fed'l Defs. Reply in Supp. of Mot. to Dismiss (ECF

[3] As discussed in Section III *infra*, the question of whether or not any of the "facts" this Court refers to in its Order are actually "operative facts" for purposes of 28 U.S.C.A. § 1500 was not, and is not, before this Court, and therefore, this Court's discussion of 28 U.S.C.A. § 1500 in the Order should be stricken.

[4] This also demonstrates the irreconcilability between this Court's "adequate remedy" Section 704 analysis in Section III.A of the Order and its later discussion in Section III.C of the Order regarding the need for further briefing. The Court cannot, on one hand, find that the requests for relief are not based on the same agency action and then, on the other hand, find that the State's requests for relief are all based on the same facts, since the undisputed facts are the agency action (or, in this case, inaction). If, as this Court found, the State's requests for relief related to subsection (c) and (d) of Section 2566 are based on the same facts, then this Court necessarily has found that they are based on the same agency action, which, in turn, means that this Court has jurisdiction over this entire matter.

No. 33) at 7 ("Through the interplay between subsections (c) and (d), 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.") (emphasis added).

The dispute in this case is only over the legal consequences of the Federal Defendants' failure to process or remove plutonium. The State contends that the Federal Defendants' failure to process or remove plutonium has legal consequences and results in "legal wrongs" against the State under both subsection (c) and (d) of Section 2566. Complaint ¶¶ 90-95, 98-100, 111; 5 U.S.C.A. § 702. The State argues that the agency action—failing to timely remove or process the defense plutonium—has three legal consequences under Section 2566:

(1) an obligation to remove one ton of defense plutonium by January 1, 2016 (subsection (c));

(2) an obligation to remove one ton of defense plutonium for each year beginning in 2016 (subsection (d)); and

(3) payment of a per-day penalty for 100 days in each year in which the defense plutonium is not removed beginning in 2016 (subsection (d)).

These are cumulative statutory remedies available to the State by law under Section 2566. This Court may only enforce each of these through declaratory and injunctive relief, *i.e.*, comply with the statutory requirement.

The Federal Defendants, on the other hand, contend that the only consequence for not meeting the so-called "processing and removal goals" is the payment of the penalties. *See* Fed'l Defs. Mot. to Dismiss (ECF No. 17) at 15-17 (arguing that the Federal Defendants' failure to process or remove plutonium only has one legal "consequence": the penalty payments); Fed'l

Defs. Reply in Supp. of Mot. to Dismiss (ECF No. 33) at 7 ("Subsection (c) thus sets the processing and removal goals, and subsection (d) sets the consequences for failing to meet those goals."). The Federal Defendants claim that any requirement to process or remove plutonium is obviated by payment of the penalty (but that they do not need to pay the penalty, either).

As recognized by this Court in its Order, the primary task in this case is to resolve this dispute over the legal consequences of the Federal Defendants' inaction by interpreting Section 2566 and deciding whether the State's or the Federal Defendants' statutory interpretation is correct. Order at 29 (discussing "argued statutory interpretation" of subsection (c) of Section 2566 and its effect on all the State's requests for relief); *see* 5 U.S.C.A. § 706 (The district court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

The Court also erred in assuming that the only legally significant "inaction" on the part of the Federal Defendants related to subsection (d) of Section 2566 is the failure to pay the penalties. However, this is in error because the Federal Defendants also could have processed or removed the plutonium to comply with subsection (d), in which case the penalty payments would not be at issue, and subsection (d) imposes a removal obligation of one ton per year for which the State seeks declaratory and injunctive relief.[5] The Order incorrectly treats the failure to process or remove plutonium for purposes of subsection (d) as mere "conditions" to payment of the penalties. *See* Order at 13-14 (discussing inapposite cases in which the plaintiffs, not the defendants, met

[5] The State has requested that the Federal Defendants be enjoined from bringing any more defense plutonium to SRS until it is in full compliance with the removal requirements of Section 2566. Under subsection (c), that compliance bar would be one ton. Under subsection (d), that compliance bar increases by one ton for every year beginning in 2016. While the Federal Defendants dispute that any removal requirement exists under subsection (d), that is a question of statutory interpretation on the merits.

certain statutory conditions for payments). But this disregards that the failure to process the plutonium, the failure to remove the plutonium, and the failure to make the penalty payments are all inextricably intertwined under subsection (d) and that the Federal Defendants could have chosen any one of those alternatives to comply with subsection (d).

