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Exhibit A

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No. 2020-CP-40-04603 **AFFIDAVIT OF JAMES M. GRIFFIN**

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Comes James M. Griffin and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.

2. That the Willoughby & Hoefer firm were notified on Friday, September 25 at 11:10 a.m. that an injunction had been set in Barnwell for today.

3. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in the Amended Complaint filed concurrently herewith.

Exhibit 1	Settlement Agreement, *South Carolina v. United States*, Fed. Cir. No. 19-2324 (Aug. 28, 2020)
Exhibit 2	Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General (Aug. 30, 2020)
Exhibit 3	Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General (Sept. 10, 2020)
Exhibit 4	Order, *South Carolina v. United States et al.*, Civil Action No. 1:16-cv-00391-JMC (D.S.C. Feb. 7, 2017), ECF No. 76

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Exhibit 5	Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32
Exhibit 6	Federal Court Docket Sheets for *South Carolina v. United States*, Case Nos. 1:16-cv-00391-JMC, 1:17-cv-01068-MMS, and 1:18-cv-00038-MMS
Exhibit 7	Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility
Exhibit 8	Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility (June 13, 2019)
Exhibit 9	*South Carolina v. United States*, 912 F.3d 720 (2019)
Exhibit 10	Petition for Writ of Certiori, *South Carolina v. United States*, No. 18-1531, 2019 WL 2464930 (4th Cir. June 7, 2019)
Exhibit 11	Reply Brief of Petitioner, *South Carolina v. United States*, No. 18-1531 (4th Cir. Sept. 24, 2019)
Exhibit 12	*South Carolina v. United States*, 140 S. Ct. 392 (2019)
Exhibit 13	Email from V. Ware to Willoughby Hoefer counsel re Injunction Hearing Sept. 30 at 10:00 A.M. Barnwell County et al. v. Alan Wilson (Sept. 25, 2020)
Exhibit 14	Email from J. Carpenter to Judge Lee regarding Hearing on Temporary and Preliminary Injunction (Sept. 25, 2020) (requesting hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 15	Email thread between Judge McCaslin law clerk and counsel for all parties re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (scheduling hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 16	Email thread between B. Humphries, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (agreement to accept service of Summons and Complaint)
Exhibit 17	Email thread between J. Griffin, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (discussing temporary hold on payment to counsel)
Exhibit 18	Email thread between counsel for Defendant, counsel for Plaintiffs, and Judge McCaslin re SCPIF v. Wilson 2020CP4004603 (Sept. 29, 2020)

(following WebEx hearing and discussing status of payment of attorneys' fees to law firms)

Exhibit 19 Email thread between J. Griffin and Judge McCaslin and counsel re SCPIF v. Wilson 2020CP4004603 (Sept. 30, 2020) (discussing confirmation from State Treasurer that funds were wired to Willoughby & Hoefer just hours prior to hearing)

Further Affiant sayeth naught.

Dated this 30th day of September, 2020.

James M. Griffin (S.C. Bar No. 9995)
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Subscribed and sworn to before me
by James M. Griffin on this
the 30th day of September 2020.

Notary Public, State at Large, South Carolina
My Commission Expires September 12, 2029

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EXHIBIT 1

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Fed. Cir. No. 19-2324
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiff's claims, without any further judicial proceedings and without there being any further trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, the parties stipulate and agree as follows:

1. In early 2000, the Department of Energy elected to construct a MOX fabrication facility (MOX Facility) at the Savannah River Site (SRS), Aiken, South Carolina. Since April 15, 2002, and through the present, the Department of Energy transferred defense plutonium or defense plutonium materials into the State of South Carolina in anticipation of disposition into MOX fuel or otherwise. For purposes of this agreement, the parties agree that the amount of defense plutonium or defense plutonium materials remaining at SRS amounts to nine and one-half (9.5) metric tons and will be referenced as the "subject defense plutonium or defense plutonium materials" in this agreement.

2. 50 U.S.C. § 2566, entitled "Disposition of Weapons-Usable Plutonium at Savannah River Site," provides a detailed plan for the MOX Facility, including a schedule for meeting the MOX production objective, defined as the average rate at which the MOX Facility converts defense plutonium into MOX fuel over a given period of time. Should the MOX

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production objective not be achieved by certain dates, the statute requires the Department of Energy to make specified economic and assistance payments and to remove certain defense plutonium or defense plutonium materials transferred to the Savannah River Site but not processed by the MOX facility – referenced in this agreement as the subject defense plutonium or defense plutonium materials – from the State of South Carolina by certain deadlines.

3. The MOX production objective has not been met and will not be met.

4. On March 3, 2018, the State of South Carolina filed an amended complaint in the Court of Federal Claims, seeking economic and impact assistance payments for the years 2016 and 2017.

5. The parties subsequently entered into negotiations designed to resolve amicably all of the State of South Carolina's present and future claims relating to obligations of the Department of Energy imposed pursuant to 50 U.S.C. § 2566(c) and (d). The State of South Carolina has offered to settle this case based upon the following terms:

a. Immediate payment by the United States to the State of South Carolina in the amount of $600 Million (Six Hundred Million Dollars), inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.

b. The State of South Carolina shall forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of 50 U.S.C. § 2566(c) or 2566(d) until January 1, 2037.

c. After January 1, 2037, the State of South Carolina's rights and remedies under 50 U.S.C. § 2566(c) and 2566(d) will be governed solely by the terms of this agreement, as set forth below.

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d. If, on January 1, 2037, 9.5 metric tons of the subject defense plutonium or defense plutonium materials have not been removed from the State of South Carolina, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during the time period from the signing of this Agreement to January 1, 2037, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be multiplied $1.5 Billion (One Billion Five Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy to the State of South Carolina by April 1, 2037. This payment shall be in full satisfaction of any claim for economic and impact assistance payments pursuant to 50 U.S.C. § 2566(d)(2) owed to the State of South Carolina from 2022 through 2036.

e. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during that calendar year, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be

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multiplied by a sum of money representing $1 Million (One Million Dollars) per day for each day during that said year in which there remains a portion of the said 9.5 metric tons, with said sum of money to be capped for any given year at $100 Million (One Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy by December 31 of that particular calendar year, for which any of the 9.5 metric tons remains in the State of South Carolina, beginning with the year 2037.

f. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, the Department of Energy shall continue to remove from the State of South Carolina such remaining subject defense plutonium or defense plutonium materials. If, after December 31, 2036, the Department of Energy has removed less than 4.75 metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may immediately institute legal action to enforce this paragraph 5(f) removal requirement. If, after December 31, 2036, the Department of Energy has removed 4.75 or more metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may only institute legal action to enforce this paragraph 5(f) removal requirement after January 1, 2042.

6. The parties agree that the United States retains sole discretion in the method of removal of the subject defense plutonium or defense plutonium materials. The parties further agree that the determination of the amount of total material removed from the State shall be by certification of the Department of Energy, through a declaration by an appropriate Department official, pursuant to the provisions of 28 U.S.C. § 1746.

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7. The terms of this agreement will remain in effect until the United States removes 9.5 metric tons of the subject defense plutonium or defense plutonium material from the State of South Carolina, or until Congress amends 50 U.S.C. § 2566(c) or (d) with respect to the obligations of the Department of Energy for the removal of defense plutonium or defense plutonium material or payments to the State of South Carolina in a manner that is inconsistent with the terms and conditions of this agreement, whichever is earlier.

8. The State of South Carolina's offer has been accepted on behalf of the United States Attorney General.

9. Upon satisfaction of the terms set forth in paragraph 5(a), the State of South Carolina agrees to join with the United States in stipulating to dismissal, with prejudice, of the appeal pending in the Court of Appeals for the Federal Circuit.

10. Upon removal of the 9.5 metric tons of subject defense plutonium or defense plutonium materials, the State of South Carolina releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related or otherwise involved in: (a) this case, regardless of whether they were included in the complaint, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and (b) any and all outstanding obligations of the Department of Energy arising under 50 U.S.C. § 2566(c) or (d).

11. This agreement is in no way related to or concerned with any taxes for which the State of South Carolina is now liable or may become liable in the future as a result of this agreement.

12. The State of South Carolina warrants and represents that no other action or suit with respect to the claims advanced in this suit or otherwise referenced in paragraph 10 is

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pending or will be filed in or submitted to any other court, administrative agency, or legislative body by the State of South Carolina. The State of South Carolina further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit. Should there be now or in the future any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement shall be refunded promptly by the State of South Carolina, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

13. This agreement is for the purpose of settling this case and all claims that the State of South Carolina may or could bring arising from obligations imposed on the Department of Energy pursuant to 50 U.S.C. § 2566(c) or 2566(d). The parties intend that this agreement will resolve all claims relating to economic and assistance payments or removal of plutonium that have arisen, or will arise, between 2016 and the date on which the Department of Energy completes removal of the subject 9.5 metric tons of defense plutonium or defense plutonium materials. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this agreement.

14. The Attorney General for the State of South Carolina represents that he is authorized to enter into this agreement on behalf of the State of South Carolina.

15. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

AGREED TO:

UNITED STATES OF AMERICA

WILLIAM P. BARR
Attorney General
United States of America

CLAIRE MCCUSKER MURRAY
Principal Deputy Associate Attorney General

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director, National Courts Section

TARA K. HOGAN
Assistant Director
Department of Justice
Civil Division
Commercial Litigation Branch
Washington, DC

DATED: August 28, 2020

STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General
State of South Carolina
Columbia, SC

DATED: August 21, 2020

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EXHIBIT 2

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HENRY MCMASTER
GOVERNOR

August 30, 2020

The Honorable Alan M. Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Attorney General Wilson:

I recently received a copy of the Settlement Agreement you executed with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). As you know, I did not receive the Settlement Agreement until late last week, at which point you had already signed it on behalf the State. Having carefully reviewed the document and your outside counsel's responses to my immediate questions regarding the same, I am compelled to express my concerns regarding the Settlement Agreement.

First, I am not convinced that this long-term arrangement provides sufficient assurances that DOE will remove the plutonium from our State in a timely manner. Currently, federal law provides that all defense plutonium transported into the State between 2002 and the present must be removed from SRS by January 1, 2022. However, under the Settlement Agreement, it appears that DOE will not be required to remove this plutonium until January 1, 2037. And if DOE only removes half of the total amount currently at SRS by this new deadline, the State of South Carolina will be forced to forgo legal action until January 1, 2042. I understand that settlement negotiations are inherently fluid in nature and that the transfer of defense plutonium is not an expeditious process, but the Settlement Agreement does not appear to align with previous discussions. At bottom, I cannot support a compromise that extends the existing removal deadline by up to twenty years.

Second, after reviewing your counsel's responses to my questions regarding the anticipated use of the settlement proceeds, I must note my concerns regarding the payment of attorneys' fees. After years of DOE repeatedly ignoring its obligations and abandoning the MOX project, President Trump and his Administration have demonstrated their commitment to removing surplus plutonium from our State. Secretary Brouillette's willingness to address these inherited issues is

noted and most appreciated. However, the federal government's relatively recent attention to this important issue is due in no small part to our zealous advocacy and coordination with members of the congressional delegation. Accordingly, while I recognize that this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims, I simply cannot endorse the payment of $75 million in attorneys' fees under the circumstances.

To be clear, I appreciate your efforts to recover the economic and impact assistance payments owed to the State and your pursuit of this litigation more generally. However, as I have repeatedly conveyed, it is of paramount importance that South Carolina not become a permanent plutonium waste repository. Therefore, I cannot support a Settlement Agreement that extends DOE's existing removal deadlines by up to twenty years and potentially sidelines South Carolina's future leadership by restricting the State's ability to enforce its legal rights.

Yours very truly,



Henry McMaster

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EXHIBIT 3

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The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

140 N. Main St., Suite 102
Summerville, SC 29484
(843) 871-2640
FAX (843) 871-2643
PTI (843) 873-7842

Courthouse, Amelia Street
Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252
FAX (803) 533-6004
PTI (803) 533-6137

DAVID M. PASCOE
Solicitor

September 10, 2020

The Honorable Alan M. Wilson
S. C. Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear Attorney General Wilson:

I write to raise serious concerns about your intent to pay two law firms $75 Million from the proceeds of a $600 Million settlement with the United States Department of Energy (DOE). I believe such payment is prohibited by South Carolina law and appears to violate the canons of ethics which govern licensed attorneys. I request that you, Governor McMaster, and our legislative leaders get together to resolve these issues to avoid potential litigation.

South Carolina law prohibits the appropriation of State funds by any officer in the Executive Branch of government. The $600 Million allocated in the Settlement Agreement with DOE are public funds allocated to South Carolina. You, of all people, know that an Attorney General has no authority to direct how those public funds are spent. Recently, you filed a Brief in the South Carolina Supreme Court emphasizing the very point that executive officers do not have authority to direct funds from a settlement agreement.

The following is a specific quote from your Brief:

> Executive officers...possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund...See, *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623 (2002)["...there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation powers. Art. I, § 8.

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State v. Quinn, Attorney General's Memorandum In Response to Court's Order of March 12 pg. 25.

This above quote is one of the few points I agree with in your Brief. When money is directed to go to the State's General Fund as in the case with the DOE Settlement Agreement, you nor the Governor have the authority to transfer those funds. Only the Legislature controls what happens with the $600 million.

The Legislature has spoken through S.C. Code Section 1-7-150. This statute requires you to deposit all funds received by judgment or settlement into the State's General Fund, and the exception for investigative costs and litigation costs awarded by court order or settlement in this statute clearly does not apply. There was not any order awarding attorneys' fees. The Settlement Agreement does not allocate any portion of the $600 Million to attorneys' fees. In fact, DOE specifically carved out attorneys' fees in the Settlement Agreement. Section 5(a) provides for:

> Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses*.

Section 5(a) clearly requires that payment of the entire $600 Million be made directly to the State of South Carolina, and S.C. Code Section 1-7-150 directs you to deposit $600 Million into the State's General Fund. These are public funds, not a slush fund to dole out money to private law firms.

Your agreement to pay private law firms also raises ethical concerns. Based upon the information I have been able to review, the agreement that you entered with these firms on behalf of the State appears to violate the South Carolina Rules of Professional Conduct. Rule 1.5 of the Rules of Professional Conduct, S.C. App Ct. Rule 407 states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Contingency fees are not exempt from this reasonable standard. *Id.* at Note 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. See, *Getzen v. L. Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006). At the very least, I believe it would be prudent to seek an opinion from the South Carolina Bar Ethics Advisory Committee regarding the fee amount.

The payment of a $75 Million fee for the services performed by the law firms in this matter seems arbitrary and unreasonable. This is public money. It belongs to the Citizens of South Carolina, and awarding private law firms $75 Million is unconscionable when one considers it is almost 13 times the total amount every Solicitor's Office in the State receives in annual state judicial circuit support. This is more than the State funding received by all 32 of the Solicitors' Offices and Public Defenders' Offices combined. It is more than our State provides our entire Judiciary in annual funding. In fact, it is even 5 times more than the annual base budget for the Attorney General's Office. Perhaps most egregious is your attempt to award more money to

private law firms than will probably be received by the counties directly impacted by the storage of plutonium.

These law firms unsuccessfully filed suit to enforce a settlement reached by Governor Hodges which is codified in the United States Code at 50 USC § 2566. The federal statute requires DOE to pay South Carolina $100 Million per year for each year it fails to meet certain deadlines relating to the processing and disposition of surplus defense plutonium stored at the Savannah River Site (SRS). DOE never contested that it failed to comply with federal law. Rather, DOE took the position in federal court that Congress had not appropriated money from which DOE could pay the penalty.

Your lawyers first sued in federal court in South Carolina to collect the $100 Million penalty for failing to comply with the statute in 2017. The federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Claims. Subsequently, your lawyers refiled the same suit before the Court of Claims, this time seeking $200 Million because DOE had not complied with the statute for 2018. Once again, your lawyers lost the case. The Court of Claims ruled with DOE. Your lawyers then appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit. While the appeal was pending, you reached this settlement with DOE.

From court records, it does not appear your lawyers engaged in any discovery whatsoever. I can't find any record of them serving interrogatories; taking depositions; hiring experts; or obtaining documents from DOE. Instead, your lawyers only drafted pleadings and wrote briefs to address the legal question of whether DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. Quite frankly, I do not understand why our State felt the need to bring in private counsel in the first place to deal with a relatively straightforward issue that government leaders were ultimately able to negotiate among themselves.

Under the terms of the settlement, you have agreed on behalf of the people of South Carolina to forgo enforcing their federal rights to have the plutonium removed or processed for another 15 years. In exchange, DOE has agreed to pay South Carolina a substantially reduced penalty of $600 Million. As you acknowledged in your press release, this was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. Yet, you now plan to pay private lawyers a contingency fee on the entire $600 Million when they only sued for $200 Million. This makes absolutely no sense, and I agree with Governor McMaster's objection to your intention to pay $75 Million to these law firms.

The contingency fee agreement that you entered with these law firms is more favorable to the lawyers than your standard contingency fee agreements entered in other cases. Under the payment terms of your standard agreements, these law firms would have been entitled to receive approximately $25 Million, not $75 Million. Curiously, you have never posted the fee agreement for this matter on your office's official website, yet you have other contingency fee agreements posted: http://www.scag.gov/litigation-retention-agreements.

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Finally, this deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.[1]

$75 Million is an enormous amount of money that can be used to make a real difference in the lives of South Carolinians. You cannot lawfully give funds directed to go into the State General Fund to your political friends and even if you could, you should not. I request that you do the right thing as a constitutional officer of our State and seek approval from our General Assembly before you make any attempt to pay public funds to private law firms.

Respectfully yours,



David M. Pascoe, Jr.
First Circuit Solicitor

cc: The Honorable Henry D. McMaster, Governor
The Honorable Curtis M. Loftis, Jr., Treasurer
The Honorable Richard A. Eckstrom, Comptroller General
President Pro Tem Hugh K. Leatherman, Sr., South Carolina Senate
Minority Leader Nikki G. Setzler, South Carolina Senate
The Honorable James H. "Jay" Lucas, Speaker of the S. C. House of Representatives
The Honorable James T. Rutherford, Minority Leader of S. C. House of Representatives
The Honorable G. Murrell Smith, Jr., Chairman of S. C. House Ways and Means

[1] https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

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EXHIBIT 4

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

State of South Carolina, Plaintiff, v. United States; United States Department Of Energy; Dr. Ernest Moniz, *in his official Capacity as Secretary of Energy*; National Nuclear Security Administration; *and* Lt. General Frank G. Klotz, *in his official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security*, Defendants.	Civil Action No. 1:16-cv-00391-JMC **ORDER**

On April 25, 2016, Defendants United States, the United States Department of Energy ("DOE"), Dr. Ernest Moniz, the National Nuclear Security Administration ("NNSA"), and Lieutenant General Frank G. Klotz (collectively "Defendants") filed a motion to dismiss the complaint filed by Plaintiff, the State of South Carolina (the "State"), arguing, among other things, that the third cause of action in the complaint, seeking review of Defendants' alleged failure to act in compliance with 50 U.S.C. § 2566(d), should be dismissed because the court lacked subject-matter jurisdiction over it. (ECF No. 17.) Specifically, Defendants contended that sovereign immunity had not been waived with respect to the third cause of action because the only potential waiver applicable to that cause of action—that found in the Administrative Procedures Act, 5

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U.S.C. § 701, *et seq.*—is not available where, as here, another court, such as the Court of Federal Claims ("CFC") provides an adequate remedy for the challenged agency action at issue. (*See id.* at 30-34.)

By order entered October 31, 2016, the court agreed with Defendants that the court lacked subject matter jurisdiction over the State's third cause of action because, pursuant to its jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346, 1491, the CFC provides an adequate remedy for the agency action challenged in that cause of action and, therefore, Defendants had not waived sovereign immunity from suit in this court with respect to the complaint's third cause of action. (*See* ECF No. 56.) The court subsequently denied the State's motion for reconsideration of its rulings in the October 31, 2016 order. (*See* ECF No. 75.) Because the court was uncertain whether it should dismiss the third cause of action without prejudice to the State's ability to prosecute it in an original action filed with the CFC or instead should transfer the cause of action to the CFC, pursuant to 28 U.S.C. § 1631, the court directed the parties to file supplemental briefing on the issue and declined to decide Defendants' motion to dismiss the third cause of action until the briefs had been submitted. (*See* ECF No. 56 at 24-31.)

The parties have since filed their supplemental briefs. (ECF Nos. 63, 64.) The parties agree that the court should dismiss the cause of action without prejudice to the State's ability to prosecute it in an original action filed in the CFC rather than transfer it. (*See* ECF Nos. 63, 64.) Accordingly, for the reasons stated in the court's October 31, 2016 order (ECF No. 56), as well as in its order denying the State's motion for reconsideration (ECF No. 75) and in the parties' supplemental briefs, Defendants' motion to dismiss the complaint (ECF No. 17) is hereby **GRANTED IN**

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PART.[1] The third cause of action in the State's complaint (ECF No. 1 ¶¶ 97-112) is hereby **DISMISSED** without prejudice to the State's ability to prosecute it an original action filed in the Court of Federal Claims.

IT IS SO ORDERED.