The State therefore respectfully submits that instead of conducting a claim-specific analysis, this Court should have conducted the "adequate remedy" analysis focused on the Federal Defendants' failure to process or remove plutonium from the State. That is the "agency action" that is at issue for all of the State's requests for relief.

2. *The Legal Wrongs Suffered by the State Because of the Federal Defendants' Agency Action.*

Having identified the "agency action" at issue, the "adequate remedy" analysis then turns to the determination of what are the alleged "legal wrongs" suffered by the State because of this "agency action." *See* U.S.C.A. § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."). The "legal wrongs" are easily identifiable because they are encompassed in what this Court refers to as the "claims," *i.e.*, the "monetary claim" and the "removal claim."[6] As set forth in the Complaint, because of subsection (c) of

[6] In truth, the State has not made a traditional "claim" at all in this case but is instead asking for review of a "final agency action." *See Delaware Div. of Health and Social Services v. U.S. Dep't of Health and Human Services*, 665 F. Supp. 1104, 1117 (D. Del. 1987) (discussing distinction between traditional "claim" and request for review of "final agency action") (favorably discussed in *Bowen*, 487 U.S. at 908 n.46, 911 n.50). And the State certainly has not made a "monetary claim." This misnomer used by the Federal Defendants and now adopted by this Court is based on the faulty premise that the only "agency action" to be reviewed for purposes of the APA with respect to subsection (d) of Section 2566 is the payment (or, in this case, nonpayment) of the penalties. However, the "agency action" at issue for all the State's requests for relief, as this Court has found, is the failure to remove or process plutonium. This is confirmed by the simple fact that the Federal Defendants could timely remove or process plutonium to comply with both subsections (c) and (d) of Section 2566.

In other words, what the Federal Defendants and Court characterize as "claims" are actually remedies for the Federal Defendants' inaction and failure to timely remove or process

Section 2566, the State alleges that the Federal Defendants' failure to meet the MOX production objective or remove plutonium from the State constituted a legal wrong against the State as soon as the Federal Defendants did not meet the statutory deadline of January 1, 2016 for removal. Complaint ¶¶ 90-95. And because of subsection (d) of Section 2566, the State alleges that this failure to act constituted a legal wrong against the State for each day in 2016 that had preceded the filing of the State's Complaint and would continue to constitute legal wrongs against the State for each day after the filing of the Complaint for the first 100 days that the Federal Defendants failed to such action or make the penalty payments. Complaint ¶¶ 98-100, 111. And Section 2566(d) imposes an ongoing obligation to remove one ton per year, even when such penalties are made.

Simply put, the "agency action" at issue in this case is the failure to process or remove plutonium, and this failure results in legal wrongs against the State because of the application of subsection (c) and (d) of Section 2566.[7] Importantly, the fact that this "agency action" results in multiple legal wrongs, thus triggering multiple remedies and relief, does not change the "adequate remedy" determination from one focused on the "agency action" at issue in the case, as required by Section 704, to one that focuses on the "claims individually," as this Court erroneously has done in the Order (especially when the supposed "claims" are actually the remedies triggered by the agency action).

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plutonium—and the prospective relief and remedy is necessary for the continued agency (in)action.

[7] *See* Order at 23 ("The provisions of § 2566 evince a design to insure that, within the deadlines set by Congress, unprocessed plutonium designated for MOX Facility processing either would be processed in specific amounts or else would be reduced through other methods. The alleged injury in Defendants disregarding this scheme is the accumulation of unprocessed plutonium at SRS for an indefinite period or, as the State puts it on numerous occasions, the risk that the lands owned by the State compromising SRS will become a permanent dumping ground for unprocessed plutonium, despite the provisions of § 2566.").