J. Michelle Childs

United States District Court Judge

February 7, 2017
Columbia, South Carolina

[1] The court notes that Defendants' motion to dismiss is not fully disposed by this order. Defendants have moved to dismiss the first and second causes of action in the State's complaint on grounds that the court has yet to address. (*See* ECF No. 17.)

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EXHIBIT 5

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In the United States Court of Federal Claims

No. 18-38C
(Filed: August 20, 2019)

STATE OF SOUTH CAROLINA,	*	
	*	
Plaintiff,	*	50 U.S.C. § 2566; Appropriations;
	*	Cross-Motions for Summary Judgment;
v.	*	Economic and Impact Assistance Payments;
	*	Judgment Fund; RCFC 56
THE UNITED STATES,	*	
	*	
Defendant.	*	

Randolph R. Lowell, Columbia, SC, for plaintiff.

Tara K. Hogan, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff, the State of South Carolina, seeks an award of economic and impact assistance payments for 2016 and 2017 pursuant to 50 U.S.C. § 2566, which directs such payments if the United States Department of Energy ("DOE") fails to meet certain deadlines related to the processing and disposition of surplus defense plutonium stored at the DOE's Savannah River Site ("SRS").[1] Specifically, plaintiff contends that 50 U.S.C. § 2566(d) requires the DOE to pay it $1 million per day, up to a statutory cap of $100 million per year, for a total of $200 million. Both plaintiff and defendant move for summary judgment. For the reasons set forth below, the court grants defendant's motion and denies plaintiff's motion.

I. BACKGROUND

A. Facts

Following the end of the Cold War, the United States was challenged with finding a safe, secure method to dispose of large amounts of weapons-grade nuclear material, including weapons-grade plutonium, from both foreign and domestic nuclear weapons production

[1] The SRS is a federally owned and operated facility that processes and stores nuclear material in support of national defense, nonproliferation, research, and environmental missions. Pl.'s Mot. App. 145.

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facilities. Am. Compl. Ex. 3 at 2. The need to securely store these materials in a safe environment was paramount; however, there was also great promise in reprocessing this material into fuel for nuclear reactors. Id. at 3. If possible, enriched nuclear material would be repurposed into lower-grade fuel, and if the material was not suitable for conversion into fuel, it would be "immobilized" to render it difficult to use as a weapon.[2] Pl.'s Mot. App. 10. To comply with the terms of an agreement with the Russian Federation, which required irradiation to dispose of the material, the DOE determined that the best option would be irradiating the material in a nuclear reactor to degrade it. Id. at 9-10, 13, 19. See generally Am. Compl. Ex. 7.

In early 2000, the DOE selected the SRS to reprocess the material. Pl.'s Mot. App. 68, 77. Simultaneously, the DOE, interested in cost savings through facility closures, wanted to move the plutonium from the Rocky Flats DOE facility near Denver, Colorado, to the SRS. Id. at 82-86. While legislation for these activities was being considered, the governor of South Carolina expressed concern to the DOE regarding the storage of large amounts of weapons-grade nuclear material within the state's borders. Id. at 93-94 (letter from South Carolina Governor Jim Hodges to DOE Secretary Spencer Abraham, dated April 10, 2002). The governor's primary concern was that an agreement brokered between the state and the DOE to remove or reprocess the material would not be legally enforceable:

> I must insist on an ironclad agreement that is fully enforceable in a court of law. The stakes are too high to accept mere political assurances. I will not risk the health and welfare of South Carolina by allowing the enforceability of any agreement to be bound only by federal departmental policy that changes according to political considerations beyond our control.

Id. at 93; see also id. at 103-09 (agreement enclosed in April 11, 2002 letter from DOE Secretary Spencer Abraham to South Carolina Governor Jim Hodges).

Ultimately, on December 2, 2002, Congress enacted a statute, later codified at 50 U.S.C. § 2566, addressing the disposition of weapons-grade plutonium stored at the SRS. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3182, 116 Stat. 2458, 2747-50 (2002) (codified at 50 U.S.C. § 2566 (Supp. III 2004)). The statute provided for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility ("MOX facility") at the SRS to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors, id.; the MOX facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually, Pl.'s Mot. App. 146. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019. § 3182(a)(1)-(2), (g)(1), 116 Stat. at 2747-50. If the DOE did not meet the MOX production objective by

[2] Immobilization is a process of encasing fissile material in glass or ceramics, making it stable for storage and difficult to recover for use in a nuclear weapon. Pl.'s Mot. App. 16. Defense plutonium that was converted into fuel would be "irradiated" in a nuclear reactor. Id. Both methods render nuclear material difficult to transport, conceal, and process into a nuclear weapon. Id.

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January 1, 2011, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2011, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to the site between April 15, 2002 and January 1, 2017, by January 2017. Id. § 3182(c)(1)-(2), 116 Stat. at 2749. The DOE would also be required to remit economic and impact assistance payments to plaintiff in the amount of $1 million per day for each day that certain milestones went unmet, up to a maximum of $100 million per year. Id. § 3182(d)(1), 116 Stat. at 2749. These payments would come "from funds available to the Secretary [of the DOE] . . . ." Id.

In subsequent enactments of the statute, Congress changed deadlines for both MOX processing and material removal, and also changed the funding source for payment of economic and impact assistance. In 2005, Congress amended 50 U.S.C. § 2566 to make payment of economic and impact assistance "subject to the availability of appropriations." See Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 313(4)(A)(ii), 119 Stat. 2247, 2280-81 (2005). This language was retained in the versions of the statute reenacted in 2013 and 2014. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3116, 126 Stat. 1632, 2172-73; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3142(f), 128 Stat. 3292, 3900 (2014). The current version of 50 U.S.C. § 2566 provides that if the MOX production objective was not met, the DOE would be required to remove from South Carolina at least one metric ton of plutonium by January 1, 2016, and an amount of plutonium equal to all unprocessed plutonium shipped to the site from April 15, 2002, to January 1, 2022, no later than January 1, 2022. See 50 U.S.C. § 2566(c) (2012 & Supp. II 2015). It further provides that if the DOE missed the January 1, 2016 deadline, the DOE would be required to make economic and impact assistance payments to plaintiff beginning in 2016. Id. § 2566(d)(1).

In 2002, the DOE began shipping plutonium to the SRS. Am. Compl. ¶ 41; Answer ¶ 41. In 2016 and 2017, the DOE failed to achieve the MOX production objective, did not remove one ton of plutonium from South Carolina, and did not provide economic and impact assistance payments to plaintiff as specified in 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45.

B. Procedural History

On January 8, 2018, plaintiff filed a complaint in the United States Court of Federal Claims, seeking $100 million in economic and impact assistance payments it alleges it is owed for 2016, prejudgment and postjudgment interest, costs and attorneys' fees, and any further relief deemed proper. On March 6, 2018, plaintiff amended its complaint to add a claim for the $100 million of economic and impact assistance payments it alleges is owed for 2017.

Ten days after defendant filed its answer, plaintiff moved for summary judgment. Defendant then cross-moved for summary judgment. Briefing is now complete and, deeming oral argument unnecessary, the court is prepared to rule.

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II. STANDARD OF REVIEW

Both plaintiff and defendant move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. Id. at 324. Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1).

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the court must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Contessa Food Prods., Inc. v. Conagra, Inc., 282 F.3d 1370, 1376 (Fed. Cir. 2002) ("On summary judgment, the question is not the 'weight' of the evidence, but instead the presence of a genuine issue of material fact . . . .") (abrogated on other grounds by Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008) (en banc)); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment."); Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) ("[T]he Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues."). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. However, if neither party satisfies this burden on the filing of cross-motions for summary judgment, then the court must deny both motions. See First Commerce Corp. v. United States, 335 F.3d 1373, 1379 (Fed. Cir. 2003) ("When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration."); Bubble Room, Inc. v. United States, 159 F.3d 553, 561 (Fed. Cir. 1998) ("The fact that both the parties have moved for summary judgment does not mean that the court must grant summary judgment to one party or the other.").

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III. DISCUSSION

The parties have differing views concerning the issue now pending before the court. Plaintiff states that the issue is whether the United States is liable to make economic and impact assistance payments for 2016 and 2017 under 50 U.S.C. § 2566(d)(1), and suggests that the funds to satisfy the liability may come from appropriations already authorized or the Judgment Fund. Pl.'s Mot. Summ. J. 12, 15-16. Defendant argues that the issue is whether the United States is liable to make economic and impact assistance payments if Congress did not appropriate funds for the payments. Def.'s Cross-Mot. Summ. J. 7-8.

The parties agree that the DOE has not met critical milestones to process or dispose of plutonium as required by 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45. Defendant also agrees that had Congress appropriated funds for economic and impact assistance payments, the DOE would be required to remit those funds to plaintiff in accordance with the statute. See Def.'s Cross-Mot. Summ. J. 8. However, the parties disagree as to whether economic and impact assistance payments may be made from: (1) certain appropriated funds for activities already authorized or funds reprogrammed from those activities; or (2) the Judgment Fund. See id. at 11-22; Pl.'s Mot. Summ. J. 12, 15-16. Because these questions turn on the interpretation of law rather than findings of fact, this case is properly before the court on summary judgment.

A. Relevant Legal Standards

Central to the parties' competing contentions is the meaning of 50 U.S.C. § 2566(d)(1). Thus, the court turns to the text of that statute to ascertain how it should be construed. As originally enacted, this section provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2011, the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina each year beginning on or after that date through 2016 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of--
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. III 2004) (emphasis added).

In 2005, the background of 50 U.S.C. § 2566 and the purpose of the economic and impact assistance payments in 50 U.S.C. § 2566(d)(1) was discussed in the United States Senate:

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> In a sign of good faith to the State of South Carolina, language was negotiated . . . that required the [DOE] to convert one metric ton of defense plutonium into fuel for commercial nuclear reactors by 2011 or face penalties of $1 million per day up to $100 million per year until the plutonium is either converted into the fuel or removed from the State. It has never been the intention of South Carolina to receive penalty payments; the residents . . . simply sought reassurances that weapons-grade plutonium would not remain at [the] SRS indefinitely. South Carolina would not have accepted [the defense] plutonium without this statute.

151 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). Later in that session, a "technical correction" to 50 U.S.C. § 2566(d)(1) was proposed:

> It is also my intention to make a technical correction, in the future, to language contained in the conference report to the Fiscal Year 2006 Energy and Water Appropriations Act. This conference report contains a change to important authorizing language that would make these penalty payments "subject to the availability of appropriations."

Id. (statement of Sen. Graham).

The technical correction was made to the version of 50 U.S.C. § 2566 enacted in 2005; subsection (d) of that statute provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2014, the Secretary shall, subject to the availability of appropriations, pay to the State of South Carolina each year beginning on or after that date through 2019 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of–
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. V 2006) (emphasis added).

Subsequent versions of 50 U.S.C. § 2566 enacted on January 2, 2013, and December 19, 2014, retained the phrase "subject to the availability of appropriations" in subsection (d)(1). See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). Notably, other

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parts of the statute remained essentially unchanged from the version originally enacted, with the exception of the deadlines. For example, 50 U.S.C. § 2566(d)(2)(A) has consistently provided:

> (A) If, as of January 1, 2022, the MOX facility has not processed mixed-oxide fuel from defense plutonium and defense plutonium materials in the amount of not less than—
>
> (i) one metric ton, in each of any two consecutive calendar years; and
>
> (ii) three metric tons total,
>
> the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the removal by the Secretary from the State of South Carolina of an amount of defense plutonium or defense plutonium materials equal to the amount of defense plutonium or defense plutonium materials transferred to the Savannah River Site between April 15, 2002, and January 1, 2022, but not processed by the MOX facility.

50 U.S.C. § 2566(d)(2)(A) (2012 & Supp. II 2015) (emphasis added).

If defendant is liable to plaintiff under 50 U.S.C. § 2566(d)(1), funds to satisfy the obligation in the statute must come from a congressionally sanctioned source because, pursuant to the Appropriations Clause of the United States Constitution, the federal government may only spend money that Congress has appropriated. See U.S. Const. art. I, § 9 cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Congress may also require that funds only be used for specific programs or purposes. See Nutt v. United States, 837 F.3d 1292, 1295 (Fed. Cir. 2016) ("According to the Constitution's Appropriations Clause, 'funds may be paid out [by the Treasury] only on . . . the express terms of a specific statute.'" (quoting Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990) (alteration in original))). If Congress specifies a purpose for appropriated funds, "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2012).

If Congress elects to provide unrestricted, or "lump-sum," appropriations to an agency, those appropriations are normally allocated at the agency's discretion. See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); see also U.S. Government Accountability Office, Principles of Appropriations Law—Vol. II ("GAO Redbook") 6-5 (3d ed. 2006) ("A lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object

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described.").[3] The normally broad agency discretion to direct lump-sum appropriations may be limited when an agency is bound by a contract; in such circumstances, an agency may not avoid contractually obligated payments if unrestricted, i.e., lump-sum, funds are available. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 636-38 (2005). Agency discretion is also limited by line-item appropriations, in which Congress places conditions on how an appropriation may be spent. To determine whether an expenditure is permitted for a particular line item, agencies perform a "necessary expense" analysis. See GAO Redbook, supra, at 3-14 to 3-15. "Under the necessary expense doctrine, '[a]n appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.'" U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quoting GAO Redbook, supra, at 4-20). For an expense to be found necessary, (1) there must be a logical relationship between the expenditure and the appropriation; (2) the expenditure must not be prohibited; and (3) the expenditure must not be provided for in another appropriation. GAO Redbook, supra at 3-14 to 3-17.

B. Plaintiff May Not Receive Economic and Impact Assistance Absent a Congressional Appropriation for That Purpose

Although plaintiff and defendant agree that the DOE did not comply with the statute, they disagree as to whether any funds are available to satisfy the DOE's statutory obligation. See Pl.'s Mot. Summ. J. 12, 15-16; Def.'s Cross-Mot. Summ. J. 11-22. Defendant argues that, absent an appropriation, the DOE is not liable to plaintiff for any payments and, alternatively, that any liability that flows from the statute is limited to the amount Congress appropriated for economic and impact assistance. Def.'s Reply 1-2, 12. Plaintiff appears to concede that no funds were specifically appropriated for economic and impact assistance. See Pl.'s Reply 3. However, the lack of a specific appropriation does not per se remove the DOE's liability for economic and impact assistance payments. Rather, defendant's obligation to make economic and impact assistance payments manifested when it failed to comply with the terms of 50 U.S.C. § 2566. See Greenlee Cty. v. United States, 487 F.3d 871, 880 (Fed. Cir. 2007) ("We conclude that defendant's liability for . . . payments was limited to the amounts appropriated by Congress." (emphasis added)). The question remaining is the extent of defendant's liability, a question that is purely legal in nature.

Plaintiff advances two theories under which the DOE could remit economic and impact assistance payments without an additional congressional appropriation to the DOE: (1) the DOE could use existing lump-sum appropriations or (2) the DOE could reprogram funds Congress appropriated for other purposes. Pl.'s Mot. Summ. J. 15-25. The court examines them in turn.

[3] The first three chapters of the GAO Redbook are in the GAO Redbook's fourth edition, while the remaining chapters are in the third edition. Citations to the GAO Redbook are to the most recent version.

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1. Congress Did Not Provide Lump-Sum Appropriations in the Consolidated Appropriations Acts of 2016 and 2017

Under its first theory, plaintiff initially contends that there are lump-sum appropriations available to made the economic and impact assistance payments for 2016 and 2017. Pl.'s Mot. Summ. J. 15, 22. It primarily relies on the observation in Greenlee County that the United States Supreme Court ("Supreme Court") addressed the question of "what appropriation amounts are available?" in Cherokee Nation–in the context of a contract case–"that the presence of sufficient unrestricted lump-sum appropriations (not specifically appropriated for the program at issue) to meet the government's contractual obligation qualified as available appropriations." 487 F.3d at 880 & n.3, quoted in Pl.'s Mot. Summ. J. 15. In essence, plaintiff is suggesting that the principle espoused in Cherokee Nation–that a court can order an agency to use its lump-sum appropriations to satisfy a contractual obligation–should be extended to situations in which the government's obligation is only statutory in nature. See Pl.'s Reply 6.

Both Greenlee County and a related case, Prairie County, concern a government benefits program enacted to reimburse local governments for lost property tax revenues caused by the federal government's ownership of large amounts of land in their communities. See Prairie Cty. v. United States, 782 F.3d 685 (Fed. Cir. 2015); Greenlee Cty., 487 F.3d at 871. Because the federal government does not pay property taxes to local communities, Congress created a "Payment in Lieu of Taxes" ("PILT") program to compensate local governments for lost tax revenue. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 873-74. Although Congress designated a formula for reimbursing local governments, appropriations for the PILT program were insufficient to reimburse all qualifying communities to the amount yielded by the formula. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 874. Greenlee County and Prairie County, whose compensation fell short when appropriations for PILT were exhausted, separately filed suits in the United States Court of Federal Claims, followed by appeals to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Prairie Cty., 782 F.3d at 687-88; Greenlee Cty., 487 F.3d at 874-75.

In Greenlee County, the Federal Circuit observed that obligations in contractual relationships were distinguishable from obligations flowing from benefits programs. 487 F.3d at 878-79. While contractual obligations could not be avoided if unrestricted appropriations were available for payment, noncontractual statutory obligations, i.e., benefits, could be avoided if Congress circumscribed its liability in the statute itself. See id. at 879 ("The conclusion that [the statute] limits defendant's liability to the amount appropriated is particularly appropriate because [the statute] . . . involves a benefits program not a contract, and 'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated." (emphasis added)). Eight years later, the Federal Circuit in Prairie County again focused on the plain language of the statute: "Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability . . . or whether [the statute] imposes a statutory obligation to pay the full amount . . . regardless of appropriations by Congress." 782 F.3d at 690 (quoting Star-Glo Assocs., LP v. United States, 414 F.3d 1349, 1355 (Fed. Cir. 2005)). Even in a contractual relationship, however, payment requires an appropriation. See Greenlee Cty., 487 F.3d at 878 ("The Supreme Court has noted that, even in the contract context, the 'subject to the availability of appropriations' language means that the government is not contractually bound except to the extent that appropriations are available."

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(citing Cherokee Nation, 543 U.S. at 643)); see also id. ("[A] statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress. . . . [I]t is undisputed that if [a statute] use[s] the phrase 'subject to the availability of appropriations,' [plaintiff's] right to recover would be limited to the amount appropriated.").

The Federal Circuit has also distinguished between the analysis of language limiting liability in contractual relationships from the analysis of similar language in benefit payment statutes, concluding in the latter that congressional intent plays a larger role:

> [When] the government is not seeking to limit contractual liability, but to limit benefit payments, . . . considerations of predictability are far less significant, and . . . there is greater room to rely on other indicia of Congressional intent, such as legislative history, to ascertain the congressional purpose.

Star-Glo Assocs., LP, 414 F.3d at 1355.

The relationship between the plaintiff and the government in Cherokee Nation was contractual, unlike the relationship between the plaintiff and the government here. Compare Cherokee Nation, 543 U.S. at 639, with 28 U.S.C § 2566 (2012 & Supp. II 2015). Plaintiff concedes that defendant's liability in this case is based upon a statute and not a contract. See Pl.'s Reply 6-7 ("The State has not (yet) asserted a contract claim against the United States. . . . [T]his case is only about DOE's failure to meet its statutory obligation to provide the economic and impact assistance payments. . . ."). In the absence of any binding precedent or other legal support for extending the holding of Cherokee Nation to a purely statutory obligation, the court declines to do so. Nevertheless, it is necessary to examine whether 50 U.S.C. § 2566 allows for the use of lump-sum appropriations for economic and impact assistance and, if so, whether Congress made such appropriations in the pertinent Consolidated Appropriations Acts.

When a statute creates a right to compensation, but also limits the government's liability to the amount appropriated, the court must determine "whether there are appropriations available to satisfy the government's liability by considering whether the statute in fact limits the government's liability to the amount appropriated," and "what appropriations are available . . . to satisfy that liability." Greenlee Cty., 487 F.3d at 878. In this case, the statute conditions defendant's payments to plaintiff as "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). This language was first enacted in 2005, well before the DOE's violation of the statute in 2016. See § 313, 119 Stat. at 2280-81. Moreover, this specific language is directly addressed in Greenlee County: "'[S]ubject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." 487 F.3d at 878. Also important is the fact that the less restrictive "from funds available to the Secretary" in the originally enacted version of 50 U.S.C. § 2566(d)(1) was later changed to the more restrictive "subject to the availability of appropriations." Compare 50 U.S.C. § 2566(d)(1) (Supp. V 2006), with 50 U.S.C. § 2566(d)(1) (Supp. III 2004).

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"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978) (collecting cases). Here, Congress twice reenacted 50 U.S.C. § 2566 following the 2005 addition of the "subject to the availability of appropriations" language and the Federal Circuit's 2007 explanation of that language in Greenlee County, retaining that verbiage each time. See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). The court therefore may presume that Congress was aware that courts interpreted the phrase "subject to the availability of appropriations" as limiting the government's liability to the amount appropriated, and purposely retained this more restrictive language in subsequent reenactments.

Given the above, a plain reading of 50 U.S.C. § 2566(d)(1) evidences Congress's intent that payments for economic and impact assistance can only be made if (1) there is a specific appropriation for that purpose, or (2) there is a lump-sum appropriation that the DOE could use for that purpose. The parties do not dispute that Congress did not appropriate funds for the specific purpose of economic and impact assistance payments. Pl.'s Reply 9; Def.'s Reply 2. Plaintiff argues, however, that funds were available through lump-sum appropriations "legally available" to satisfy statutory obligations. Pl.'s Reply 3.

As plaintiff notes, "Congress appropriated approximately $18.59 billion and $19.69 billion to DOE for its 'Atomic Energy Defense Activities' for fiscal years 2016 and 2017, respectively." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 248-50 (fiscal year 2017). Of those amounts, "Congress directed that approximately $1.9 billion would be for 'Defense Nuclear Nonproliferation' each year." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 250-51 (fiscal year 2017). Congress further directed that the $1.9 billion be allocated to certain, specified programs, including:

- Global Material Security
- Material Management and Minimization
  - Nuclear Material Removal
  - Material Disposition
- Nonproliferation and Arms Control
- Defense Nuclear Nonproliferation R&D
- Nonproliferation Construction

Pl.'s Mot. Summ. J. 19-20; Pl.'s Mot. App. 195. Plaintiff asserts that the funds Congress allocated to these programs were lump-sum appropriations that the DOE could use to make economic and impact assistance payments. Pl.'s Mot. Summ. J. 19-20.

Defendant contends that the funds Congress provided for these programs were not lump sums. See Def.'s Cross-Mot. Summ. J. 13-14. In support of its argument, defendant relies on the 2016 and 2017 Consolidated Appropriations Acts, id., which incorporate, by reference, tables allocating funds for specific programs (as plaintiff recognizes). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 301(d), 129 Stat. 2242, 2417 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 301(d), 131 Stat. 135, 320; Pl.'s Mot. App. 166; see also Pl.'s Mot. App. 166, 186-201 (containing the tables). Defendant contends that the

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"DOE's appropriated funds are limited to the specific purposes and amounts provided in the tables contained within the explanatory statements accompanying the relevant [Consolidated Appropriations Acts]." Def.'s Cross-Mot. Summ. J. 14; see also id. at 15 ("'When an appropriation specifies the purpose for which funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds for the specified purpose.'" (quoting GAO Redbook, supra, at 4-11)).

Defendant is correct. The tables incorporated by reference into the Consolidated Appropriations Acts specify funding for specific programs, evidencing that the appropriations for Defense Nuclear Nonproliferation and its constituent programs were not lump-sum appropriations, which, by definition, fund multiple programs. GAO Redbook, supra, at 6-5. Plaintiff fails to acknowledge the import of the tables. See Pl.'s Reply 12 ("[T]hese subprogram appropriations are 'lump-sum' appropriations because they 'cover a number of specific programs, projects, or items.'"). Because of Congress's level of precision, the court is not persuaded that these appropriations were in fact "lump-sum appropriations." Consequently, the appropriations could not be used for economic and impact assistance payments.

2. Reprogramming Is Not Available for Economic and Impact Assistance Payments

Plaintiff alternatively argues that the economic and impact assistance payments could be provided from other funds that Congress appropriated to the DOE via a discretionary reallocation known as "reprogramming." Id. at 16-17. "Reprogramming" refers to "the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation." GAO Redbook, supra, at 2-44. Reprogramming, however, is subject to guidelines to prevent abuse or the allocation of funds to activities that are too far removed from Congress's intended purpose in providing the funds. See id. at 2-44 ("[A]gencies generally are free to reprogram, even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation."); see also id. at 2-45 ("Though agencies generally have authority to reprogram funds, Congress may limit this authority."). These limitations accord with the principle that funds appropriated for a particular purpose may not be used for any other purpose. See 31 U.S.C. § 1301(a)-(b).

Defendant argues that reprogramming funds for economic and impact assistance would effectively create a new program or activity because the purpose of economic and impact assistance is substantially different from the purposes of programs identified in the 2016 and 2017 Consolidated Appropriations Acts. Def.'s Reply 11. Defendant notes that those Acts "prohibit DOE from reprogramming funds to create, initiate, or eliminate a 'program, project, or activity.'" Id. (quoting § 301(f)(1), 129 Stat. at 2417; § 301(f)(1), 131 Stat. at 320). Defendant also observes that § 301(d) of each of these Acts incorporates, by reference, a table that specifically allocates appropriations to individual programs, projects, and activities. Def.'s Cross-Mot. Summ. J. 15. Defendant argues that because the purpose of economic and impact assistance payments are not reasonably related to the purposes for which Congress made appropriations in the 2016 and 2017 Consolidated Appropriations Acts, the funds appropriated in those Acts are not available to pay plaintiff or to be reprogrammed to pay plaintiff. Id. at 15-17.

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As an initial matter, plaintiff provides no legal support for the proposition that this court has the authority to direct an agency to reprogram funds appropriate for one purpose to another purpose. Nor is the court aware of any.[4] Moreover, even if the court could review an agency's decision to reprogram, or not to reprogram, appropriated funds, the record lacks any evidence indicating whether the DOE considered reprogramming funds or conducted an analysis to determine the feasibility of reprogramming funds. In other words, the court lacks the necessary administrative record to review the propriety of the DOE's decision.

Plaintiff also argues that a "necessary expense" analysis supports its contention that economic and impact assistance payments may be made from appropriations in the 2016 and 2017 Consolidated Appropriations Acts. See Pl.'s Reply at 13-14 ("The determinative issue in this case is whether the statutorily-mandated economic and impact assistance payments have a 'logical,' 'reasonable,' or 'sufficient' relationship to, and therefore constitute a necessary expense of, any of DOE's appropriations."). Id. But plaintiff gets ahead of itself. As noted above, an agency performs a "necessary expense" analysis to determine whether a prospective expenditure comports with appropriations Congress has provided. GAO Redbook, supra, at 3-17. As with its request that the court direct the DOE to reprogram funds to make economic and impact assistance payments, plaintiff provides no legal support for the proposition that the court has the authority to conduct a "necessary expense" analysis, and the court is unable to locate any. Moreover, even if the court could conduct such an analysis, the record lacks evidence that would be necessary for the court to proceed. Thus, the court declines to conduct the analysis.

Ultimately, to the extent that the DOE could exercise its discretion to make economic and impact assistance payments, the payments would need to be consistent with the purpose restrictions in the appropriation to be charged because the DOE is required to obey the restrictions Congress places on appropriations. See Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation . . . .'" (quoting UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984))). In the 2016 and 2017 Consolidated Appropriations Acts, the DOE was restricted from using appropriations to create or initiate a program, project, or activity. Thus, the DOE's reprogramming authority was limited to shifting funds within programs, projects, or activities that already existed. And both parties admit that no appropriations for economic and impact assistance were made in the 2016 and 2017 Appropriations Acts. Consequently, Congress provided the DOE with no mechanism through which it could reprogram funds to make economic and impact assistance payments.

Congress could have appropriated money for economic and impact assistance, or it could have broadened the DOE's discretion to reprogram funds. But it did neither. The court cannot ignore the limiting language in the statute–"subject to the availability of appropriations"–which courts have consistently held to limit government liability. The unique mention of economic and impact assistance payments in 50 U.S.C. § 2566, as well as the detail in the appropriations

[4] To the extent that reprogramming decisions are subject to judicial review, they would be reviewable under the Administrative Procedure Act ("APA"), see 5 U.S.C. § 702 (2012), but this court lacks jurisdiction to adjudicate APA claims, see Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

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Congress provided in 2016 and 2017, persuade the court that had Congress intended to appropriate funds for these payments, it would have made a specific appropriation. There is also evidence in the record that the purpose of the economic and impact assistance payments was to assure plaintiff that weapons-grade plutonium would not be stored at the SRS indefinitely. See Pl.'s Mot. App. 93, 100; see also 51 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). These facts support the DOE's failure to use existing appropriations to satisfy the obligation resulting from its failure to meet the MOX production objective.

Agencies must comply with the law and, where Congress has given direction on how to do so, agencies are not free to improvise. Although Congress originally provided that the DOE was required to make economic and impact assistance payments "from funds available to the Secretary [of the DOE]," 50 U.S.C. § 2566(d)(1) (Supp. III 2004), it subsequently narrowed the DOE's discretion, providing that economic and impact assistance payments were "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (Supp. IV 2006); 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). When Congress originally enacted 50 U.S.C. § 2566, the DOE arguably could have had discretion to reprogram funds to make economic and impact assistance payments, but the court cannot ignore that Congress has since intentionally and consistently restricted the DOE's discretion.

C. The Judgment Fund Is Not Available for Economic and Impact Assistance Payments

Finally, plaintiff argues that the economic and impact assistance payments could be paid from the Judgment Fund if there are no legally available appropriations. Pl.'s Mot. Summ. J. 12. Plaintiff is incorrect. Pursuant to the Appropriations Clause, "no money can be paid out of the Treasury unless it has been appropriated by Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). "The Judgment Fund is a permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States." 31 C.F.R. § 256.1(a) (2015); accord 31 U.S.C. § 1304 (providing that the Judgment Fund can be used "to pay final judgments, award compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law"). Significantly, the Judgment Fund may only be used when "payment is not otherwise provided for . . . ." 31 U.S.C. § 1304(a)(1). "Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment." GAO Redbook, supra, at 14-39.

The Judgment Fund was designed to expedite the administration of justice by enabling courts to issue awards without the need to obtain separate appropriations. Slattery v. United States, 635 F.3d 1298, 1316-17 (Fed. Cir. 2011) (en banc); see also United States v. Maryland ex rel. Meyer, 349 F.2d 693, 695 (D.C. Cir. 1965) ("The obvious purposes of the [Judgment Fund] are (1) to enable . . . prompt payment without awaiting a special appropriation, and (2) to relieve the United States of the obligation of paying interest, or of a bad conscience as it were for not doing so, while the principal remains unpaid.").

Plaintiff effectively seeks to exploit the flexibility of the Judgment Fund to circumvent Congress's failure to appropriate funds for economic and impact assistance. But, "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990).

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Two facts are fatal to plaintiff's argument: First, there is clear statutory language limiting the DOE's liability to the amount appropriated, and no funds were subsequently appropriated. Second, there is no contractual relationship available to complement the statutory language and thereby overcome the lack of an appropriation and that limiting language. Given these facts, to resort to the Judgment Fund would ignore the apparent Congressional intent not to appropriate for economic and impact assistance payments.

Congress created a benefit of economic and impact assistance in 50 U.S.C. § 2566 and outlined the circumstances under which plaintiff could receive payment. Congress then did not appropriate funds to make payments, choosing instead to fund other priorities. The record indicates that Congress did make restricted appropriations to the DOE that not only reserved funds for particular purposes, but also prohibited those funds from being used for other, unrelated purposes.

The Judgment Fund is a separate appropriation which is available to furnish awards when other appropriations are not legally available. But plaintiff is not merely asking for a damages award. Plaintiff is effectively asking for the Judgment Fund to be used to create an appropriation where none was made by Congress. Resorting to the Judgment Fund, however, bypasses the case's central question, answered above: Did Congress make any appropriations available to pay economic and impact assistance? The answer is clearly "no." The Judgment Fund cannot be manipulated to change the answer to this question from "no" to "yes." To hold otherwise would enable courts to circumvent congressional decisions not to act. Most importantly, allowing resort to the Judgment Fund in a case where Congress has also clearly limited the government's liability entangles the court in decisions reserved to Congress by the United States Constitution. The court declines to become so entangled.

Under the circumstances of this case, plaintiff's proper course to obtain economic and impact assistance is to request an appropriation from Congress.

IV. CONCLUSION

As set forth in more detail above, the court **DENIES** plaintiff's motion for summary judgment and **GRANTS** defendant's cross-motion for summary judgment. Plaintiff's complaint is **DISMISSED**. Each party shall bear its own costs. The clerk of court shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

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EXHIBIT 6

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U.S. District Court
District of South Carolina (Aiken)
CIVIL DOCKET FOR CASE #: 1:16-cv-00391-JMC

State of South Carolina v. United States et al
Assigned to: Honorable J Michelle Childs
Cause: 05:702 Administrative Procedure Act

Date Filed: 02/09/2016
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

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Date Filed	#	Docket Text
02/09/2016	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0420−6390222.), filed by State of South Carolina. Service due by 5/12/2016 (Attachments: # 1 Table of Exhibits to Complaint, # 2 Exhibit 1 (Am. Interim Action Determination), # 3 Exhibit 2 (SPD Supplemental EIS Factsheet), # 4 Exhibit 2 (SPD Supplemental EIS Factsheet), # 5 Exhibit 4 (Final Surplus Plutonium Disposition Supplemental Environmental Impact, # 6 Exhibit 5 (Excerpt from History of the U.S. Weapons−Usable Plutonium Disposition, # 7 Exhibit 6 (Report to Congress: Disposition of Surplus Defense Plutonium at Savan, # 8 Exhibit 7 (Record of Decision for PEIS), # 9 Exhibit 7 (Record of Decision for PEIS), # 10 Exhibit 9 (Excerpt from Surplus Plutonium Disposition Final EIS, Summary), # 11 Exhibit 10 (Record of Decision for SPD EIS), # 12 Exhibit 11 (PMDA), # 13 Exhibit 12 (Congressional Research Serv., Mem., U.S.−Russia Plutonium Management, # 14 Exhibit 13 Exhibit NRC EIS, # 15 Exhibit 14 (Press Release, No. PR−02−007), # 16 Exhibit 15 (Am. ROD for PEIS & SPD EIS), # 17 Exhibit 16 (Am. SPD EIS ROD), # 18 Exhibit 17 (Storage of Surplus Plutonium Materials at the Savannah River Site Su, # 19 Exhibit 18 (NRC Construction Authorization No. CAMOX−001), # 20 Exhibit 19 (DOE/NNSA Report to Congress), # 21 Exhibit 20 (Excerpt from Draft SPD Supp. EIS), # 22 Exhibit 21 (PMDA as amended by 2010 Protocol), # 23 Exhibit 22 (Letter to Secretary Moniz), # 24 Exhibit 22 (Letter to Secretary Moniz), # 25 Exhibit 24 (Letter of Atty General Wilson to Secretary Moniz), # 26 Exhibit 25 (FY2015 Budget Justification))(asni,) (Entered: 02/09/2016)
02/09/2016	2	Summons Issued as to United States Department of Energy, Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, U.S. Attorney and U.S. Attorney General. (asni,) Modified to edit text on 2/10/2016 (asni,). (Entered: 02/09/2016)
02/09/2016	3	Local Rule 26.01 Answers to Interrogatories by State of South Carolina.(asni,) (Entered: 02/09/2016)
02/18/2016	5	NOTICE of Appearance by William Henry Davidson, II on behalf of State of South Carolina (Davidson, William) (Entered: 02/18/2016)
03/31/2016	6	MOTION to Intervene by Southern Carolina Regional Development Alliance. Response to Motion due by 4/18/2016. (Attachments: # 1 Exhibit A − Complaint, # 2 Exhibit 1 to Complaint (Affidavit of Danny Black), # 3 Exhibit 2 to Complaint (South Carolina Promise Zone Fact Sheet))No proposed order.(Shealy, Samuel) (Entered: 03/31/2016)
04/06/2016	7	MOTION for Extension of Time to File Answer re 1 Complaint by Frank G Klotz, Ernest Moniz, United States, United States Department of Energy and National Nuclear Security Administration. Response to Motion due by 4/25/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) Modified to add filers on 4/7/2016 (asni,). (Entered: 04/06/2016)

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04/06/2016	8	**ORDER granting 7 Motion for Extension of Time to Answer Frank G Klotz answer due 4/25/2016; Ernest Moniz answer due 4/25/2016; United States answer due 4/25/2016; United States Department of Energy answer due 4/25/2016, National Nuclear Security Administration answer due 4/25/2016. Signed by Honorable J Michelle Childs on 4/6/2016.(asni,)** (Main Document 8 replaced on 4/6/2016) (asni,). Modified to edit text on 4/7/2016 (asni,). (Entered: 04/06/2016)
04/06/2016	9	SUMMONS Returned Executed by State of South Carolina. All Defendants. (Attachments: # 1 Summons Service on DOE, # 2 Summons Service on NNSA, # 3 Summons Service on Moniz, # 4 Summons Service on Klotz, # 5 Summons Service on Lynch, # 6 Summons Service on Nettles)(Lowell, Randy) (Entered: 04/06/2016)
04/06/2016	10	MOTION for Summary Judgment by State of South Carolina. Response to Motion due by 4/25/2016. (Attachments: # 1 Memo in Support, # 2 Exhibit Table of Exhibits, # 3 Exhibit 1 (Excerpt from D.J. Spellman et al., History of the U.S. Weapons−Usable Plutonium Disposition Program Leading to DOEs Record of Decision), # 4 Exhibit 2 (Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site), # 5 Exhibit 3 (Record of Decision (ROD) for Storage and Disposition of Weapons−Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS)), # 6 Exhibit 4 (Excerpt from Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS), Vol. I Part A), # 7 Exhibit 5 (ROD for SPD EIS), # 8 Exhibit 6 (Plutonium Management and Disposition Agreement (PMDA)), # 9 Exhibit 7 (Release No. PR−02−007), # 10 Exhibit 8 (Aff. of Jessie Hill Roberson (ECF No. 10), 1:02−cv−01426−CMC), # 11 Exhibit 9 (Ltr. of Hodges to Abraham (Apr. 6, 2001)), # 12 Exhibit 10 (Ltr. of Hodges to Abraham (Apr. 24, 2001)), # 13 Exhibit 11 (Ltr. of Hodges to Abraham (Jun. 13, 2001)), # 14 Exhibit 12 (Ltr. of Abraham to Hodges (Jun. 26, 2001)), # 15 Exhibit 13 (Ltr. of Card to Hodges, Peeler, and Wilkins (Aug. 27, 2001)), # 16 Exhibit 14 (Ltr. of Hodges and Condon to Abraham (Aug. 30, 2001)), # 17 Exhibit 15 (Ltr. of Abraham to Hodges (Sept. 21, 2001)), # 18 Exhibit 16 (Ltr. of Hodges to Abraham (Oct. 26, 2001)), # 19 Exhibit 17 (Ltr. of Hodges to Abraham (Apr. 10, 2002)), # 20 Exhibit 18 (Ltr. of Abraham to Hodges (Apr. 11, 2002)), # 21 Exhibit 19 (Ltr. of Hodges to Abraham (Apr. 11, 2002)), # 22 Exhibit 20 (Ltr. of Bates to Otis (Apr. 11, 2002)), # 23 Exhibit 21 (Am. ROD for SPD EIS), # 24 Exhibit 22 (Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis), # 25 Exhibit 23 (Ltr. of Trice to Congressman Wilson (Oct. 9, 2015)), # 26 Exhibit 24 (Amended PMDA), # 27 Exhibit 25 (CRS PMDA Report), # 28 Exhibit 26 (Excerpt from Draft SPD Supplemental EIS), # 29 Exhibit 27 (Excerpt from FY 2014 DOE Budget Justification), # 30 Exhibit 28 (Excerpt from FY 2015 DOE Budget Justification), # 31 Exhibit 29 (Ltr. to Moniz (Mar. 6, 2014)), # 32 Exhibit 30 (Excerpt from Consolidated Appropriations Act 2016), # 33 Exhibit 31 (Consolidated Appropriations Act FY 2016 Explanatory Statement), # 34 Exhibit 32 (Excerpt from FY 2017 DOE Budget Justification), # 35 Exhibit 33 (High Bridge Associates, Inc., Independent Assessment of the Impact of Disposing of Surplus Plutonium at WIPP), # 36 Exhibit 34 (Excerpt from Senate Armed Services Strategic Forces Subcommittee Hearing Transcript (Feb. 24, 2016)), # 37 Exhibit 35 (Excerpt from Senate Appropriations Subcommittee Hearing Transcript (March 16, 2016)), # 38 Exhibit 36 (Ltr. of Wilson to Moniz (Sept. 4, 2015)), # 39 Exhibit 37 (Ltr. of Haley to Moniz (Dec. 14, 2015)), # 40 Exhibit 38 (Ltr. of Moniz to Haley (Jan. 19, 2016)), # 41 Exhibit 39 (DOE/NNSA Report to Congress (Oct. 3, 2011)), # 42 Exhibit 40 (Environmental Assessment for Gap Material Plutonium Transport, Receipt, and Processing))No proposed order.(Lowell, Randy) (Entered: 04/06/2016)
04/18/2016	11	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by State of South Carolina.Reply to Response to Motion due by 4/28/2016 (Attachments: # 1 Exhibit)(Lowell, Randy) (Entered: 04/18/2016)
04/18/2016	12	MOTION for Extension of Time to File Response/Reply as to 6 MOTION to Intervene by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/18/2016)
04/19/2016	13	**TEXT ORDER granting 12 Motion for Extension of Time to File Response/Reply re 6 MOTION to Intervene Response to Motion due by 5/2/2016. Signed by Honorable J Michelle Childs on 4/19/2016.(asni,)** (Entered: 04/19/2016)