3. *The CFC Cannot Provide an Adequate Remedy for the Legal Wrongs Suffered by the State Because of the Federal Defendants' Agency Action.*

Having identified the "agency action" and the "legal wrongs" the State alleges were suffered because of the Federal Defendants' "agency action," the only remaining question for the Section 704 analysis is whether there is another court that can provide an "adequate remedy" for all of these alleged wrongs. Here, as this Court already has found, the answer is a resounding "no," because the CFC cannot provide a remedy for the wrong suffered by the State resulting from the Federal Defendants' failure to take action in compliance with subsection (c) of Section 2566. Order at 18-19; *see Richardson v. Morris*, 409 U.S. 464, 465 (1973) (stating that the CFC "has no power to grant equitable relief.").[8]

4. *Because the CFC Cannot Provide an Adequate Remedy, the Federal Defendants' Sovereign Immunity Has Been Waived for, and this Court Has Jurisdiction Over, All of the State's Requests for Relief.*

Accordingly, it is clear that the CFC does not provide an "adequate remedy" for the "agency action" at issue in this case for purposes of determining whether the Federal Defendants' sovereign immunity has been waived under Section 704 of the APA. Because the State's requests for relief are not seeking "money damages" and no other statute "impliedly forbids" the requested relief, there also is no other limitation or exception in the APA applicable in this case and the Federal Defendants' sovereign immunity has been waived with respect to all requests for relief

[8] On page 14 of its Order, this Court implies that 28 U.S.C.A. § 1491(a)(2) may be available to provide some form of "equitable relief" to the State should it be forced to litigate in the CFC. To the extent this is the implication, it is a clear error of law. Contrary to this Court's description of Section 1491(a)(2), this statutory provision, by its plain language, only applies in a few very limited situations for collateral relief, none of which are applicable here. 28 U.S.C.A. § 1491(a)(2) ("To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.") (emphasis added). Simply put, it is black letter law that the CFC cannot grant general equitable relief.

brought by the State. *See* discussion *supra* pp. 5-6; *Bowen*, 487 U.S. at 893-901 (distinguishing between claims for "money damages" and requests for specific relief that may result in the payment of money); *Transohio*, 967 F.2d at 610 ("The lesson of *Sharp*, we think, is straightforward: under § 702 and the Tucker Act, litigants may bring common-law contract claims only as actions for money damages in the Claims Court, but they may bring statutory and constitutional claims for specific relief in federal district court.") (emphasis added). As the Supreme Court affirmed in *Department of Army v. Blue Fox*, if a lawsuit (such as this one) seeks to enforce a statutory mandate, even if it results in the payment of money, and the "substance of the State's suit was one for specific relief, not money damages," and thus not substitute or compensatory relief, "the suit [falls] within § 702's waiver of immunity." 525 U.S. 255, 262 (1999) (discussing *Bowen* and the specific relief distinction for jurisdictional purposes).

Therefore, this Court should have found that it had jurisdiction with respect to the State's requests for relief related to subsection (d) of Section 2566 in addition to finding that it has jurisdiction over the State's requests for relief related to subsection (c), as these are both necessary remedies to which the State is entitled as a matter of law stemming from the improper agency action.

C. Purposes of the APA and the Interests of Judicial Economy.

The practical effect of the Order confirms that this Court has jurisdiction over all requests for relief. The "central purpose" of the APA as a whole is to provide a "broad spectrum of judicial review of agency action." *Bowen*, 487 U.S. at 903; *see also King v. Burwell*, 759 F.3d 358, 367 (4th Cir. 2014) ("The plaintiffs here challenge the legality of a final agency action, which is consistent with the APA's underlying purpose of 'remov[ing] obstacles to judicial review of agency action.'") (quoting *Bowen*, 487 U.S. at 904). For this reason, the Supreme Court, on

multiple occasions, has described the APA as including "generous review provisions" that deserve "hospitable interpretation." *Id*. at 904 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967)). This also is why there is a "presumption that final agency action is reviewable in district court if no specific method of judicial review is prescribed by statute" and "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[9] *Delaware*, 665 F. Supp. at 1115 (favorably discussed in *Bowen*, 487 U.S. at 908 n.46, 911 n.50); *see Hammond v. United States*, C/A No. 1:13–00139-JMC, 2014 WL 1277892, at *5 (D.S.C. 2014) ("Consequently, 'judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'") (quoting *Abbott*, 387 U.S. at 140).