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04/21/2016	14	MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/9/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/21/2016)
04/21/2016	15	RESPONSE in Opposition re 14 MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment Response filed by State of South Carolina.Reply to Response to Motion due by 5/2/2016 (Lowell, Randy) (Entered: 04/21/2016)
04/22/2016	16	**ORDER granting 14 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment Response to Motion due by 5/25/2016. Signed by Honorable J Michelle Childs on 4/22/2016.(asni,)** (Entered: 04/22/2016)
04/25/2016	17	MOTION to Dismiss by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/12/2016. (Attachments: # 1 Exhibit A, MOX February 2013−14 Report, # 2 Exhibit B, HQ Signed Report 2015)No proposed order.(Bowens, Barbara) (Entered: 04/25/2016)
04/28/2016	19	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 04/28/2016)
05/02/2016	20	MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/19/2016. No proposed order.(Bowens, Barbara) (Entered: 05/02/2016)
05/02/2016	21	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 5/12/2016 (Bowens, Barbara) (Entered: 05/02/2016)
05/10/2016	25	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 05/11/2016)
05/11/2016	24	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 5/31/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/11/2016)
05/11/2016	26	**ORDER granting 24 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/11/2016.(asni,)** (Entered: 05/11/2016)
05/12/2016	27	RESPONSE in Opposition re 17 MOTION to Dismiss Response filed by State of South Carolina.Reply to Response to Motion due by 5/23/2016 (Attachments: # 1 Table of Exhibits, # 2 Exhibit 1 (Deadlines Table), # 3 Exhibit 2 (Hodges Ltr), # 4 Exhibit 3 (COA Table), # 5 Exhibit 4 (Transcript Excerpt))(Lowell, Randy) (Entered: 05/12/2016)
05/17/2016	28	Joint MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment , 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by State of South Carolina. Response to Motion due by 6/3/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/17/2016)
05/18/2016	29	**ORDER granting 28 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment, 20 MOTION to Stay Proceedings on Plaintiff's Motion for Summary Judgment Response to Motion to Stay due by 5/24/2016, Response to Motion for Summary Judgment due by 6/10/2016. Signed by Honorable J Michelle Childs on 5/18/2016.(asni,)** (Entered: 05/18/2016)
05/23/2016	31	Consent MOTION for Leave to File Excess Pages by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 6/9/2016. No proposed order.(Bowens, Barbara) (Entered: 05/23/2016)

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05/23/2016	32	**TEXT ORDER granting 31 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/23/2016.(asni,)** (Entered: 05/23/2016)
05/23/2016	33	REPLY to Response to Motion re 17 MOTION to Dismiss Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/23/2016)
05/24/2016	34	NOTICE of Hearing on Motion 10 MOTION for Summary Judgment, 6 MOTION to Intervene, 20 MOTION to Stay, 17 MOTION to Dismiss : Motion Hearing set for 6/30/2016 10:00 AM in Columbia # 3, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable J Michelle Childs. ***Please note this hearing will include all pending motions not ruled upon prior to the date of the hearing***(asni,) (Entered: 05/24/2016)
05/24/2016	35	RESPONSE in Opposition re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by State of South Carolina.Reply to Response to Motion due by 6/3/2016 (Lowell, Randy) (Entered: 05/24/2016)
05/25/2016	36	**ORDER AND OPINION denying 6 Motion to Intervene. Signed by Honorable J Michelle Childs on 5/25/2016.(asni,)** (Entered: 05/25/2016)
05/25/2016	37	REPLY to Response to Motion re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/25/2016)
06/10/2016	38	RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Exhibit 1, Record of Decision, Surplus Plutonium Disposition, 81 Fed. Reg. 19588 (Apr. 5, 2016), # 2 Exhibit 2, Declaration of Henry A. Gunter, # 3 Exhibit 3, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No., # 4 Exhibit 4, Department of Energy, Preferred Alternative for Certain Quantities of Plutonium, 80 Fed. Reg. 80348 (Dec. 24, 2015), # 5 Exhibit 5, Consolidated Appropriations Act of 2016, Pub. L. No. 114−113, div. D, tit. III, Dec. 18, 2015, # 6 Exhibit 6, Explanatory Table, 114 Cong. Rec. 161, H10108−H10123 (daily ed. Dec. 17, 2015), # 7 Exhibit 7, Explanatory Statement, 114 Cong. Rec. 161, H10056, H10102−H10107 (daily ed. Dec. 17, 2015), # 8 Exhibit 8, Declaration of Peter H. Hanlon, # 9 Addendum Table of Exhibits)(Bowens, Barbara) (Entered: 06/10/2016)
06/15/2016	39	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 7/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 06/15/2016)
06/16/2016	40	**ORDER granting 39 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 6/16/2016.(asni,)** (Entered: 06/16/2016)
06/20/2016	42	REPLY to Response to Motion re 10 MOTION for Summary Judgment Response filed by State of South Carolina. (Attachments: # 1 Exhibit, # 2 Exhibit 1 (Ltr. of Del Vecchio), # 3 Exhibit 2 (Moniz Senate Test.), # 4 Exhibit 3 (Fact Sheet), # 5 Exhibit 4 (Rpt. to Congress), # 6 Exhibit 5 (DOE FY16 Budget Excerpt))(Lowell, Randy) (Entered: 06/20/2016)
06/20/2016	41	CORRECTED RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Corrected Memorandum in Opposition) Re−filed by Clerk to correct event type.(mdea) Modified on 6/21/2016 to correct entry number (mdea,). (Entered: 06/21/2016)
06/21/2016	43	**TEXT ORDER denying 20 Motion to Stay: This matter is before the court on Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20) seeking to stay all proceedings on Plaintiffs pending Motion for Summary Judgment (ECF No. 10) until the court adjudicates Defendants pending Motion to Dismiss (ECF No. 17). In support of their Motion to Stay, Defendants assert that all Plaintiffs claims are subject to dismissal on jurisdictional or other legal grounds and, therefore, concerns for judicial**

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		economy and litigation efficiency make it appropriate for the [c]ourt to resolve [D]efendants Motion to Dismiss before proceeding to summary judgment. (ECF No. 20 at 4.) Plaintiff opposes the Motion to Stay arguing that Defendants have not met their burden to demonstrate a need for a stay, and both judicial economy and the prejudice to South Carolina if such stay is granted weigh heavily in favor of denying the stay request. (ECF No. 35 at 1.) When considering a motion to stay, the district court should consider three factors: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non−moving party. Johnson v. DePuy Orthopaedics, Inc., No. 3:12−cv−2274, 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012) (granting stay pending a transfer of the case to MDL) (citation omitted). In view of these factors, the court finds that a stay would not serve the interests of judicial economy and could cause prejudice to Plaintiff. In this regard, the court understands that it will first have to address the merits of Defendants Motion to Dismiss asserting a lack of subject matter jurisdiction. In re Bulldog Trucking, Inc., 147 F.3d 347, 352 (4th Cir. 1998) (A federal court is required, sua sponte, to determine if a valid basis for its jurisdiction exists, and to dismiss the action if no such ground appears.) (citation omitted). However, the court is also persuaded that judicial economy will be best served by allowing the parties to proceed with their arguments relevant to Plaintiffs Motion for Summary Judgment at the June 30, 2016 hearing (ECF No. 34), even if the court has to allow for discovery and additional briefing subsequent to the hearing. Accordingly, the court DENIES Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20). Signed by Honorable J Michelle Childs on 6/21/16.(alew,) (Entered: 06/21/2016)
06/22/2016	44	MOTION to Appear Pro Hac Vice by Raphael Ortega Gomez by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/22/2016)
06/24/2016	45	MOTION to Appear Pro Hac Vice by Spencer Elijah Wittmann Amdur by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/24/2016)
06/27/2016	46	**TEXT ORDER granting 44 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/27/2016	47	**TEXT ORDER granting 45 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/30/2016	50	**Minute Entry. Proceedings held before Honorable J Michelle Childs: taking under advisement 10 Motion for Summary Judgment; 17 Motion to Dismiss. Motion Hearing held on 6/30/2016. Written order forthcoming. Court Reporter Kathleen Richardson. (mbro,)** (Entered: 06/30/2016)
08/18/2016	51	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Motion hearing held on June 30, 2016, before Judge J. Michelle Childs. Court Reporter/Transcriber Kathleen Richardson, RMR, CRR, Telephone number/E−mail Kathleen_Richardson@scd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction.. Redaction Request due 9/8/2016. Redacted Transcript Deadline set for 9/19/2016. Release of Transcript Restriction set for 11/16/2016. (kari,) (Entered: 08/18/2016)
09/15/2016	53	Letter from Counsel for the State. (Lowell, Randy) (Entered: 09/15/2016)
10/03/2016	55	Letter from Spencer E. Amdur. (Attachments: # 1 Letter, # 2 Press Release)(Bowens, Barbara) (Entered: 10/03/2016)
10/31/2016	56	**ORDER AND OPINION: The court declines to rule on Defendants' Motion to Dismiss 17 for failure to state a claim for which relief could be granted as to the**

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		removal claim under Fed. R. Civ. P. 12(b)(6) until supplemental briefs, herein described are submitted. The parties are DIRECTED to file briefs that address the following issues: 1. Whether the court should transfer the monetary claim to the CFC, pursuant to 28 U.S.C. § 1631. 2. Whether the court should dismiss the monetary claim without prejudice to the State's ability to refile the claim in an action in the CFC. The briefs shall comply with rules governing memoranda in Local Civ. Rule 7 (D.S.C.) and must be filed by November 30, 2016. Signed by Honorable J Michelle Childs on 10/31/2016.(asni,) (Entered: 10/31/2016)
11/18/2016	59	Consent MOTION for Extension of Time by State of South Carolina. Response to Motion due by 12/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 11/18/2016)
11/21/2016	60	**ORDER granting in part and denying in part 59 Motion for Extension of Time. The parties are directed to file their supplemental briefs in response to the court's October 31, 2016 order on or before December 5, 2016. The State is given no additional time by this order in which to file a memorandum in support of a motion to reconsider under Rules 59(e) or 60(b). Signed by Honorable J Michelle Childs on 11/21/2016.(asni,)** (Entered: 11/21/2016)
11/28/2016	62	MOTION for Reconsideration re 56 Order on Motion to Dismiss by State of South Carolina. Response to Motion due by 12/15/2016. (Attachments: # 1 Memo in Support)No proposed order.(Lowell, Randy) (Entered: 11/28/2016)
12/05/2016	63	REPLY by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 56 Order on Motion to Dismiss,,, *Defendants' Supplemental Brief.* (Bowens, Barbara) (Entered: 12/05/2016)
12/05/2016	64	REPLY by State of South Carolina to 56 Order on Motion to Dismiss,,, *State of South Carolina's Supplemental Brief.* (Roberts, John) (Entered: 12/05/2016)
12/16/2016	66	Joint MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 1/3/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 12/16/2016)
12/16/2016	67	RESPONSE in Opposition re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 12/28/2016 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Bowens, Barbara) (Entered: 12/16/2016)
12/19/2016	68	**ORDER granting 66 Motion for Extension of Time. Signed by Honorable J Michelle Childs on 12/19/2016.(mbro,)** (Entered: 12/19/2016)
01/11/2017	70	MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 1/25/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 01/11/2017)
01/11/2017	71	**TEXT ORDER granting 70 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 1/11/2017.(asni,)** (Entered: 01/11/2017)
01/13/2017	72	REPLY to Response to Motion re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by State of South Carolina. (Roberts, John) (Entered: 01/13/2017)
02/07/2017	75	**ORDER AND OPINION denying 62 Motion for Reconsideration re 56 Order on Motion to Dismiss. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,)** (Entered: 02/07/2017)
02/07/2017	76	**ORDER AND OPINION granting in part 17 Motion to Dismiss. The third cause of action in the State's complaint (ECF No. 1 97–112) is hereby DISMISSED without prejudice to the State's ability to prosecute it an original action filed in**

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		the Court of Federal Claims. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,) (Entered: 02/07/2017)
02/08/2017	77	**CONFERENCE AND SCHEDULING ORDER Rule 26(f) Conference Deadline 2/28/2017, 26(a) Initial Disclosures due by 3/14/2017, Rule 26 Report due by 3/14/2017, Motions to Amend Pleadings due by 4/24/2017, Plaintiffs ID of Expert Witness due by 5/24/2017, Defendants ID of Expert Witnesses Due by 6/23/2017, Records Custodian Affidavit due by 6/23/2017, Discovery due by 7/24/2017, Motion in Limine due by 11/3/2017, Motions due by 8/7/2017, Rule 26(a)(3) Disclosures due by 11/3/2017, Pretrial Briefs due by 11/28/2017, Bench Trial Deadline 12/5/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/08/2017	78	**MEDIATION ORDER Mediation Due by 7/31/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/13/2017	79	NOTICE of Appearance by Barbara Murcier Bowens on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Bowens, Barbara) (Entered: 02/13/2017)
03/10/2017	81	ADR STATEMENT/CERTIFICATION by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	82	Rule 26(f) Report by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	83	**AMENDED SCHEDULING ORDER Mediation concluded by 7/31/2017, Signed by Honorable J Michelle Childs on 3/10/2017. (asni,)** (Entered: 03/10/2017)
03/14/2017	84	**ORDER AND OPINION Defendants' motion to dismiss the State's complaint 17 is hereby GRANTED IN PART, with respect to the complaint's first cause of action, and DENIED IN PART, with respect to the complaint's second cause of action. The first cause of action in the State's complaint (ECF No. 1 at 84–88) is hereby DISMISSED. Signed by Honorable J Michelle Childs on 3/14/2017. (asni,)** (Entered: 03/14/2017)
03/20/2017	86	**ORDER AND OPINION granting in part and denying in part 10 Motion for Summary Judgment. Parties shall submit a joint written statement to the court on or before April 21, 2017, and, after reviewing the statement, the court will determine the need for further submissions or hearings. Signed by Honorable J Michelle Childs on 3/20/2017.(asni,)** Modified to edit text on 3/24/2017 (asni,). (Entered: 03/20/2017)
04/20/2017	88	NOTICE of Appearance by Jennifer J Aldrich on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	89	Consent MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/4/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.(Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	90	**TEXT ORDER granting 89 Motion for Extension of Time for the parties to submit the joint written statement. Signed by Honorable J Michelle Childs on 4/20/2017.(asni,)** (Entered: 04/20/2017)
07/31/2017	96	STATUS REPORT *(Joint Statement)* by State of South Carolina. (Lowell, Randy) supplement 97 added on 8/1/2017 (asni,). supplement added 100 added on 8/14/2017 (asni,). supplements added 103 104 8/22/2017 (asni,). (Entered: 07/31/2017)
07/31/2017	97	SUPPLEMENT by State of South Carolina *Proposing Injunctive Relief.* (Lowell, Randy) (Entered: 07/31/2017)
08/01/2017	98	**TEXT ORDER: By a March 20, 2017 order, the court granted in part the State of South Carolina's (the "State") motion for summary judgment in this matter,**

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specifically granting the State's requested relief for an injunctive order compelling the Secretary of Energy (the "Secretary") to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the State's summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties "to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]." (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that "[i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy." (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant "is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017," and that (2) one of the four attorneys representing them in this matter is "out of the office" on a scheduled one–week vacation in August and is "out of the office" for another week in August and five days in September while "handling depositions in another matter." (Id.) The State objects to Defendants' proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the State's consideration until July 20, and arguing that Defendant's proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the court's March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the court's March 20, 2017 order. (Id. at 2.) In the court's view, Defendants' April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants' proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the court's previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants' April 20, 2017 motion also contemplated that the parties would "propose" deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants' proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be "out of the office" for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants' proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the State's unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a lackadaisical approach on Defendants' part to complying with the court's order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly,

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Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017.: By a March 20, 2017 order, the court granted in part the State of South Carolinas (the State) motion for summary judgment in this matter, specifically granting the States requested relief for an injunctive order compelling the Secretary of Energy (the Secretary) to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the States summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]. (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that [i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy. (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017, and that (2) one of the four attorneys representing them in this matter is out of the office on a scheduled one–week vacation in August and is out of the office for another week in August and five days in September while handling depositions in another matter. (Id.) The State objects to Defendants proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the States consideration until July 20, and arguing that Defendants proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the courts March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the courts March 20, 2017 order. (Id. at 2.) In the courts view, Defendants April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the courts previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants April 20, 2017 motion also contemplated that the parties would propose deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be out of the office for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the States unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a

		lackadaisical approach on Defendants part to complying with the courts order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly, Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017. (Specific Document due by 8/11/2017.) Signed by Honorable J Michelle Childs on 8/1/2017. (asni,) (Entered: 08/01/2017)
08/11/2017	100	SUPPLEMENT by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 98 Order, Set Deadlines,,,

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CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:17-cv-01068-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Cause: 28:1491 Tucker Act

Date Filed: 08/07/2017
Date Terminated: 03/05/2018
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202-8416
(803) 252-3300
Fax: (803) 256-8062
Email: rlowell@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
U.S. Department of Justice (C)
Commerical Litigation Branch, Civil Division
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-2228
Fax: (202) 514-8624
Email: tara.hogan@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/07/2017	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4115693) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 10/6/2017.** (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9

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		Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Civil Cover Sheet, # 16 Exh. List)(ac7) (Entered: 08/07/2017)
08/07/2017	2	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 08/07/2017)
08/07/2017	3	NOTICE of Designation of Electronic Case. (ac7) (Entered: 08/07/2017)
08/18/2017	4	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 08/18/2017)
10/06/2017	5	MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Hogan, Tara) (Entered: 10/06/2017)
10/06/2017	6	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/06/2017)
10/18/2017	7	MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA.**Response due by 11/1/2017.**(Hogan, Tara) (Entered: 10/18/2017)
10/24/2017	8	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/7/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/24/2017)
10/30/2017	9	RESPONSE to 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/6/2017.** (Lowell, Randolph) (Entered: 10/30/2017)
10/31/2017	10	REPLY to Response to Motion re 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA. (Hogan, Tara) (Entered: 10/31/2017)
11/07/2017	11	REPLY to Response to Motion re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA. (Hogan, Tara) (Entered: 11/07/2017)
11/20/2017	12	MOTION for Leave to File Surreply , filed by STATE OF SOUTH CAROLINA.**Response due by 12/4/2017.** (Attachments: # 1 Exhibit A)(Lowell, Randolph) (Entered: 11/20/2017)
11/28/2017	13	ORDER granting 7 Motion to Stay; granting 12 Motion for Leave to File Surreply. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/28/2017)
11/28/2017	14	SUR-REPLY re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 11/28/2017)
02/15/2018	15	SCHEDULING ORDER: **Defendant's Supplemental Brief due by 3/8/2018. Plaintiff's Supplemental Response Brief due by 3/29/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/15/2018)
03/05/2018	16	NOTICE of Voluntary Dismissal without prejudice, filed by STATE OF SOUTH CAROLINA (Lowell, Randolph) (Entered: 03/05/2018)
03/05/2018		Complaint dismissed pursuant to Rule 41(a)(1)(A)(i) this day. (ac7) (Entered: 03/06/2018)

PACER Service Center

Transaction Receipt			
09/01/2020 12:08:29			
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Description:	Docket Report	**Search Criteria:**	1:17-cv-01068-MMS
Billable Pages:	2	**Cost:**	0.20

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APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18-cv-00038-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Case in other court: 19-02324
Cause: 28:1491 Tucker Act

Date Filed: 01/08/2018
Date Terminated: 08/20/2019
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202-8416
(803) 252-3300
Fax: (803) 256-8062
Email: rlowell@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
U.S. Department of Justice (C)
Commerical Litigation Branch, Civil Division
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-2228
Fax: (202) 514-8624
Email: tara.hogan@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

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01/08/2018	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4403717) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 3/9/2018.** (Attachments: # 1 Exh. List, # 2 Exhibit 1-13, # 3 Civil Cover Sheet)(ac7) (Entered: 01/08/2018)
01/08/2018	2	NOTICE of Directly Related Case(s) [17-1068C], filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 01/08/2018)
01/08/2018	3	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 01/08/2018)
01/08/2018	4	NOTICE of Designation of Electronic Case. (ac7) (Entered: 01/08/2018)
01/25/2018	5	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 01/25/2018)
03/05/2018	6	MOTION to Amend Pleadings - Rule 15 , filed by STATE OF SOUTH CAROLINA.**Response due by 3/19/2018.** (Attachments: # 1 Exhibit A - Proposed Amended Complaint)(Lowell, Randolph) (Entered: 03/05/2018)
03/06/2018	7	ORDER granting 6 Motion to Amend Pleadings - Rule 15(b). **Amended Complaint due by 3/9/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 03/06/2018)
03/06/2018	8	AMENDED COMPLAINT against USA, filed by STATE OF SOUTH CAROLINA. , filed by STATE OF SOUTH CAROLINA.Answer due by 3/20/2018. (Attachments: # 1 Exhibit Exhibit List, # 2 Exhibit Exhibits 1-14)(Lowell, Randolph) (Entered: 03/06/2018)
03/20/2018	9	ANSWER to 8 Amended Complaint , filed by USA.**JPSR due by 5/8/2018.**(Hogan, Tara) (Entered: 03/20/2018)
03/30/2018	10	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 4/27/2018.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 03/30/2018)
04/23/2018	11	Unopposed MOTION for Extension of Time until 5/18/18 to File Response as to 10 MOTION for Summary Judgment , filed by USA.**Response due by 5/7/2018.**(Hogan, Tara) (Entered: 04/23/2018)
04/24/2018	12	ORDER granting 11 Motion for Extension of Time to File Response re 10 MOTION for Summary Judgment. **Response due by 5/18/2018. Reply due by 6/8/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 04/24/2018)
05/08/2018	13	JOINT PRELIMINARY STATUS REPORT . (Hogan, Tara) (Entered: 05/08/2018)
05/16/2018	14	Unopposed MOTION for Extension of Time until 5/23/18 to File Response , filed by USA.**Response due by 5/30/2018.**(Hogan, Tara) (Entered: 05/16/2018)
05/17/2018	15	ORDER granting 14 Motion for Extension of Time to File Response re: 10 Motion for Summary Judgment. **Response due 5/23/2018. Reply due 6/13/2018.** Signed by Judge Margaret M. Sweeney. (pp) Service on parties made. (Entered: 05/17/2018)
05/23/2018	16	CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA, filed by USA.**Response due by 6/20/2018.**(Hogan, Tara) (Entered: 05/23/2018)
06/12/2018	17	Unopposed MOTION for Extension of Time to File Reply , filed by STATE OF SOUTH CAROLINA.**Response due by 6/26/2018.**(Lowell, Randolph) (Entered:

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		06/12/2018)
06/13/2018	18	ORDER granting 17 Motion for Extension of Time to File Combined Reply in Support of 10 MOTION for Summary Judgment and Response to 16 CROSS MOTION for Summary Judgment. **Plaintiff's Reply and Response due by 6/20/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 06/13/2018)
06/20/2018	19	REPLY to Response to Motion re 10 MOTION for Summary Judgment , 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 06/20/2018)
07/05/2018	20	REPLY to Response to Motion re 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by USA. (Hogan, Tara) (Entered: 07/05/2018)
10/24/2018	21	ORDER Staying Further Consideration of 10 MOTION for Summary Judgment filed by STATE OF SOUTH CAROLINA and 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA filed by USA., ORDER STAYING CASE **Status Report due by 11/26/2018** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 10/24/2018)
11/26/2018	22	JOINT STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 11/26/2018)
01/25/2019	23	JOINT STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 01/25/2019)
03/26/2019	24	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 03/26/2019)
05/28/2019	25	JOINT STATUS REPORT , filed by All Defendants. (Hogan, Tara) (Entered: 05/28/2019)
05/29/2019	26	STATUS REPORT ORDER **Status Report due by 6/28/2019** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 05/29/2019)
06/24/2019		**IMPORTANT NOTICE:** On **Monday, August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e-filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e-filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two-step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e-file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800-676-6856 or the Clerk's Office CM/ECF Help Desk at (202)357-6402.. (dh) (ADI) (Entered: 06/24/2019)

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06/28/2019	27	STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Exhibit Ltr of McMaster to Trump, # 2 Exhibit Ltr of Wilson to Barr)(Lowell, Randolph) (Entered: 06/28/2019)
06/28/2019	28	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 06/28/2019)
07/01/2019	29	ORDER LIFTING STAY and ORDER to file supplemental briefs. The stay on proceedings in this case is lifted. **The parties shall file supplemental briefs by Wednesday, July 31, 2019.** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 07/01/2019)
07/20/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after **August 26, 2019**. To link your upgraded PACER account **on or after August 26, 2019**, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357-6402. (dh) (ADI) (Entered: 07/20/2019)
07/31/2019	30	SUPPLEMENTAL BRIEF , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix to Supplemental Brief)(Lowell, Randolph) (Entered: 07/31/2019)
07/31/2019	31	RESPONSE to *Court's order*, filed by USA. (Hogan, Tara) (Entered: 07/31/2019)
08/16/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. **Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account**on or after August 26, 2019**. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you **MUST** know your CM/ECF login and password---do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk **immediately** at (202) 357-6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/20/2019	32	REPORTED OPINION denying 10 Motion for Summary Judgment; granting 16 Cross Motion. The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 08/20/2019)

08/20/2019	33	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of defendant. Plaintiff' complaint is dismissed. Each party shall bear its own costs. (Service on parties made.) (ac7) (Entered: 08/20/2019)
08/23/2019	34	NOTICE OF APPEAL as to 33 Judgment, filed by STATE OF SOUTH CAROLINA. Filing fee $ 505, receipt number 9998-5597681. Copy to CAFC. (Lowell, Randolph) (Entered: 08/23/2019)
08/26/2019		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 34 Notice of Appeal. (ac7) (Entered: 08/26/2019)
08/28/2019		CAFC Case Number 2019-2324 for 34 Notice of Appeal filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 08/28/2019)

PACER Service Center

Transaction Receipt

09/01/2020 12:04:02

PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:18-cv-00038-MMS
Billable Pages:	4	**Cost:**	0.40

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EXHIBIT 7

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LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A. and Davidson and Lindemann, P.A. ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of radioactive material at the Savannah River Site; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

ARTICLE I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016, and terminates on January 4, 2019, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the termination date, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

ARTICLE II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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1. Special Counsel assumes joint responsibility with the Attorney General's Office for the representation of the State in this litigation. However, the Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion shall appoint a designated assistant or assistants ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General's Office for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must identify the Attorney General or his designated assistant as counsel of record.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Attorney General's Office, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be provided to the Attorney General's Office in draft form in a reasonable and timely manner for review and approval. Special Counsel shall copy the Attorney General's Office on all case-related correspondence. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Attorney General's Office unless otherwise authorized by the Attorney General.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

7. The scope of Special Counsel's retention under this Agreement shall include appellate proceedings in this litigation.

8. The scope of Special Counsel's retention under this Agreement shall include any litigation initiated by the defendant(s) against the Attorney General or the State relating to this litigation.

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B. Non-Delegation of Work

Special Counsel may not, without the express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

C. Employment Status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

ARTICLE III. CASE MANAGEMENT

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within five business days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

At a minimum, status reports must include a description of the current status of the litigation, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

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Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov
Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov
Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov
Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com
Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

Special Counsel agrees to consult in advance, in person, by telephone, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

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Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings;
2. Dispositive motions;
3. Hearings;
4. Rulings;
5. Trials;
6. Settlement negotiations;
7. Appeals or Notice of Appeals;
8. Briefs filed by any party or entity;
9. Appellate arguments or decisions; and
10. Enforcement efforts.

Special Counsel agrees to meet with Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Should Special Counsel receive any public records request which seeks records related to this litigation, Special Counsel shall within one business day email that public records request to the Attorney General and obtain his approval before responding to that request. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from

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destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

G. Settlement or Judgment Proceeds

All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's Office, which shall distribute them or have them distributed.

ARTICLE IV. COMPENSATION

A. Contingent Status

Notwithstanding any other term of this Agreement, Special Counsel shall receive no compensation of any kind for any services rendered unless the State of South Carolina receives a settlement or judgment in connection with this litigation.

B. Fee Schedule and Division

If the State receives a settlement or award in connection with this litigation, Special Counsel will be compensated from the litigation's gross recovery (any final settlement or judgment received by the State, including any post-judgment interest) for their services as follows:

1. The Attorney General's Office shall be reimbursed for all costs and expenses incurred in the litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit. Compensation under this Section IV.B.1 shall be deducted from the litigation's gross recovery before any further distribution is made. However, any attorneys' fees retained by the Attorney General's Office are not subtracted from the gross recovery for purposes of calculating Special Counsel's fee.

2. Special Counsel shall be reimbursed for certain costs and expenses incurred in this litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit, pursuant to Article V below. Compensation under this Section IV.B.2 shall be deducted from the litigation's gross recovery before any further distribution is made.

3. After any deduction from the gross recovery pursuant to Section IV.B.1 and IV.B.2, if the defendant(s) filed a separate suit against the Attorney General or the State regarding this litigation or this Agreement, Special Counsel shall be compensated for time spent defending against such suit at the following rates: $190 per hour for attorneys with 10 or more years of experience, $130 per hour for attorneys with more than 6 but less than 10 years of experience, $110 per hour for attorneys with more than 3 but less than 6 years of experience, $100 per hour for attorneys with less than 3 years of experience, and $60 per hour for paralegals. This applies only to time spent defending a

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lawsuit against the Attorney General or the State, and not to time spent on the litigation brought by the Attorney General against the defendant(s). Compensation under this Section IV.B.3 shall be deducted from the net recovery that remains after any deduction pursuant to Section IV.B.1 and IV.B.2 and before any further distribution is made.

4. After any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	24%
$25,000,000.01 to $50,000,000.00	21%
$50,000,000.01 to $75,000,000.00	18%
$75,000,000.01 to $100,000,000.00	16%
$100,000,000.01 to $125,000,000.00	13%
$125,000,000.01 to $150,000,000.00	10%
$150,000,000.01 to $250,000,000.00	5%
Greater than $250,000,000.00	2%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

6. If Special Counsel's fee is to be divided among lawyers who are not in the same firm, all lawyers receiving a fee must jointly submit (a) a declaration that the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and (b) the share each lawyer will receive, for written approval by the Attorney General's Office prior to the disbursement of any fee.

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C. Early Settlement

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees shall be one half of that specified in Section IV.B.4 above.

D. Non-Monetary Relief

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General in his sole discretion shall determine the monetary value to the State and attorneys' fees awarded based on such monetary value. Should the litigation be favorably resolved by solely non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), in consultation with the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee, Special Counsel is entitled to attorneys' fees at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2016 and not to exceed $100,000 for every calendar year thereafter; in such event the obligation for such attorneys' fees shall be upon the opposing party in the litigation or as appropriated by the General Assembly.

E. Compensation upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys' fees as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

F. No Other Payment Source

Special Counsel shall be reimbursed solely from the litigation's recovery. Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for their work in this litigation other than as set forth in Articles IV and V herein. Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

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G. Court Approval of Fees and Costs

When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

B. Expert Expenses

Special Counsel shall seek prior approval from the Attorney General for the retention of experts before incurring expenses related to such expert. Provided that the Attorney General has approved the retention of an expert, Special Counsel shall be reimbursed for the expert's retainer and fees incurred on an hourly basis. Other expert expenses will be reimbursed in accordance with the provisions of Section V.C.

C. Other Expenses

Special Counsel shall be reimbursed for other certain reasonable expenses and costs enumerated below.

1. Overnight lodging shall be reimbursed at actual cost up to a maximum of the rate published by the United States General Services Administration as of the date of the lodging exclusive of taxes and fees. There is no reimbursement for in-room internet, room service, business center services, gratuity, or any other hotel services or upgrades.

2. There is no reimbursement for meals.

3. Automobile travel shall be reimbursed at the rate per mile published by the Internal Revenue Service for business miles driven as of the date of the automobile travel. Special Counsel must document the date of the travel, the address of the departure location, the address of the arrival location, and the purpose of the travel in order to be eligible for reimbursement. Automobile travel reimbursement must not exceed the commercial coach fare available for the same travel. There is no reimbursement for gas.

4. All other travel or travel-related expenses, including airfare, train, bus, taxi, shuttle, parking, and baggage fees, will be reimbursed at actual cost. Airfare reimbursements must be for commercial coach fares. There is no reimbursement for seat upgrades, preferred seating, preferred boarding, internet access, or any other transportation related upgrade.

5. Actual expenses for court fees and both offensive and defensive discovery, including but not limited to filing fees, service of process, motions fees, document productions, transcripts, and witness fees, as well as mailing costs related thereto. Charges for priority or overnight mail services shall be reimbursed only if use of such services is necessary. Should the cost of printing and copying any particular item under this section exceed $100, such expense shall be reimbursed.

6. If Special Counsel determines that the hiring of an Outside Vendor for any discovery, electronic discovery, or printing related project is reasonably necessary to the litigation, Special Counsel shall assess and select an appropriate Outside Vendor based on objective criteria, including but not limited to expertise, experience, professional certifications, capacity, geographic location, and cost. The Attorney General retains the right to veto the selection of any Outside Vendor, and the Attorney General must give written approval prior to the use of or contracting with any Outside Vendor by Special Counsel.

7. There will be no reimbursement for printing, copying or mailing costs other than under Section C.5, secretarial, paralegal, or other staff costs or overtime, Westlaw, LexisNexis, PACER, or other research expenses, or any telephone calls, or any other expense, unless prior approval is obtained in writing from the Attorney General.

Any deviation from these rules, such as a hotel room higher than GSA rate, must be approved by the Attorney General's Office prior to Special Counsel incurring the expense. Should a significant, unusual, and unexpected expense arise that is necessary and germane to the litigation, Special Counsel may request approval from the Attorney General for such expense. The Attorney General shall, in his sole discretion, determine whether Special Counsel shall be reimbursed for such expenses.

D. Hourly Fee

Where Special Counsel seeks payment of an hourly fee for defending litigation brought against the Attorney General or the State under the terms of this Agreement, in accordance with Section IV.B.3, Special Counsel is required to submit detailed time records on a monthly basis for time worked over the previous month. The Attorney General's Office is not obligated to approve or reject any requests for hourly fees until after the conclusion of the litigation. Each monthly time record must clearly identify, by name or initials, the attorney or paralegal who performed the work, the date of the work, a detailed description of the work, and the number of hours or fraction thereof worked to the nearest tenth of an hour. When initials are used, the submission must identify all persons whose initials appear on the invoice and indicate whether each is an attorney or paralegal.

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No time records shall be submitted or paid for work occurring either prior to the effective date of this Agreement or after its termination.

To the extent time was spent working on both the case brought by the Attorney General and the case where the Attorney General or the State is a defendant, it is Special Counsel's duty to separate the time based on the proportion fairly allocated to each case and only seek payment of an hourly fee for time fairly spent defending the Attorney General or the State in a case brought by the defendant(s). The Attorney General, in his sole discretion, may decline to pay an hourly fee for time determined to be unnecessary, unreasonable, and/or not submitted in accordance with the requirements of this Agreement.

E. Form and Timing of Submission

Special Counsel shall submit invoices every 90 days for any expenses incurred over the previous 90 days for which Special Counsel seeks reimbursement; however, the Attorney General's Office is not obligated to approve or reject any expenses until after the conclusion of the litigation.

For an expense to be reimbursed, Special Counsel must provide an original receipt reflecting the charges. Credit card statements are not sufficient unless approved by the Attorney General's Office. The receipts will be scanned and submitted to the Attorney General's Office as a single PDF document.

In addition, Special Counsel will provide an Excel spreadsheet that contains, at a minimum, the following information:

1. Date of expense;
2. Amount of expense;
3. Amount of expense for which reimbursement is sought;
4. Description of expense; and
5. Page reference to the PDF document of receipts.

To the extent prior written approval of the Attorney General's Office was given for a particular expense, such approval shall be included with the invoice.

Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following the termination of this Agreement. All expenses must be itemized and no reimbursement will be granted for "miscellaneous" listings. The Attorney General may, in his sole discretion, decline to reimburse Special Counsel for any expenses determined to be unnecessary, unreasonable, improperly documented, or improperly submitted.

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ARTICLE VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform their duties

required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that it has no conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time for this representation. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment that may impact this representation.

F. Equal Opportunity

Special Counsel hereby represents that neither they nor their law firms discriminate on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Right to Contact

To clarify, nothing in this Agreement shall be construed to prohibit defendant(s) from discussing this case with the Attorney General without the presence of Special Counsel if the Attorney General agrees to such discussion.

H. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

I. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

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J. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

K. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

L. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

SPECIAL COUNSEL

Davidson & Lindemann, P.A.
By:
Its: Shareholder

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EXHIBIT 8

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AMENDMENT TO THE LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

Pursuant to Article VII.J of the Litigation Retention Agreement for Special Counsel Appointed by the Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility, the Litigation Retention Agreement is hereby amended as follows, effective as of January 1, 2019. Except as set forth in this Amendment, the Agreement is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between this amendment and the Agreement or any earlier amendment, the terms of this Amendment will prevail.

1. **The title of the Agreement is deleted in its entirety and replaced with the following:**

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO VIOLATIONS OF 50 U.S.C.A. § 2566 AND OTHER CLAIMS RELATED TO NEPA, CERTIFICATION, AND WAIVER CLAIMS REGARDING THE MIXED OXIDE (MOX) FACILITY AND PLUTONIUM DISPOSITION

2. **The preamble of the Agreement after the title and prior to the recitals is deleted in its entirety and replaced with the following:**

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A., for certain causes of action and claims as set forth herein, and Davidson, Wren & Plyler, P.A., for certain causes of action and claims as set forth herein, each respectively "Special Counsel" for the matters for which each law firm has been engaged.

3. **The recitals of the Agreement are deleted in their entirety and replaced with the following:**

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual

litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of defense plutonium at the Savannah River Site; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's attempts to terminate the MOX Project at the Savannah River Site without compliance with applicable law; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

4. Article I of the Agreement is deleted in its entirety and replaced with the following:

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016 and terminates at the completion of these litigation matters, unless the Attorney General or Special Counsel terminates this appointment earlier pursuant to Article VI of this Agreement. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

5. Article II.D is added to the Agreement as follows:

D. Legal Services

Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are retained as Special Counsel for litigation matters to enforce claims for injunctive relief under 50 U.S.C.A. § 2566(c) and for monetary claims under 50 U.S.C.A. § 2566(d). Willoughby & Hoefer, P.A., is further retained as Special Counsel for litigation matters: arising from and related to all other matters under 50 U.S.C.A. § 2566; in venues outside of the State of South Carolina arising from or related to any claim under 50 U.S.C.A. § 2566 or defense plutonium disposition at the Savannah River Site; and arising from NEPA, waiver, or certification claims regarding the MOX Facility project termination.

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6. Article III.B is deleted in its entirety and replaced with the following:

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); or (5) by email.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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Name: Kenneth P. Woodington
Davidson, Wren & Plyler, P.A.
Address: 1611 Devonshire Drive, Second Floor
Columbia, SC 29204
Phone: 803-806-8222
Email: kwoodington@dml-law.com

7. Article III.F is deleted in its entirety and replaced with the following:

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Public records requests are to be handled by the Attorney General's Office, and any public records requests received by Special Counsel shall be emailed to the Attorney General's Office within one business day of receipt. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

8. Article IV.B.4 is deleted in its entirety and replaced with the following:

4.i. For the matters for which Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are jointly engaged as Special Counsel in the District Court of South Carolina and Court of Federal Claims, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

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4.ii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of South Carolina related to the MOX Facility and its termination, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

4.iii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of Nevada related to the transport and storage of defense plutonium from South Carolina and its disposition, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating the claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court in the Ninth Circuit	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

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9. Article IV.B.5 is deleted in its entirety and replaced with the following:

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings for any matter under the ambit of Section IV.B.4.i only, Special Counsel shall receive the following in additional attorneys' fees for each individual appellate matter, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	3%
$25,000,000.00 to $50,000,000.00	3%
$50,000,000.00 to $75,000,000.00	3%
$75,000,000.00 to $100,000,000.00	2%
$100,000,000.00 to $125,000,000.00	2%
$125,000,000.00 to $150,000,000.00	1%
$150,000,000.00 to $250,000,000.00	1%
Greater than $250,000,000.00	1%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. These fees are not awarded for any matter for which Special Counsel receives additional attorneys' fees under Section IV.B.4.ii or iii. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

10. Article IV.C is deleted in its entirety and replaced with the following:

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees may be reduced to one half of that specified in Section IV.B.4 above, in the sole discretion of the Attorney General.

11. Article IV.D is deleted in its entirety and replaced with the following:

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Except as otherwise set forth and contemplated in the compensation and fee recovery provisions in Article IV.B.4 and 5 for those actions and the requested relief, should the litigation be favorably resolved solely by other non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), Special Counsel shall engage in best efforts to recover attorneys' fees from the opposing party in the litigation. If attorneys' fees cannot be recovered from the opposing party, the

Attorney General shall seek an appropriation of attorneys' fees from the General Assembly at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2017 and not to exceed $100,000 for every calendar year thereafter. In no event shall Special Counsel be entitled to attorneys' fees directly from the Attorney General's office except out of a monetary recovery as specified in Article IV.B.

[Signatures on following page.]

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ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

Date: 6/13/19

SPECIAL COUNSEL

Davidson, Wren & Plyler, P.A.
By: William H. Davidson, II
Its: Shareholder

Date: 6/2/19

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EXHIBIT 9

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912 F.3d 720
United States Court of Appeals, Fourth Circuit.

State of SOUTH CAROLINA,
Plaintiff – Appellee,
v.
UNITED STATES of America; United States Department of Energy; Rick Perry, in His Official Capacity as Secretary of Energy; National Nuclear Security Administration; Lisa E. Gordon-Hagerty, in Her Official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants – Appellants.

No. 18-1684
|
Argued: September 27, 2018
|
Decided: January 8, 2019

Synopsis

Background: State brought action against United States Department of Energy (DOE) and National Nuclear Security Administration (NNSA) and their officials challenging termination of mixed oxide fuel fabrication facility project in state. The United States District Court for the District of South Carolina, No. 1:18-cv-01431-JMC, J. Michelle Childs, J., 329 F.Supp.3d 214, granted state's motion for preliminary injunction, and defendants appealed.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

[1] state did not suffer sufficiently concrete injury-in-fact to support standing to bring action, and

[2] state's claims were not ripe for adjudication.

Vacated and remanded.