As recognized in *Bowen*, Congress did not intend, however, for this "general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. Hence, the inclusion of the "adequate remedy" exception in Section 704. *Id*. The problem here is that, rather than interpreting the Section 704 exception in a manner that avoids duplication, this Court has interpreted it in a way to create duplication and unnecessary bifurcation. *Bowen*, 487 U.S. at 903-04 ("The [adequate remedy] exception that was intended to avoid [ ] duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action."); *Delaware*, 665 F. Supp. at 1117 ("[B]ifurcated proceedings . . . would add another layer of complexity to an arena already straining under excess jurisdictional baggage

[9] In *Bowen*, the Supreme Court also stated: "The policies of the APA take precedence over the purposes of the Tucker Act. In the conflict between the two statutes, established principles of statutory construction mandate a broad construction of the APA and a narrow interpretation of the Tucker Act. The Court of Federal Claims is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed." *Bowen*, 487 U.S. at 908 n.46 (emphasis added). In finding that this Court does not have jurisdiction over this entire matter, this Court disregards this fundamental precedent.

and procedural weightiness."). Indeed, this Court's interpretation is precisely the kind of "restrictive interpretation of § 704" that the Supreme Court rejected in *Bowen* because it "run[s] counter" to the APA. *Bowen*, 487 U.S. at 904. The Court's own discussion in Section III.C of the Order proves as much.

Although finding that the same agency action is at issue for all of the State's requests for relief and that the same questions of statutory interpretation likely would need to be answered by this Court and the CFC,[10] this Court has found that the State must not only go to another court to obtain complete relief but that the State may have to "choose" what relief it wants to seek now for the Federal Defendants' unlawful inaction and what relief it will have to wait to obtain, if at all. Order at 29-30; *but see King*, 759 F.3d at 367 ("It is clear, then, that the alternative forms of relief suggested by the defendants would not afford the plaintiffs the complete relief they seek. . . . The plaintiffs here challenge the legality of a final agency action, which is consistent with the APA's underlying purpose of 'remov[ing] obstacles to judicial review of agency action'") (quoting *Bowen*, 487 U.S. at 904). Even ignoring the considerations of judicial economy that weigh strongly against this Court's Order, the manifest injustice worked against the State in having to choose which relief to abstain from seeking—relief specifically provided by Congress in a statute—dictates modification and revision of this Court's Order.

[10] Order at 29 ("Because the argued statutory interpretation [of subsection (c)] is one that the CFC likely would be required to make before concluding whether, and to what extent, Defendants are liable to pay the State the subsection (d)(1) economic and impact assistance payments, both the CFC and this court would be forced to adjudicate an issue that is material and perhaps dispositive to the claim that is in the other court."); *but see Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) ("[P]laintiff unmistakably asks for prospective relief. An adjudication of the lawfulness of [the federal agency's] regulatory interpretation will have future impact on the ongoing relationship between the parties. The Court of Federal Claims cannot provide this relief.").

Here, this Court is potentially divesting the State of a statutory remedy it is entitled to as a matter of right. For instance, if the State "chooses" to proceed in the CFC on the so-called "monetary claim," or if this Court makes this choice for the State by staying this case, as it states in the Order it may do, then the State may have to give up the right to seek the immediate removal of plutonium that the State asserts was required to be removed by January 1, 2016, pursuant to subsection (c) of Section 2566.[11] As a consequence, every day the State proceeds in the CFC would be another day that it is harmed by the Federal Defendants' unlawful failure to remove plutonium from the State pursuant to subsection (c) of Section 2566. These are harms that will never be remedied by a future monetary award because, as this Court recognized, if the State's statutory interpretation is correct, the remedy for the failure to remove under subsection (c) of Section 2566 is not the penalty payments under subsection (d).[12] *Cf. Gracepointe Church v. Jenkins*, C/A No. 2:06-CV-1463-DCN, 2006 WL 1663798, at *3 (D.S.C. 2006) ("Irreparable harm is an injury that cannot be undone through monetary relief.") (internal quotation marks and citation omitted).

Equally as troubling with this situation would be the fact that, as set forth in the Order, "the CFC likely would be required" to interpret subsection (c) of Section 2566. Order at 29. But, if the

[11] The State reserves the right to make any and all alternative arguments for appropriate relief in any court in dual proceedings. However, the State here is responding to what this Court has deemed to be potential consequences of its ruling.

[12] Regardless of whose interpretation of the statute is correct, as this Court has found, any future removal of plutonium will have an effect on "whether, and to what extent" the Federal Defendants will be required to make penalty payments to the State in future years. Order at 29. Indeed, this interplay between meeting the MOX production objective, removal of plutonium, and any payment of penalties in future years is why part of the State's requested relief is for continuing jurisdiction and status reports as to the Federal Defendants' future actions (or inactions). And it also is why it only makes sense for one court to decide all questions regarding Section 2566. *Cf. Delaware*, 665 F. Supp. at 1116 ("District Court with jurisdiction over non-monetary claim can exercise pendent jurisdiction over monetary claim to provide a 'common sense solution' for complete relief in one court.") (internal citations omitted).

CFC were to agree with the State's interpretation that subsection (c) makes the Federal Defendants' failure to remove unlawful, the CFC could not provide any remedy to the State because it could not order the removal of the plutonium or provide any other form of relief. *Richardson*, 409 U.S. at 465 (stating that the CFC "has no power to grant equitable relief.").

In comparison, this Court has the jurisdiction and authority to review the Federal Defendants' "agency action," "decide all relevant questions of law" regarding subsections (c) and (d) of Section 2566, "determine the meaning or applicability of the terms of" the Federal Defendants' inaction in light of these statutory provisions, and then "compel agency action unlawfully withheld" or "hold unlawful and set aside agency action . . . not in accordance with law." 5 U.S.C.A. § 706. In other words, this Court can provide the full and complete relief for the Federal Defendants' unlawful inaction that the CFC cannot.

Congress did not intend through its inclusion of the "adequate remedy" provision in the APA for the only court with the jurisdiction and power to grant the complete relief needed to fully remedy unlawful action on the part of the federal government to divest itself of jurisdiction to provide some of the requested relief simply because it is conceivable another court could provide partial, limited relief through payment of a monetary penalty. *See Hammond*, C/A No. 1:13–00139-JMC, 2014 WL 1277892, at *6 ("[T]he mere fact that Plaintiff may be entitled to monetary relief based upon the allegations contained within his complaint does not require the court to find that this action is monetary in nature and outside of section 702's limited waiver of sovereign immunity."); *Morrow v. District of Columbia*, 417 F.2d 728, 738 (D.C. Cir. 1969) ("The notion that a party must go to several forums to obtain relief in any given situation, deriving from the ancient and formalistic distinctions between law and equity, has been discredited. The important

policy of having one single expeditious resolution of a dispute has thus led to the doctrine of ancillary jurisdiction and analogous practices of courts.").

And "[i]t is no response to suggest that [the State] could reframe its claim as one for damages and bring it in the Claims Court. That is precisely the 'restrictive—and unprecedented—interpretation of § 704' that the Supreme Court rejected [in *Bowen*]." *Transohio*, 967 F.2d at 608, 296.

Moreover, this Court should have found the ongoing relationship between the State and the Federal Defendants would be impacted by this Court's decisions with respect to both subsections (c) and (d) of Section 2566 and affect the nature of that relationship going forward. The placement of defense plutonium for storage and disposition within the boundaries of the State of South Carolina in and of itself creates a unique relationship between the State and Federal Government that requires long-term interaction by the very nature of defense plutonium. Because of this, the initial decision to locate the MOX Facility for plutonium disposition at SRS required the Secretary to consult with the State's Governor and created the back-and-forth between the State and Federal Defendants in 2001-02 resulting in the passage of Section 2566. Thus, the existence of the statute establishes an ongoing relationship. And while the Federal Defendants eschew any accountability to comply with the statute, it is undisputed that for 2016 and the years that follow that the defense plutonium will remain in South Carolina in violation of Section 2566 and the penalty payments will be due and owing on a going-forward basis. *See also* 50 U.S.C.A. § 2567(h) (requiring the Secretary to include in the annual budget justification an explanation of how DOE will meet its defense plutonium commitments). Injunctive relief for removal and a requirement to make the penalty payments (from available appropriations) will impact the Federal Defendants' future compliance. Just as the Federal Circuit previously held following *Bowen*, if declaratory and