West Headnotes (12)

[1] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears burden of establishing standing to assert each of its claims.

1 Cases that cite this headnote

[2] **Federal Courts** Standing

Court of Appeals reviews question of whether plaintiff possesses standing de novo.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must show that: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to defendant's challenged action; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

To satisfy injury-in-fact requirement for standing, plaintiff must establish realistic danger of sustaining direct injury.

2 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

While it is true that threatened rather than actual injury can satisfy Article III standing requirements, not all threatened injuries constitute injury-in-fact; rather, injury-in-fact

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must be concrete in both qualitative and temporal sense. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[6] **Environmental Law** Government entities, agencies, and officials

State did not suffer sufficiently concrete injury-in-fact to support standing to bring action alleging that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state, despite state's contention that DOE's decision meant that it would become permanent repository of weapons-grade plutonium and be subject to environmental, health, and safety risks that entailed, where current environmental impact statement provided that DOE had 28 years to identify alternative method for disposing of nuclear material or otherwise removing it from state, Secretary of Energy had already certified that one potential alternative to MOX program existed, and Congress had put in place contingency plans for removal of plutonium shipped to site to forestall indefinite storage of plutonium in state. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[7] **Constitutional Law** Nature and scope in general

Federal Civil Procedure In general; injury or interest

Standing doctrine is built on separation-of-powers principles, and serves to prevent judicial process from being used to usurp political branches' powers.

1 Cases that cite this headnote

[8] **Federal Courts** Ripeness; Prematurity

Ripeness is question of subject matter jurisdiction.

10 Cases that cite this headnote

[9] **Federal Courts** Fitness and hardship

Question of whether claim is ripe turns on fitness of issues for judicial decision and hardship to parties of withholding court consideration.

4 Cases that cite this headnote

[10] **Administrative Law and Procedure** Ripeness; prematurity

In context of claims challenging agency actions, ripeness doctrine's purpose is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties.

5 Cases that cite this headnote

[11] **Administrative Law and Procedure** What constitutes finality in general

To be fit for judicial review, controversy should be presented in clean-cut and concrete form, which occurs when action is final and not dependent on future uncertainties or intervening agency rulings.

5 Cases that cite this headnote

[12] **Environmental Law** Ripeness

State's claims that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state were not ripe for adjudication, where state based its claims on premise that it would be permanent repository of weapons-grade nuclear material currently stored in state, but numerous contingent future events would have to occur before that would occur, including DOE's failure to identify alternative method of disposal and breach its commitment

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to dispose of waste, and failure by Congress and courts to set aside or refuse to enforce statutory mechanisms currently in place to ensure timely removal of nuclear material. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

***722** Appeal from the United States District Court for the District of South Carolina, at Aiken. J. Michelle Childs, District Judge. (1:18-cv-01431-JMC)

Attorneys and Law Firms

ARGUED: Andrew Alperin Rohrbach, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Randolph R. Lowell, WILLOUGHBY & HOEFER, PA, Columbia, South Carolina, for Appellee. ON BRIEF: Chad A. Readler, Acting Assistant Attorney General, Mark B. Stern, Daniel Tenny, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellants.

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Opinion

Vacated and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Niemeyer and Judge King joined.

WYNN, Circuit Judge:

The State of South Carolina brought this action to enjoin the United States of America and other Defendants[1] (collectively, "the United States") from terminating the construction of a mixed-oxide fuel nuclear processing facility located at the Savannah River Site in South Carolina. South Carolina alleges that the United States Department of Energy unlawfully failed to (1) prepare a supplemental Environmental Impact Statement analyzing the long-term storage of plutonium in the state; and (2) follow statutory waiver provisions for terminating construction of the facility. We conclude that South Carolina ***723** has not established standing to pursue either of these claims. Accordingly, we vacate the preliminary injunction imposed by the district court.

I.

Following the collapse of the Soviet Union and the end of the Cold War, the United States of America and the Russian Federation began a worldwide nuclear nonproliferation effort that included developing plans for the safe disposition of nuclear weapons material. As part of this nonproliferation pact, the Department of Energy began studying the effects of various nuclear waste storage and disposal strategies. In its initial 1996 study, the Department of Energy prepared an Environmental Impact Statement in accordance with Section 4332 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., analyzing the potential environmental consequences associated with the long-term storage of weapons-grade plutonium and highly enriched uranium prior to disposition. The Environmental Impact Statement addressed storage of these materials for a period of up to fifty years.

Ultimately, the Department of Energy determined that the best approach to nuclear waste disposal was a dual strategy involving (1) immobilization of a portion of the surplus plutonium in glass or ceramic; and (2) irradiation of the remaining plutonium in mixed oxide fuel (the "MOX process"). Both strategies would convert the surplus nuclear material into forms that would meet the National Academy of Science's Spent Fuel Standard, meaning that the material would be "inaccessible and unattractive for weapons" use. J.A. 78.

In 1997, the Department of Energy announced its intention to build a new mixed oxide fuel fabrication facility (the "MOX facility") to dispose of some of the nuclear material using the MOX process. Following completion of a supplemental Environmental Impact Statement and a Record of Decision in January of 2000, the Department of Energy announced that the MOX facility would be located at the Savannah River Site along South Carolina's border with Georgia. The facility's original production goals included disposition of up to thirty-three metric tons of nuclear material using the MOX process and immobilization of up to seventeen metric tons of additional nuclear material. As part of its supplemental Environmental Impact Statement, the Department of Energy continued to look at the environmental impacts of long-term plutonium storage.

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In 2002, the Department of Energy decided to drop the immobilization portion of the disposition strategy, leaving the MOX process as the sole plutonium disposal method. That same year, Congress directed the Secretary of Energy to submit a plan for the construction and operation of the MOX facility at the Savannah River site. Pub. L. No. 107-314, § 3182 (2002), *subsequently codified* as 50 U.S.C. § 2566. Congress further authorized the Secretary to take corrective actions if the construction timetable and operation schedule for the MOX facility were not being met. Additionally, Congress also required that in the event the MOX facility failed to achieve its production goals, the Department of Energy remove plutonium shipped to South Carolina for processing. *See* 50 U.S.C. § 2566(c), § 2566(e). Finally, as part of its findings, Congress mentioned the economic benefit that the MOX facility would bring to the State of South Carolina, noting that the economic benefit would not be fully realized unless the facility was built. *See* Pub. L. No. 107-314 at § 3181.

Three years later, in 2005, the Department of Energy began transferring plutonium to the Savannah River Site for conversion, and in 2007, construction began on ***724** the MOX facility. The original cost estimate for construction of the facility was $4.8 billion, with completion anticipated in 2016. And the original production goal estimate for the facility was to have thirty-four metric tons of defense plutonium processed no later than January 1, 2019. 50 U.S.C. § 2566(a)(2)(B).

These original estimates proved grossly inaccurate due to delays and cost overruns in the construction of the MOX facility. The Department of Energy now estimates cost for construction of the facility to be $17.17 billion, with completion now anticipated to be in 2048, over thirty years beyond the original estimated schedule.

Since 2014, the Department of Energy has sought to terminate the MOX program and pursue an alternative method of plutonium disposal known as "Dilute and Dispose," which it contends is less costly, faster, and safer. Under the Dilute and Dispose method, nuclear material would be "downblended" with inhibitor materials to reduce the plutonium content to less than ten percent by weight. Upon completion of the downblending process, the material would then be shipped from the Savannah River Site to the Waste Isolation Pilot Plant near Carlsbad, New Mexico, for permanent disposal.

Thus far, Congress has continued to fund construction of the MOX facility and has, to date, restricted the Department of Energy from utilizing MOX-related appropriations to begin termination of the program. To that end, in 2017, Congress enacted a statute providing that the Secretary of Energy "shall carry out construction and project support activities relating to the MOX facility." Pub. L. 115-91, § 3121(a), 131 Stat. 1283, 1892.

However, Section 3121(b) of that statute allows the Secretary of Energy to discontinue construction of the MOX facility if certain conditions have been met. Specifically, the Secretary of Energy must submit to the Congressional defense committees:

> (A) the commitment of the Secretary [of Energy] to remove plutonium intended to be disposed of in the MOX facility from South Carolina and ensure a sustainable future for the Savannah River Site;
>
> (B) a certification that—
>
> (i) an alternative option for carrying out the plutonium disposition program for the same amount of plutonium as the amount of plutonium intended to be disposed of in the MOX facility exists, meeting the requirements of the Business Operating Procedure of the National Nuclear Security Administration entitled "Analysis of Alternatives" and dated March 14, 2016 (BOP-03.07); and
>
> (ii) the remaining lifecycle cost, determined in a manner comparable to the cost estimating and assessment best practices of the Government Accountability Office ["GAO"], as found in the document of the Government Accountability Office entitled "GAO Cost Estimating and Assessment Guide" (GAO-09-3SP), for the alternative option would be less than approximately half of the estimated remaining lifecycle costs of the mixed oxide fuel program; and
>
> (C) the details of any statutory or regulatory changes necessary to complete the alternative option.

§ 3121(b)(1).

Additionally, in exercising his authority to discontinue construction of the MOX facility, the Secretary of Energy

> (1) shall concurrently submit to the Committees on Appropriations of both Houses of Congress the lifecycle

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cost estimate used to make the certification under section 3121(b) of such Act; and

***725** (2) may not use funds provided for the Project to eliminate such Project until the date that is 30 days after the submission of the lifecycle cost estimate required under paragraph (1).

Pub. L. No. 115-141, § 309(c), 132 Stat. 348, 530 (2018).

Pursuant to these provisions, on May 10, 2018, the Secretary of Energy submitted a letter to the Chairman of the House Armed Services Committee that purported to execute the authority of the Secretary of Energy under Section 3121(b) to discontinue construction of the MOX facility. The Secretary of Energy certified, *inter alia*, that (1) the Department of Energy is committed to removing plutonium from South Carolina; (2) an alternative option for carrying out the plutonium disposition, the Dilute and Dispose method, exists and has a lifecycle cost of less than approximately half of the remaining lifecycle cost for the MOX program; (3) the Department of Energy estimated the cost of the Dilute and Dispose approach in a manner compatible with the best practices of the GAO; and (4) the Department of Energy is committed to ensuring a sustainable future for the Savannah River Site. The Secretary of Energy further reported that the Department of Energy expected the total cost of disposition via the Dilute and Dispose method to be $19.9 billion, compared to $49.4 billion for the total cost of construction of the MOX facility and conversion of all the plutonium into MOX fuel.

In accordance with the Secretary of Energy's letter, the Department of Energy and the National Nuclear Security Administration issued a Partial Stop Work Order on May 14, 2018, ending all new contracts and hiring related to the MOX program. The Department of Energy further indicated its intent to issue a Full Stop Work Order and begin winding down the MOX program, including terminating employees currently working on the project, on or about June 11, 2018.

On May 25, 2018, before the Department of Energy issued a full stop work order, South Carolina brought this action in the United States District Court for the District of South Carolina and moved for a preliminary injunction barring the federal government from terminating the MOX program. In its complaint, South Carolina asserted that the United States (1) violated NEPA by failing to prepare a supplemental Environmental Impact Statement covering a period of more than fifty years and (2) failed to satisfy Section 3121(b) because of the alleged insufficiency of the Secretary of Energy's certifications.[2]

On June 7, 2018, the district court granted South Carolina's motion for preliminary injunction. The district court first found that South Carolina had standing due to environmental risks associated with long-term storage at the Savannah River Site, which abuts property owned by South Carolina. As to the merits, the district court held, in pertinent part, that South Carolina was likely to succeed on the merits of its NEPA claim and its claim that the Secretary of Energy's certifications were insufficient. The district court further found that South Carolina would be irreparably harmed absent a preliminary injunction and that the balance of equities tilted in South Carolina's favor. Thus, the district court enjoined the federal government from ceasing construction of the MOX facility and issuing the full stop work order. The United States timely appealed.

***726** After careful review, we dispositively hold that South Carolina failed to establish standing and therefore we do not reach the district court's determination on the merits of this matter.

II.

A.

On appeal, the United States contends that the district court erred in concluding that South Carolina established standing to pursue the two claims that serve as the basis of the district court's preliminary injunction order—the NEPA claim and the claim premised on the alleged insufficiency of the Secretary's certifications. The standing doctrine derives from "the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.' " *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 750–51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Standing implicates the court's subject matter jurisdiction. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 230 (4th Cir. 2008).

[1] **[2]** Here, South Carolina, as plaintiff, bears the burden of establishing standing to assert each of its claims. *See id.*;

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see also Lewis v. Casey, 518 U.S. 343, 359 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." (internal quotation marks omitted)). We review the question of whether South Carolina possesses standing de novo. *Frank Krasner Enters.*, 401 F.3d at 234.

[3] To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The United States contends South Carolina failed to show it has suffered an injury-in-fact sufficient to give rise to Article III standing.

[4] **[5]** To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "[W]hile it is true 'that threatened rather than actual injury can satisfy Article III standing requirements,' ... not all threatened injuries constitute an injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc)). "Rather, as the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.' " *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The requirement that an alleged injury be palpable and imminent ensures that the injury "is not too speculative for Article III purposes." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564–65 n.2, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[6] On appeal, South Carolina contends that it has suffered an injury-in-fact sufficient ***727** to support standing because "[South Carolina] is harmed by being rendered the permanent repository of weapons-grade plutonium as a result of [the Department of Energy's] decision to terminate the MOX Facility without first complying with NEPA or following the congressional mandates of § 3121." Appellee's Br. at 15–16. According to South Carolina, this "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 14. But this alleged injury is too speculative and thus, does not give rise to a concrete injury-in-fact sufficient to support either of South Carolina's claims.

The Supreme Court has repeatedly held that an alleged harm is too "speculative" to support Article III standing when the harm lies at the end of a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *see also*, *e.g.*, *Beck*, 848 F.3d at 275 (holding that plaintiffs, who received treatment at a medical center that suffered a data breach and alleged that they were at risk of experiencing identity theft, failed to establish standing because their theory of injury rested on an "attenuated chain of possibilities").

Illustratively in *Clapper*, the Supreme Court considered a challenge to Section 702 of the Foreign Intelligence Surveillance Act, which "authoriz[es] the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." 568 U.S. at 401, 133 S.Ct. 1138. The plaintiffs—a group of "attorneys and human rights, labor, legal, and media organizations"—alleged that their work demanded that they "engage in sensitive international communication with individuals who they believe are likely targets of surveillance under" Section 702, rendering it reasonably likely that the government would target and intercept the plaintiffs' communications. *Id.* at 401, 406, 133 S.Ct. 1138.

The Supreme Court held that the plaintiffs failed to establish a concrete injury-in-fact based on the possibility that their communications would be intercepted, explaining that a series of hypothetical events would have to occur before the government would intercept any particular plaintiff's communications. *Id.* at 1148–50, 133 S.Ct. 1138. The Court held that among other steps, the government would have to decide to invoke its Section 702 authority to target a non-U.S. person with whom a plaintiff communicated, a panel of federal judges would have to "conclude that the Government's proposed surveillance procedures satisfy [the statute's] many safeguards and are consistent with the Fourth Amendment," and the government would have to succeed in intercepting one of the target's communications with the plaintiff. *Id.* Thus, the Court held that that the "highly attenuated chain of possibilities, d[id] not satisfy

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the requirement that threatened injury must be certainly impending." *Id.* at 1148, 133 S.Ct. 1138 (citation omitted).

Applying *Clapper*, this Court reached a similar conclusion in *Beck*, in which a putative class of veterans who received medical treatment at a veterans' medical center alleged that they had been injured when two sets of records were stolen from the center. 848 F.3d at 262, 267. Although none of the named plaintiffs alleged any actual or attempted misuse of the personal information contained in their stolen records, they alleged that they suffered cognizable injuries-in-fact because they faced "(1) [an] increased risk of future identity theft, and (2) the costs of protecting against the same." *Id.* at 273. We concluded ***728** that both alleged injuries were too speculative to confer standing. *Id.* at 275–77. As to the alleged increased risk of identity theft, in particular, we explained that plaintiffs' theory of injury required us to "assume that the thie[ves] targeted the stolen items for the personal information they contained" and that the thieves would "then select, from thousands of others, the personal information of the named plaintiffs, and attempt successfully to use that information to steal their identities." *Id.* at 275. "This 'attenuated chain' cannot confer standing," we held. *Id.* We likewise rejected the plaintiffs' costs of mitigation theory of standing as a "repackaged" version of their first theory of standing, amounting to an effort to recoup "costs they incurred in response to a *speculative threat*." *Id.* at 276 (emphasis added) (quoting *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138).

Here, South Carolina's theory of standing—that it will become "the permanent repository of weapons-grade plutonium" and all the environmental, health, and safety risks that entails, Appellee's Br. at 15–16—rests on a similarly "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138. Between now and 2046—when the analysis in the current Environmental Impact Statement governing the risks associated with long-term storage of weapons-grade nuclear material at the Savannah River Site expires—the Department of Energy has twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina. The Secretary of Energy already has certified that one potential alternative to the MOX program exists, the Dilute and Dispose method. And the Department of Energy may identify and develop other methods during that twenty-eight-year period. Or the Department of Energy may decide to transfer the plutonium out of South Carolina to another location.

Furthermore, Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina. A federal statute requires that, by 2022, all additional plutonium transferred into South Carolina to the MOX facility, but not processed, must be removed. 50 U.S.C. § 2566(c)(2). Notably, because the Department of Energy already has failed to meet certain statutory time limits for disposing of nuclear material at the site, South Carolina has successfully brought suit pursuant to the Administrative Procedure Act to enforce these congressionally mandated deadlines via a mandatory injunction. *See id.* § 2566(c)(1) (requiring removal of one metric ton of plutonium no later than January 1, 2016); *South Carolina v. United States*, 243 F.Supp.3d 673 (D.S.C. 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018) (ordering the Department of Energy to remove one metric ton of plutonium within two years).

In sum, for South Carolina's alleged injury—becoming "the permanent repository of weapons-grade plutonium," Appellee's Br. at 15–16—to occur: (1) the proposed Dilute and Dispose method must fail; (2) the Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and (3) the Department of Energy must breach its statutory obligation to remove the nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation. At this juncture, before the Department of Energy has even had an opportunity to finish analyzing the Dilute and Dispose method, this "chain of possibilities" is too speculative to give rise to a sufficiently concrete injury-in-fact.

[7] That several of the links in this "chain of possibilities" the State's standing ***729** theory contemplates require our coordinate branches to either breach or abandon their existing commitments to ensure timely removal of the nuclear material at the Savannah River Site further weighs against treating the South Carolina's alleged injury as conferring standing. As *Clapper* recognized, the standing doctrine is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408, 133 S.Ct. 1138 (citations omitted); *see also Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315 (1984) ("[Article] III standing is built on a single basic idea—the idea of separation of powers."). To confer standing on South Carolina at this juncture based on an alleged injury —becoming the permanent repository of nuclear material— that the political branches already have made written and legally binding commitments to forestall would improperly

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"usurp the powers of the political branches." *Clapper*, 568 U.S. at 408, 133 S.Ct. 1138.

The "highly attenuated chain of possibilities" that must occur for South Carolina to become the permanent repository of nuclear material also sets this case apart from this Court's decision in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), upon which South Carolina principally relies.

Like the instant case, *Hodges* dealt with the storage of plutonium at the Savannah River Site. *Id.* at 436. In 2002, the Department of Energy issued a Record of Decision authorizing the immediate shipment of six metric tons of plutonium from a nuclear facility in Colorado to the Savannah River Site. *Id.* The Governor of South Carolina sought to enjoin shipment of the plutonium into South Carolina, alleging that the Department of Energy's *existing* Environmental Impact Statement, and its supplemental analyses to the Environmental Impact Statement, related to storage of plutonium at the Savannah River Site violated NEPA in several ways. *Id.* at 445. This Court held that the Governor adequately alleged an injury-in-fact to support his NEPA claims because the South Carolina owned property adjacent to the Savannah River Site. *Id.* "[T]he Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage" as a result of the Department of Energy's shipment of plutonium to the Savannah River Site and storage of that plutonium there, we explained. *Id.*

Here, unlike in *Hodges*, South Carolina does not argue that its injury, as a neighboring landowner, is attributable to the *current* storage of nuclear material at the Savannah River Site or the inadequacy of the Environmental Impact Statement pursuant to which the nuclear material is *currently* stored—a question that *Hodges* already resolved in the federal government's favor. *Id.* at 446–49. Rather, South Carolina contends it is injured because the termination of the MOX program renders it the *permanent* repository of the nuclear material when the Department of Energy has not issued an Environmental Impact Statement analyzing the environmental impact of the storage of the material at the Savannah River Site *beyond the year 2046*, the year when the existing Environmental Impact Statement's analysis terminates, or, allegedly, satisfies its statutory obligations in terminating the MOX program. There is a meaningful distinction between the alleged *immediate* environmental injuries associated with storing plutonium at the Savannah River Site, which were at issue in *Hodges*, and the alleged *future* adverse environmental impacts on South Carolina as a neighboring landowner if the Department of Energy continues to store the plutonium at the Savannah River Site *decades in the future*. That distinction is particularly meaningful because, as explained ***730** above, numerous contingencies must occur in order for the plutonium to remain in South Carolina after 2046, the year when South Carolina's alleged injury will mature.