injunctive relief (as here) may modify future behavior and appropriations by the Federal Defendants (which injunctive relief regarding removal will do and is the point of the penalties—to coerce compliant behavior), then jurisdiction is vested in the district court. *See Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 202 (Fed. Cir. 1997) ("[W]hen we look to the true nature of the claims in this case we conclude that the relief sought by NCMS 'may make it appropriate for judicial review to culminate in the entry of declaratory or injunctive relief that requires the [government] to modify future practices' with respect to the disposition of appropriated funds. *Bowen*, 487 U.S. at 893. . . . The Tucker Act, however, does not empower the Court of Federal Claims to grant that kind of equitable relief. For that reason, the remedy provided by a Tucker Act suit in the Court of Federal Claims does not serve as the 'other adequate remedy in a court' referred to in 5 U.S.C. § 704 that would be sufficient to divest the district court of the authority to conduct APA review in this case.").

It also would be "anomalous to assume that Congress would channel review" of the Federal Defendants' failure to take action as it pertains to subsection (c) of Section 2566 to the district courts, and yet intend that the same type of questions—even identical questions—with respect to how that inaction relates to subsection (d) of Section 2566 should be resolved by the CFC. *Bowen*, 487 U.S. at 908. This is especially so when considering that Congress placed language in subsection (d) of Section 2566 that specifically contemplates district court jurisdiction over the Federal Defendants' compliance with that subsection. *Compare* 50 U.S.C.A. § 2566(d)(3) ("If the State of South Carolina obtains an injunction that prohibits the Department of Energy from taking any action necessary for the Department of Energy to meet any deadline specified by this subsection, that deadline shall be extended for a period of time equal to the period of time during which the injunction is in effect.") (emphasis added) *with Richardson*, 409 U.S. at 465 (stating that

the CFC "has no power to grant equitable relief"). Reading subsection (d)(3) in conjunction with this Court's Order means that the State can obtain equitable relief from the district courts in a manner that affects the deadlines in subsection (d), but it cannot obtain equitable relief to enforce those same deadlines. Congress could not have intended such an inconsistent and inefficient outcome.

Moreover, even if subsection (d) were construed to only require payment of the daily penalties (which it should not, in furtherance of the spirit and intent of Section 2566, *see* p.14 n.7), Congress nevertheless has expressly provided district courts, not the CFC, with jurisdiction over penalties and fines. 28 U.S.C.A. § 1355(a) ("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. . . .").

In sum, there simply is nothing to indicate that Congress intended for questions regarding Section 2566 to be heard and answered in two separate forums rather than only in the district courts. The Court's finding that it does not have jurisdiction over this entire matter is inconsistent with the plain language and the purposes of the APA and produces a legally erroneous result that works injustice against the State. It also directly conflicts with the Supreme Court's holding in *Bowen* and it is not supported by the very case law cited by this Court in its Order. Nothing requires or supports this Court splitting this case into two, potentially depriving the State of a statutory remedy which in and of itself means any remedy is inadequate. *Bowen*, 487 U.S. at 911 ("As long as it had jurisdiction under § 702 to review the disallowance orders of the Secretary, it also had the authority to grant the complete relief authorized by § 706. Neither the APA nor any of our decisions required the Court of Appeals to split either of these cases into two parts.").

II. NO WAIVER OF SOVEREIGN IMMUNITY IS NECESSARY FOR THE STATE'S REQUEST FOR A WRIT OF MANDAMUS REQUIRING THE SECRETARY TO COMPLY WITH THE LAW.

As discussed, the Federal Defendants' sovereign immunity has been waived for, and this Court has jurisdiction over, all of the State's requests for relief pursuant to the APA based on the agency action. In the alternative, all of the State's requests for relief against Secretary Moniz should proceed in this Court because the State is seeking a writ of mandamus against the Secretary to force him to perform his statutory duties. 50 U.S.C.A. § 2566(c) ("… the Secretary shall…), (d) ("… the Secretary shall…"). Thus, no waiver of sovereign immunity is needed.

The Court found in its Order that "the State relies only on the APA for its assertion that sovereign immunity has been waived." Order at 7. That is incorrect. The Court overlooked that, as previously argued by the State, "no waiver of sovereign immunity is necessary when 'a plaintiff seeks a writ of mandamus to force a public official to perform a duty imposed upon him in his official capacity. . . .'" *See* State's Mem. in Supp. of Mot. for Summ. J. (ECF No. 10-1) at 20 n.55 (citing *Al Jabari v. Chertoff*, 536 F.Supp.2d 1029, 1033 (D. Minn. 2008) and *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996)); *see also* State's Resp. to Mot. to Dismiss (ECF No. 27) at 6 n.2 (incorporating by reference arguments set forth in memorandum in support of motion for summary judgment).

Moreover, in its Order, this Court looked only to the general rule that "a claim against a federal official for acts performed within his or her official capacity amounts to an action against the sovereign and is therefore barred by sovereign immunity." *International Fed'n of Professional & Technical Eng'rs v. United States*, 934 F. Supp. 2d 816, 820 (D. Md. 2013); Order at 6. The Court failed to identify that "the Supreme Court has recognized an important exception to this

general rule." *Id.* (citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 684 (1949)). This exception has been described by the Supreme Court as follows:

> There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign.... [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Larson, 337 U.S. at 689.

Here, Congress, through Section 2566, required the Secretary to take action by certain deadlines. It is undisputed that the Secretary has not taken this action. The Secretary has no authority to refuse to comply with these Congressional mandates, and the State is seeking a writ of mandamus to enjoin him to do only what Congress already has required. 28 U.S.C.A. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

Therefore, this Court should have found that it has jurisdiction over all of the State's requests for relief because no waiver of the Secretary's sovereign immunity is necessary in this instance. At the very least, though, this Court was required to conduct the proper inquiry into the merits of this case—which already have been fully briefed by the parties—to determine whether Secretary failed to perform any statutory duties prior to determining whether it has jurisdiction. *Wash. Legal Found.*, 89 F.3d at 901–02 ("Whether the *Larson–Dugan* exception applies to this case depends upon whether the Government has a duty to the plaintiff. . . . The Government denies that it has such a duty, and that is the only basis upon which it resists application of the *Larson–Dugan* exception. We agree with the district court, therefore, that the question of jurisdiction

merges with the question on the merits."). The Court's failure to do so in this case was a clear error of law.

III. THE COURT'S DISCUSSION REGARDING 28 U.S.C.A. § 1500 SHOULD BE STRICKEN.

In Section III.C of its Order, this Court discusses issues related to 28 U.S.C.A. § 1500 and potential findings that the CFC could make in the future should the State be forced to institute proceedings in that court. As this Court recognized in its Order, "the parties never addressed these issues" and the Order was "the first time these issues have been discussed in this case." Order at 30. Because issues regarding Section 1500 were not before this Court and because neither party had raised any issues or presented any arguments regarding Section 1500, the State respectfully submits that this Court's discussion regarding Section 1500 and findings that the CFC may or may not make in the future be stricken from its Order. *See Selvidge,* C/A No. 93–4083–DES, 1995 WL 89016, at *1 (providing that Rule 59(e) relief is appropriate when there is "a mistaken decision by the court of issues outside those presented for determination").

CONCLUSION

For the reasons set forth above, this Court should amend its Order 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. In the alternative, this Court should find that it has jurisdiction over the Secretary for all the State's requests for relief. The Court should also amend its Order to remove any discussion of 28 U.S.C.A. § 1500.

Respectfully submitted,

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