In sum, the single theory of injury[3] that South Carolina relies on to support both of its claims is too speculative at this juncture to support Article III standing. The district court, therefore, was without jurisdiction to enter its preliminary injunction premised on those two claims.

B.

[8] For reasons similar to those that lead us to find that South Carolina lacks standing, we also find that the two claims at issue fail on ripeness grounds. Like standing, the ripeness doctrine "originates in the 'case or controversy' constraint of Article III." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 269 (4th Cir. 2013) (citations omitted). "Analyzing ripeness is similar to determining whether a party has standing." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). "Although the phrasing makes the questions of who may sue and when they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness." *Id.* (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)). As with standing, ripeness is a question of subject matter jurisdiction. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (citation omitted).

[9] **[10]** The question of whether a claim is ripe "turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) (citation omitted). In the context of claims challenging agency actions, like the two at issue, the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136,

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148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[11] To be fit for judicial review, a controversy should be presented in a "clean-cut and concrete form." *Miller*, 462 F.3d at 319 (citation omitted). This occurs when the action is "final and not dependent on future uncertainties or intervening agency rulings." *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (citation omitted). On the other hand, just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, a plaintiff's claim is not ripe for judicial review "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

[12] The two claims that South Carolina advances before this Court rest on the premise that South Carolina will be the permanent repository of the weapons-grade ***731** nuclear material currently stored at the Savannah River Site. But, numerous "contingent future events," *id.*, must occur before South Carolina becomes the *permanent* repository of the nuclear material, *see supra* Part II.A. In particular, the Dilute and Dispose method must prove unworkable. The Department of Energy must fail to identify an alternative method of disposal and breach its commitment to dispose of the waste. And Congress or the courts must set aside or refuse to enforce the statutory mechanisms currently in place to ensure timely removal of the nuclear material. All of these "future uncertainties," *Franks*, 313 F.3d at 195, lead us to conclude that the two claims at issue are not ripe for review at this time —at least as presented by South Carolina. Accordingly, the ripeness doctrine provides an additional basis for our holding that the district court was without jurisdiction to enter the preliminary injunction.

III.

In sum, the only theory of injury advanced by South Carolina —that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site—rests upon a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270. In such circumstances, we must conclude that South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review.

That the two claims are not currently justiciable does not mean that they never will be so. If uncertainty as to several links in the chain of possibilities is resolved, then South Carolina's alleged injury may move from the speculative to the concrete, and therefore the two claims also may become ripe for review. But until that uncertainty is lifted, the Constitution demands that we withhold judicial review.

Accordingly, we vacate the preliminary injunction imposed by the district court and remand the case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED

All Citations

912 F.3d 720

Footnotes

1 The other Defendants are the United States Department of Energy; Rick Perry, in his official capacity as Secretary of Energy; the National Nuclear Security Administration; and Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration.

2 South Carolina further claimed that the United States violated 50 U.S.C. § 2567 by failing to consult with the governor before deciding to terminate the MOX facility. The district court held that South Carolina failed to establish that that claim was likely to succeed on the merits, and therefore that claim is not before this Court.

3 Because South Carolina has advanced only one theory of injury to support the two claims before this Court—that South Carolina is harmed by becoming the permanent repository of weapons-grade nuclear material—we cannot and do not take any position on whether other theories of injury would presently confer standing on South Carolina to support either of the two claims before us on appeal.

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EXHIBIT 10

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2019 WL 2464930 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
June 7, 2019.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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***i** QUESTION PRESENTED

The U.S. Department of Energy (DOE) shipped massive amounts of weapons-grade plutonium to South Carolina for a decade in anticipation of building a facility there - the "MOX Facility" - to process it. After running way behind schedule and far over budget, DOE sought to mothball the still-uncompleted MOX Facility. In response, Congress enacted a statute requiring DOE to keep building the MOX Facility unless DOE gets a "waiver" of that requirement. This lawsuit arose from DOE's decision to halt construction of the MOX Facility permanently after purportedly satisfying the statute's requirements for a waiver. South Carolina claims in this suit that DOE's decision violates the statute, which was specifically designed to protect South Carolina's interests, and the National Environmental Policy Act.

The question presented is whether the United States Court of Appeals for the Fourth Circuit erred in holding that South Carolina lacked standing to challenge the DOE's final action and that the challenge is not ripe.

***ii** PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. State of South Carolina, Plaintiff and Petitioner;

2. United States of America, Defendant and Respondent;

3. United States Department of Energy, Defendant and Respondent;

4. Rick Perry, in his official capacity as Secretary of Energy, Defendant and Respondent;

5. National Nuclear Security Administration, Defendant and Respondent;

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6. Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendant and Respondent.

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner State of South Carolina (South Carolina or State) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.3d 720. App. 1a-22a. The opinion of the district court is reported at 329 F. Supp. 3d 214. App. 34a-82a. The decision of the United States Secretary of Energy is unreported but is reproduced in the appendix. App. 107a-109a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on January 8, 2019. On March 29, 2019, the Chief Justice extended the time to file a petition for a writ of certiorari up to and including June 7, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the U.S. Constitution provides in relevant part, "[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 83a-106a.

*2 INTRODUCTION

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This case involves the justiciability of a State's claims against the federal government for statutory violations, including violations of provisions expressly designed to protect the State's concrete interests. The decision below, which denied the justiciability of those claims, conflicts with this Court's decision in *Massachusetts v. EPA,* 549 U.S. 497 (2007), and provides an excellent vehicle for dispelling continuing confusion among the lower courts about the standing of States to sue the federal government.

South Carolina is home to the Savannah River Site (SRS), where Congress directed the U.S. Department of Energy (DOE) to build a facility to convert weapons-grade plutonium (also known as "defense plutonium") into mixedoxide (MOX) fuel for use in commercial nuclear reactors. App. 3a-4a, 83a.[1] In the statute directing DOE to build this facility - known as the MOX Facility or Project - Congress included multiple provisions designed to address South Carolina's concern about becoming a permanent dumping ground for multiple tons of this admittedly dangerous material. 50 U.S.C. § 2566. Starting in 2014, DOE sought to terminate construction of the MOX Facility after its construction had fallen way behind schedule and gone way over budget.

On May 10, 2018, the Secretary of DOE announced his decision to permanently abandon construction of the ***3** MOX Facility and to pursue a new concept for processing weapons-grade plutonium called "Dilute and Dispose" or "downblending." In the letter announcing this decision, the Secretary purported to comply with the statutory requirements for a "waiver" of the statutory mandate to continue construction of the MOX Facility. DOE made this decision without any analysis under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA), or complying with the analysis requirements of the governing statute.[2]

To remedy these statutory violations, South Carolina brought this action against DOE. The district court granted a preliminary injunction to prevent DOE from terminating construction of the MOX Facility, but the Fourth Circuit reversed. Without reaching the merits, the Fourth Circuit held that South Carolina lacked Article III standing and that its claims are not ripe. The Fourth Circuit characterized South Carolina's standing argument as resting on its fear of being "the permanent repository of weapons-grade plutonium." App. 12a. The Fourth Circuit believed that this fear was "too speculative" to constitute injury in fact or present ripe claims. App. 12a. The Fourth Circuit did not cite *Massachusetts v. EPA* despite its obvious relevance and South Carolina's citation of that decision in its brief.

The Fourth Circuit's decision conflicts with this Court's decision in *Massachusetts v. EPA* and misreads ***4** other decisions of this Court on Article Ill's standing and ripeness requirements. The decision warrants this Court's review because it could hamper South Carolina's ability to enforce statutory provisions that relate to the weapons-grade plutonium at SRS, and other States' ability to enforce statutory rights enacted to protect their interests.

STATEMENT OF THE CASE

South Carolina is home to 10 metric tons of weapons-grade plutonium, which are stored at SRS. If the decision below stands and DOE has its way, South Carolina will be forced to host at least an additional 20 metric tons indefinitely, while DOE tries to turn a new concept for processing it into a reality. DOE's track record in dealing (more accurately, in failing to deal) with the existing 10 metric tons does not inspire confidence that the proposed total of more than 30 metric tons, and their associated dangers, will be going anywhere any time soon. Remarkably, after the district court held that South Carolina was likely to succeed on the merits of its claims in this action, the Fourth Circuit foreclosed the State from even being able to question executive-branch compliance with statutory requirements that Congress specifically and expressly designed to protect South Carolina's interests.

I. Congress enacts statutory protections to prevent South Carolina from becoming the permanent repository of weapons-grade plutonium put there by the federal government.

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In September 2000, the United States and Russia entered an agreement under which each country ***5** would dispose of 34 metric tons of weapons-grade plutonium. App. 35a, 76a. To meet its obligations under this agreement, Congress in 2003 enacted legislation authorizing the construction of the MOX Facility at SRS. App. 39a, 76a-77a. The legislation included a finding that the "agreement with Russia is a significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists." Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), § 3181(1), 116 Stat. 2458, 2747 (2002). Another finding stated that DOE planned - quite optimistically in hindsight - for the MOX Facility to begin operating in 2009 and to convert 34 metric tons of weapons-grade plutonium into mixed-oxide fuel "before the end of 2019." *Id.* § 3181(3) & (4).

South Carolina had protested selection of SRS as the site for the MOX Facility. In addition to the concern that weapons-grade plutonium could fall into the wrong hands, South Carolina worried about its citizens' prolonged exposure to multiple tons of this admittedly hazardous material. Indeed, the Nuclear Regulatory Commission (NRC) recognized, when it issued the construction license for the MOX Facility in 2005, that the primary benefit of the Facility's operation would be to reduce the supply of weapons-grade plutonium "available for unauthorized use." App. 62a. The NRC also recognized that "continued storage [of the plutonium] would result in higher annual impacts" of public radiation exposure than implementation of the Project. App. 62a. Besides concerns for its citizens, South Carolina had concerns as the owner of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

***6** Congress addressed some of South Carolina's concerns in the 2003 statute authorizing the MOX Facility. NDAA FY03, § 3182, *subsequently codified* as 50 U.S.C.A. § 2566 (Section 2566). Section 2566 prescribes deadlines for construction of the Facility and for its processing of the plutonium. *E.g., id.* § 2566. The key deadline provided that, as of January 1, 2012, the MOX Facility would be processing no less than one metric ton of weapons-grade plutonium per year. *Id.* 2566(a), (h). The statute also prescribes remedies against DOE for missing these deadlines. *Id.* § 2566(b)(6)(B), (b)(6)(C); *id.* § 2566(c); *id.* § 2461.

Beginning shortly after the enactment of § 2566 and continuing through 2012, DOE shipped significant amounts of defense plutonium to South Carolina for conversion into MOX fuel. Construction began on the MOX Facility on or about August 1, 2007. As the National Academy of Sciences observed, however, "Construction has encountered substantial schedule delays and cost overruns." National Academies of Sciences, Engineering, and Medicine, *Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report* 2 (Washington, DC: The National Academies Press, Oct. 2018) [hereafter cited as NAS Interim Report].[3] Although the MOX Facility originally was supposed to begin operating in 2009, today DOE estimates construction will not be completed until at least 2048. App. 5a. The delay caused DOE to violate, among other statutory requirements, a requirement that it remove not less than one metric ton of weapons-grade plutonium by January 1, 2016. In a prior action, South Carolina successfully sued DOE for this statutory ***7** violation. *South Carolina v. United States,* 907 F.3d 742 (4th Cir. 2018).

II. DOE terminates construction of the MOX Facility with no approved alternative for disposition of the defense plutonium at SRS.

Since 2014, DOE has continuously sought termination of the MOX Project and advocated for its proposed "Dilute and Dispose" concept, under which DOE would prepare "dilute" plutonium at SRS for ultimate "disposition" at the Waste Isolation Pilot Plant (WIPP) in New Mexico. Despite DOE's new idea, Congress has continued to mandate that DOE build the MOX Facility. The current mandate is found in two statutory provisions: Section 3121(a) of the NDAA FY18, and Section 309(a) of the Consolidated Appropriations Act, 2018 (CAA FY18). App. 95a-98a.[4]

Recognizing South Carolina's concerns that it be left as an indefinite repository for defense plutonium, Congress specified that DOE can avoid the statutory mandate to construct the MOX Facility only if the Secretary of Energy obtained a waiver of it. The waiver requirements are prescribed in Section 3121(b) of NDAA FY18, and are incorporated by reference in Section 309(b)

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of CAA ***8** FY18. App. 95a-98a. To get a waiver, the Secretary must "submit to the congressional defense committees" (1) a commitment to remove defense plutonium from South Carolina and (2) a certification regarding certain points, including the existence of a viable and feasible alternative option.[5] This waiver requirement was enacted by Congress to ensure a legally viable and feasible disposition pathway existed to remove defense plutonium from South Carolina.

The Secretary of Energy purported to meet the waiver requirement in a letter dated May 10, 2018 ("May 10 Letter"). The May 10 Letter notified Congress of DOE's decision to permanently abandon construction of the MOX Facility and pursue its "Dilute and Dispose" concept for plutonium disposition. App. 107a-109a. In the May 10 Letter, the Secretary stated, "I confirm that the Department is committed to removing plutonium from South Carolina intended to be disposed of in the MOX facility." App. 107a. The Secretary also certified that "an alternative option for carrying out the plutonium disposition program … exists" - namely, the "Dilute and Dispose Approach." App. 108a. But the Secretary did not address the "many barriers" that the National Academy of Sciences has identified and said "must be addressed … before the dilute and dispose conceptual plans can be implemented." NAS Interim Report, *supra,* at 19. In particular, the Secretary did not address any of the legal barriers that exist, despite the waiver provision's requirement that he identify "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose concept. NDAA FY18, § 3121(b)(1)(C).

***9** Based on the decision reported in the May 10 Letter, the Secretary issued a "partial stop work order" on May 14, 2018. App. 50a (quoting ECF No. 19-1 ¶ 10). The partial stop work order "halted any new contracts or new hires at SRS for the MOX Project." App. 44a, 72a. The order "was issued to minimize cos[t] to the government during the 30 day period leading up to an eventual full stop work order and the termination letter expected to be issued on June 11, 2018." App. 50a (quoting ECF No. 19-1 ¶ 10). South Carolina filed this action before the termination letter issued and obtained a preliminary injunction against its issuance.

Today, South Carolina continues to host about 10 metric tons of weapons-grade plutonium at SRS slated for MOX Facility processing. South Carolina has no reason to believe that this material is going anywhere anytime soon. To the contrary, as discussed above, DOE has repeatedly missed statutory deadlines for construction and operation of the MOX Facility. In the meantime, South Carolina and its people continue to live with the dangers that are associated with this material and that led to the international agreement with Russia and the Act of Congress directing construction of the MOX Facility in the first place.

III. The Proceedings Below.

A. Federal District Court

On May 25, 2018, the State filed a complaint in the United States District Court for the District of South Carolina challenging DOE's final agency action to terminate the Project. The complaint invoked subjectmatter ***10** jurisdiction under the federal-question statute, 28 U.S.C. § 1331. The State asserted two claims of statutory violations, both resting on the cause of action created by the Administrative Procedure Act (5 U.S.C. §§ 702, 704 & 706): DOE violated (1) NEPA by failing to prepare a supplemental Environmental Impact Statement analyzing its decision to terminate the MOX Facility in favor of the Dilute and Dispose approach; and (2) the statutory provisions requiring DOE to obtain a waiver before terminating construction of the MOX Facility (NDAA FY18, § 3121(b) and CAA FY18, § 309(b)). The State sought declaratory relief and a permanent injunction.

The State also moved for a preliminary injunction to maintain the status quo by enjoining DOE from terminating the Project during the pendency of this lawsuit. The district court granted the preliminary injunction on June 7, 2018. App. 34a-82a.

In its preliminary injunction order, the district court comprehensively addressed and rejected DOE's arguments that South Carolina lacks standing and that the May 10 Letter is not final agency action. App. 44a-54a. The court held that South Carolina has standing to assert its procedural rights under NEPA and the statutory waiver provisions "because the State owns extensive property adjoining, and one road traversing the impacted area." App. 47a. The court further held that the decision of the Secretary

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announced in the May 10 Letter is final agency action reviewable under the APA. The Secretary's "execution of the MOX termination waiver" in the May 10 Letter, if allowed to stand, waives the statutory requirements to continue building the MOX Facility. In addition to this legal effect, the May 10 Letter creates the ***11** "practical reality that the full stop order that is planned for June 11, 2018 will shut down the MOX Facility." App. 50a. Furthermore, the court concluded, "[b]ecause the MOX Project is the only legally authorized disposition method for MOXable plutonium at SRS," the "practical effect" of the decision announced in the May 10 Letter "is that the plutonium will remain at SRS indefinitely." App. 54a.[6]

The court also held that South Carolina is likely to succeed on the merits of both its claims.

In analyzing the State's NEPA claim, the court observed that the relevant statutes, and DOE itself, contemplate that NEPA applies "when rendering decisions and taking action related to the disposition of defense plutonium at SRS." App. 60a. DOE relied, however, on an Environmental Impact Statement (EIS) issued in December 1996 that analyzed the storage of weapons-grade plutonium for a period of up to 50 years - *i.e.,* until 2046. App. 63a, 65a. DOE argued that this EIS sufficed because its use of the new Dilute and Dispose approach would remove all the MOXable plutonium before that 50- ***12** year period ended. App. 63a. The district court rejected that argument on two grounds. First, DOE's past actions with regard to the MOX Facility "have called into question the viability" of DOE's timeline for removal using the Dilute and Dispose approach. App. 65a. Second, and in any event, "pursuing the Dilute and Dispose approach" for the MOXable plutonium "would have a significant impact on the environment." App. 65a. Therefore, the court held, DOE must "produce a supplemental EIS that addresses the conceivability, both practically and legally" of its proposed new approach. App. 65a-66a.

The court also held that the State is likely to succeed on its claim that the Secretary violated the statutory requirements for a waiver of the statutory mandate to continue building the MOX Facility. App. 66a-72a. The court identified three flaws in the May 10 Letter announcing the Secretary's decision to terminate the MOX Project. First, there is no basis for the Secretary's commitment to remove the MOXable plutonium from SRS, since it rests on the unauthorized and unanalyzed Dilute and Dispose approach. App. 68a. Second, the Secretary's cost comparison of the MOX Project and the Dilute and Dispose approach does not meet statutory requirements for accuracy. App. 69a-70a. Third, although the statutory waiver provision requires the Secretary to report to Congress "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose alternative, the May 10 letter provides no such details. App. 70a-71a. The district court, however, held that adoption of the Dilute and Dispose approach would require, among other changes, the amendment of two federal statutes. App. 71a-72a.

***13** DOE appealed the district court order granting the preliminary injunction to the Fourth Circuit under 28 U.S.C. § 1291(a)(1).[7]

B. Court of Appeals

The Fourth Circuit vacated and remanded, holding that "South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review." App. 22a.

The court held that South Carolina lacks Article III standing because it cannot establish injury in fact. App. 10a-19a. The State argued that DOE's failure to comply with NEPA and Section 3121's waiver provision "results in increased radiation exposure to the public, increased risk of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." App. 12a (quoting State's brief on appeal). The court concluded that those alleged injuries were "too speculative" because they rest "on a … 'highly attenuated chain of possibilities.' " App. 13a (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013)).

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The court focused on the time frame "[b]etween now and 2046 - when the analysis in the current [EIS] governing the risks associated with long-term storage of ***14** weapons-grade nuclear material at the Savannah River Site expires." App. 15a. The court did not explain how the EIS's time frame bears on South Carolina's standing. Nonetheless, it assigned 2046 as "the year when South Carolina's alleged injur[ies] will mature." App. 19a. On this view, the court reasoned that the EIS gives DOE "twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina." App. 15a. The court observed that DOE has already identified the Dilute and Dispose method as "one potential alternative," and it might come up with more. App. 15a. The court also observed that DOE is under a statutory deadline to remove, by January 1, 2022, any weapons-grade plutonium that have been slated for processing by the MOX Facility but not yet processed by then. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)). If DOE failed to meet that deadline, the court explained, South Carolina could sue it, just as it had for DOE's past failure to meet statutory deadlines. App. 16a.

"For reasons similar to" the ones that led the court of appeals to hold that South Carolina lacks standing, it also held that "the two claims at issue fail on ripeness grounds." App. 19a. The court recognized that " 'ripeness turns on the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " App. 20a (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983)). The court apparently found the problem here to be a lack of fitness. *See* App. 20a-21a (paragraph discussing requirements for a case "[t]o be fit for review"). The court said that a case is fit "when the action is final and not dependent on future uncertainties." App. 21a (internal quotation marks omitted). Despite this reference to ***15** "final[ity]," the court of appeals did not discuss, much less express disagreement with, the district court's conclusion that DOE's decision to terminate the MOX Project was final agency action. *Cf.* App. 21a. Instead, the court of appeals seemed to conclude that neither the NEPA claim nor the statutory-waiver-provision claim is ripe because of "uncertainties" about whether South Carolina will indeed become "the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a.

REASONS FOR GRANTING THE PETITION

There are four compelling reasons for this Court to grant review of the Fourth Circuit's opinion on a writ of certiorari.

First, the Fourth Circuit's decision conflicts with *Massachusetts v. EPA, Lujan v. Defenders of Wildlife,* and other decisions of this Court addressing the justiciability of suits by States and other plaintiffs seeking to compel a federal agency to comply with express statutory directives. Rule 10(c). Instead, the Fourth Circuit rejected the precedent of this Court in favor of a novel standing and ripeness analysis that narrowly interprets and, thus, unduly restricts the ability of a State to seek enforcement of a statute that involves and pertains to its legitimate interests.

Second, the Fourth Circuit's opinion creates a conflict among the circuits in applying this Court's holdings on standing. By circumscribing the State's ability to invoke the federal judicial power in seeking the enforcement of an existing statutory framework, the Fourth Circuit went far ***16** beyond any other circuit in heightening the level of injury sufficient to form the basis for a "case or controversy." This Court's intervention is necessary to address the conflict among the circuits. Rule 10(a).

Third, this case presents important Constitutional issues regarding the justiciability of claims brought by a State seeking to vindicate its sovereign interests. The State has a legitimate interest in protecting its environment and in enforcing its substantive and procedural rights in its relations with the federal government. The Fourth Circuit's opinion denies the State the ability to even adjudicate its claims, which strikes at the heart of the federalism principle accepted by the State and the United States upon the formation of the union.

Fourth, this case provides an excellent opportunity for this Court to provide the clarification of *Massachusetts v. EPA* that the Fourth Circuit's decision and the conflict among the circuits demonstrate is warranted. This case presents fundamental and well-defined questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA,* including how "special solicitude" relates to a State's possession of a "procedural right" and to the apparent limitations on suits against the federal government by States suing as *parens patriae.*

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I. The decision below squarely conflicts with decisions of this Court.

A. The decision below conflicts with *Massachusetts v. EPA*.

The decision below conflicts in approach and result with this Court's decision in *Massachusetts v. EPA* by ***17** failing to give "special solicitude" to South Carolina when analyzing the State's standing. South Carolina met all the requirements for Article III and statutory standing, and had the court below given South Carolina the "special solicitude" required by *Massachusetts v. EPA,* it would have been compelled to uphold South Carolina's standing in this case.

In *Massachusetts v. EPA,* this Court held that Massachusetts was "entitled to special solicitude in [its] standing analysis" because of (1) the State's possession of a "procedural right" and (2) its "stake in protecting its quasi-sovereign interests." 549 U.S. at 520. The State's "procedural right" was the statutory right to seek judicial review "for agency action unlawfully withheld." *Id.* at 517 (quoting 42 U.S.C. § 7607(b)(1)). The "quasi-sovereign interests" at stake were Massachusetts' "desire to preserve its sovereign territory" from harmful effects assertedly imposed on that State by greenhouse gases (GHGs). *Id.* at 519. The latter interests were reinforced by Massachusetts ownership of "a great deal of the territory alleged to be affected" by GHGs. *Id.* (internal quotation marks omitted).

Both conditions for "special solicitude" exist here. First, South Carolina asserts violations of its procedural rights under NEPA and the statutory provisions requiring DOE to get a waiver before terminating the MOX Facility. NEPA's creation of a procedural right was recognized by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992). And the statutory waiver provisions plainly create procedural rights designed to protect South Carolina's interests. *Cf. Maryland People's Counsel v. FERC,* 760 F.2d 318, 320 (D.C. Cir. 1985) (per Scalia, J.) ***18** (stating that statute authorizing state agencies to seek judicial review of FERC orders showed "special solicitude" for States, removing prudential barriers on States' relying on *parens patriae* standing in litigation against federal government). Second, South Carolina asserts its quasi-sovereign interests in protecting its territory against the environmental harms threatened by the DOE's decision to terminate the MOX Facility. *See* App. 12a (quoting South Carolina's allegations that DOE's May 10 decision "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increase threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium"). Here, as in *Massachusetts v. EPA,* the State's quasi-sovereign interests are reinforced by its ownership of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

Given South Carolina's "procedural right[s] and [its] stake in protecting its quasi-sovereign interests," South Carolina was "entitled to special solicitude" in the Fourth Circuit's standing analysis. *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina plainly identified those rights and interests in its brief for the Fourth Circuit, and cited *Massachusetts v. EPA* in its brief. Br. of Pl.-Appellee at 16-17, *South Carolina v. United States,* 912 F.3d 720 (4th Cir. 2019) (No. 18-1684), ECF No. 31. Yet the Fourth Circuit disregarded those rights and interests, and based its standing analysis - not on *Massachusetts v. EPA* - but instead primarily on *Clapper,* a case involving the standing of private plaintiffs. *Id.* at 406; App. 13a-17a (citing *Clapper*).[8]

***19** The Fourth Circuit's disregard of *Massachusetts v. EPA* led to error. South Carolina's argument for standing closely resembles Massachusetts'. Both States attack agency decisions (to deny a rulemaking petition; to terminate the MOX Project) for failure to follow statutory requirements that, if followed, could have led to a different decision. As things stood, the challenged agency decisions exposed the States to increased risk of harms (additional loss of coastal land; additional radiation and risks of accidents and theft). The risks of harm associated with prolonged storage of weapons-grade plutonium are at least as well established and imminent as those associated with greenhouse gases. *See* App. 39a (district court decision quoting federal officials' acknowledgement of dangers posed by storage of weapons-grade plutonium). Thus, South Carolina's standing in this case follows *a fortiori* from this Court's decision upholding Massachusetts' standing in *Massachusetts v. EPA*.

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***20 B. The decision below conflicts with decisions of this Court on ripeness.**

The Fourth Circuit held that South Carolina's claims are not ripe because they are not "fit" for review. App. 19a-21a. They are not fit for review, the Fourth Circuit concluded, because South Carolina might not "become[] the *permanent* repository" of "weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a (emphasis in original). This conclusion, however, conflicts with decisions of this Court.

South Carolina's claims are fit for review under this Court's precedent. That precedent establishes that a claim is generally fit for review when it challenges agency action that is final, the challenge is purely legal, and the court's ability to resolve the challenge will not benefit from further factual development. *E.g., Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 811 (2003). The court of appeals below did not disturb the district court's holding that DOE's decision to terminate the MOX Facility is "final agency action" within the meaning of the federal APA. App. 48a-54a; 5 U.S.C. § 704. Furthermore, South Carolina's claims that DOE violated NEPA and the statutory waiver requirements are purely legal, as is clear from the district court's analysis of these claims. *See* App. 59a-72a. The court of appeals below did not identify any further factual developments that would facilitate the resolution of South Carolina's NEPA and statutory-waiver claims.

As this Court has held, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes ***21** place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 737 (1998). The decision below squarely conflicts with this holding in *Ohio Forestry Ass'n* by finding South Carolina's NEPA claim unripe. *See* App. 19a-21a. Moreover, this Court's holding in *Ohio Forestry Ass'n* also applies to South Carolina's claim that DOE violated the requirements for a waiver of the statutory mandate to continue construction of the MOX Facility: Nothing that happened after the date of the Secretary's May 10 Letter will affect analysis of South Carolina's claim that the DOE violated the requirements for a waiver of that mandate.[9]

Although the Fourth Circuit apparently, erroneously - and in conflict with this Court's precedent - relied on the "fitness" prong of ripeness analysis, its conclusion of unripeness seemed to rest on a supposed lack of hardship. That conclusion, in turn, rested on the Fourth Circuit's belief that only in the year 2046 will "South Carolina's alleged injury mature." App. 19a. The Fourth Circuit cited the year 2046 because it was the end date of the 50-year period analyzed in DOE's 1996 Programmatic EIS (PEIS) on storage of weapons-grade plutonium at SRS. App. 15a, 36a. The 1996 PEIS's 50-year period of analysis arguably *might* bear on the merits of South Carolina's claim that DOE must now prepare a supplemental EIS for its termination of the MOX Project. But it has no bearing on South Carolina's standing or the ripeness of its claims. In concluding otherwise, the Fourth Circuit's ***22** ruling reflects "the familiar confusion between standing and the merits." 13B Charles Alan Wright *et al., Federal Practice and Procedure* § 3531.11.1, at 98 (3d ed. 2008).

Properly understood, South Carolina's standing and hardship stem from the *existing* 10 metric tons of weapons-grade plutonium stored within its borders, plus the additional 20 metric tons that DOE currently plans to ship to South Carolina. The existing plutonium exposes South Carolina's property and its citizens to ongoing radiation and the risks of nuclear accidents and threats. South Carolina reasonably fears that DOE's decision to terminate the MOX Facility to pursue the unstudied, unauthorized "Dilute and Dispose" concept will indefinitely *prolong* the storage of massive amounts of plutonium in South Carolina, and in turn cause South Carolina to incur additional costs associated with protecting against the radiation and risks. South Carolina's fear is well-founded considering DOE's dismal track record in meeting statutory deadlines for construction of the MOX Facility. *See* App. 5a.

The Fourth Circuit dismissed this fear, reasoning that South Carolina can always sue DOE when DOE fails to meet the *next* statutory deadline. App. 16a. But the likelihood that DOE will violate *additional* statutory requirements in the future surely cannot disable South Carolina from suing DOE for current statutory violations arising from its termination of the Project. To the contrary, the possibility that South Carolina will have to sue DOE again in the future represents just another realistic risk of future harm that supports its standing to bring this suit. *Cf. Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 154-55 (2010) (upholding standing based ***23** partly on costs incurred by plaintiffs to mitigate realistic risks); *Texas v. United States,* 497

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F.3d 491, 497 (5th Cir. 2007) (upholding State's standing based partly on realistic risk that State would have to participate in compelled mediation over tribal gaming).

II. The Fourth Circuit's decision creates a conflict among the circuits concerning the justiciability of State suits against the federal government.

The Fourth Circuit's decision conflicts in approach with decisions in at least three other circuits: the Second, Fifth, and Tenth. Courts of appeals in these circuits rely on *Massachusetts v. EPA* to accord "special solicitude" to States in analyzing the States' standing to sue the federal government. The analysis in those decisions strongly suggest that those courts of appeals would have upheld South Carolina's standing to bring the present suit.

A. Second Circuit

The Second Circuit analyzed *Massachusetts v. EPA* in a decision that upheld the standing of eight States to sue electric power companies that allegedly contributed to global warming. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 109 (2d Cir. 2015), *rev'd on other grounds,* 564 U.S. 410 (2011).[10] As the Second Circuit understood ***24** *Massachusetts v. EPA,* in that case this Court "seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land." *Id.* at 338.

The Second Circuit upheld the States' standing using reasoning that, if applied in the present case, would have led it to uphold South Carolina's standing: The Second Circuit emphasized that the States were suffering present harms from the defendants' conduct - just as South Carolina's property and residents are currently exposed to radiation and other threats from the continued storage of plutonium - and the relief sought could incrementally reduce the harm - as could occur here, if DOE's compliance with its statutory obligations reduces the amount of time that massive amounts of weapons-grade plutonium are stored at SRS. *Id.* at 340-43.

Although *Connecticut* was a suit against private defendants, the Second Circuit relied on it, as well as on *Massachusetts v. EPA,* in a later decision upholding several States' standing to sue a federal agency for statutory violations. *Nat. Res. Def Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 103-04 (2d Cir. 2018) (internal citations omitted).

***25** B. Fifth Circuit

The Fifth Circuit accorded "special solicitude" to a State under circumstances close enough to those of this case to indicate that it would have upheld South Carolina's standing in this case.

Texas and other States sued the United States over the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). *Texas v. United States,* 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court,* 136 S. Ct. 2271 (2016). After the federal district court preliminarily enjoined implementation of DAPA, the United States appealed. *Id.* On appeal, the Fifth Circuit affirmed the preliminary injunction and upheld Texas's standing to bring the suit. *Id.* at 151-62.

The Fifth Circuit said, "[O]ur determination that Texas has standing is based in part on the 'special solicitude' we afford it under *Massachusetts v. EPA.* " *Id.* at 162. The court described "special solicitude" as a "presumption," presumably meaning a presumption that favors standing in close cases. *Id.; see also id.* at 159 (relying partly on "special solicitude" in finding traceability). The court afforded "special solicitude" based on the same two conditions that exist in the present case: The State was asserting procedural rights that required interpretation of federal statutes, and the challenged conduct implicated the State's "quasi-sovereign interests." *Id.* at 152-53.

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Moreover, the Fifth Circuit's reasons for concluding that "quasi-sovereign interests" were at stake equally apply here. Texas challenged DAPA, a federal immigration program. The Fifth Circuit observed that "[w]hen the ***26** states joined the union, they surrendered some of their sovereign prerogatives over immigration." *Id.* at 153. Consequently, the Fifth Circuit explained, States must rely on the federal government to protect their interests in immigration matters, just as they must with respect to their interests in the matters involved in *Massachusetts v. EPA:* namely, interstate and international pollution. *Id.* at 153-54. So too here: Because of the federal government's control over nuclear defense material, South Carolina cannot prevent it from storing that material at SRS as long as federal law allows. South Carolina must rely on the federal government to protect its interests and those of its citizens. This reliance warrants consideration when South Carolina sues to enforce the federal executive-branch's compliance with federal statutory requirements enacted, in part, to protect the State's interests. In short, South Carolina's present lawsuit provides at least as compelling a case for "special solicitude" as did the States' lawsuit in *Texas v. United States.*

C. Tenth Circuit

Like the Fifth Circuit, the Tenth Circuit has relied partly on "special solicitude" to uphold State standing.

Illustrative is *New Mexico v. Dep't of Interior,* 854 F.3d 1207 (10th Cir. 2017). In that case, New Mexico sued the Department of Interior (DOI) claiming that DOI lacked statutory authority for regulations on tribal gaming. *Id.* at 1211. Under the challenged regulations, DOI could allow tribal gaming without the State's input unless the State participated in a process that included mediation. *Id.* at 1213. The Tenth Circuit held that New Mexico had standing to challenge the regulations ***27** on two grounds. First, the regulations caused New Mexico procedural injury by depriving it of its asserted statutory right to have a court determine that the State had bargained in bad faith before tribal gaming could be allowed without the State's input. *Id.* at 1216-17. Second, the regulations "injure[d] New Mexico by forcing it to choose between participating in a process it considers unlawful and forgoing any benefit from that allegedly unlawful process - viz., the benefit of being able to offer input, presumably beneficial to its interests, relating to the content of those procedures." *Id.* at 1218. After identifying these two injuries, the Tenth Circuit said, "[T]he Supreme Court's direction that we give states special solicitude in analyzing standing provides further support for each basis establishing New Mexico's standing." *Id.*

In *New Mexico v. Dep't of Interior* and other cases, the Tenth Circuit has, like the Fifth Circuit, apparently treated "special solicitude" as a presumption favoring standing in close cases, or possibly as a "plus factor" applicable in all cases. At the same time, the Tenth Circuit has remarked on " 'the lack of guidance on how lower courts are to apply the special solicitude doctrine to state standing.' " *Id.* at 1219 (quoting *Wyoming v. United States Dep't of Interior,* 674 F.3d 1220, 1238 (10th Cir. 2012); *see also Ariz. State Legisl. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions … are hard to reconcile.") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009)); *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683, 696 n.13 (10th Cir. 2009) ("In determining ***28** that New Mexico has standing because of the threat of environmental damage to lands within its boundaries, we consider that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders."); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States,* 528 F.3d 712, 721 (10th Cir. 2008) (attaching "importan[ce]" to "special solicitude" in analyzing State's standing).

III. This case presents important issues of constitutional justiciability for a State seeking to vindicate its rights under federal law.

The proper handling of weapons-grade plutonium is a public policy matter of exceptional importance, implicating not only issues of national defense and national security but also the United States' obligations under an agreement with Russia. *Cf. New York v. United States.* 505 U.S. 144, 149 (1992). South Carolina does not challenge the federal government's broad authority to regulate this matter or to control operations at the SRS as a federal facility. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983); *Hancock v. Train,* 426 U.S. 167 (1976). But being forced by virtue

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of the Supremacy Clause to host SRS, South Carolina seeks only to ensure federal executive-branch compliance with federal law. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607-08 (1982) ("[T]he State has an interest in securing observance of the terms under which it participates in the federal system.… [A] State does have an interest … in assuring that the benefits of the federal system are not denied to its general population."). This petition thus poses a question of the justiciability of claims by a State against the federal government.

***29** The importance of this question is reflected in the long line of cases in which this Court has addressed it. In addition to *Massachusetts v. EPA, see, e.g., Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995) (addressing State's standing to assert claim against the United States under prior decree); *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (addressing scope of statutory waiver of federal government's sovereign immunity from State's suit); *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966) (addressing standing of State to challenge constitutionality of federal statute); *Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923) (addressing State's standing to challenge constitutionality of federal statute); *Kansas v. United States,* 204 U.S. 331 (1907) (addressing United States' sovereign immunity from suits by States); *Georgia v. Stanton,* 73 U.S. 50 (1867) (addressing justiciability of State's suit to enjoin federal Reconstruction Act).

Although the defense plutonium at issue implicates domestic and international concerns of broad significance, even in these areas, States play an important role. Implementing policies and actions involving defense plutonium necessarily require some degree of state involvement through state regulation of related, collateral matters (such as the issuance of certain environmental permits), the utilization of state infrastructure, and the emissions and impact on state proprietary interests.[11] For ***30** that reason, this case implicates the relationship between the federal government and the States. The Supremacy Clause gives the United States the upper-hand in this relationship. But the federal government's supremacy rests on the rule of law. The federal government's violation of the rule of law generally is objectionable, but for an executive agency to inflict violence upon statutory obligations enacted by the legislature to protect a State without any mechanism of accountability by the state through the judiciary is particularly harmful to our system of government. This Court's review is necessary to ensure a State can remedy that harm, especially when, as here, the harm concerns the State's concrete interests in the proper disposition of the massive amounts of weapons-grade plutonium within its borders.

IV. This case provides an excellent vehicle for clarifying *Massachusetts v. EPA.*

The decision below and the circuit split discussed above show the need for clarification of *Massachusetts v. EPA*. This Court has granted certiorari in two prior cases that offered opportunities to do so that were not subsequently realized. *See United States v. Texas,* 136 S. Ct. 2271; *Connecticut,* 546 U.S. at 420. This case provides an excellent opportunity to provide the needed clarification.

For one thing, the decision below is for all practical and legal purposes final. *Cf., e.g., Trump v. Hawaii,* 138 S. Ct. 2392 (2018) (granting certiorari to review court of appeals decision affirming preliminary injunction on dispositive grounds). Although the Fourth Circuit below addressed an interlocutory appeal from an order granting ***31** a preliminary injunction, its holding that South Carolina lacks standing prevents the case from going forward on the merits. By the same token, this Court's reversal of the decision below will enable South Carolina to pursue legal claims that the district court held, in rulings not disturbed on appeal, are likely to succeed. App. 59a-72a.

For another thing, South Carolina preserved below the arguments that it would advance in this Court. The Fourth Circuit characterized South Carolina as advancing "one theory of injury" (App. 19a n.3) because the State's injuries all arise from the real risk of it becoming the indefinite - and, as a practical matter, the "permanent" - "repository of weapons-grade plutonium." App. 12a (quoting South Carolina's brief for the Fourth Circuit). As the Fourth Circuit's opinion reflects, however, South Carolina argued for standing based on its quasi-sovereign interests and its proprietary interests. App. 9a, 12a. Thus, South Carolina has asserted in the courts below precisely the same claims of injury-in-fact that Massachusetts advanced in *Massachusetts v. EPA,* 549 U.S. at 518-23.[12]

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Finally, this case presents legal claims that crystallize key questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA*. One key question is how "special solicitude" relates to the ***32** State's possession of a "procedural right." That question is cleanly posed here by South Carolina's claim under NEPA, a statute that this Court has recognized creates a procedural right. *See Defenders of Wildlife,* 504 U.S. at 572 n.7. Another key question is how "special solicitude" relates to case law apparently limiting suits against the federal government by States suing as *parens patriae. See Massachusetts v. EPA,* 549 U.S. at 539 (Roberts, C.J. dissenting). That question is posed starkly by South Carolina's claim under SRS-specific statutory provisions that are designed partly for the precise purpose of protecting South Carolina's interests and therefore evince "special solicitude" for the State and a corresponding intention to allow South Carolina to sue for enforcement of those provisions. *Cf. Maryland People's Counsel,* 760 F.2d at 320; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 266 (6th ed. 2009). A decision by this Court addressing those questions would go far toward providing the needed clarification of *Massachusetts v. EPA*.

***33 CONCLUSION**

The petition for a writ of certiorari should be granted.

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June 7, 2019

Footnotes

1 We use "DOE" to refer collectively to the respondents. Among the respondents is the National Nuclear Security Administration (NNSA). NNSA is "established within the Department of Energy [as] a separately organized agency." 50 U.S.C. § 2401(a). The NNSA administers and manages activities related to the MOX Facility. *See id.* §§ 2471(2)(D) & 2481(a).

2 National Defense Authorization Act for Fiscal Year 2018 (NDAA FY18), § 3121(b)(1)(B)(i), 131 Stat. 1283, 1892-93 (2017) (App. 95a); Business Operating Procedure of the National Nuclear Security Administration, "Analysis of Alternatives," dated March 14, 2016 (BOP-03.07), available at https://directives.nnsa.doe.gov/bop/bop-0003-0007.

3 Available at https://www.nap.edu/read/25272/chapter/1.

4 *See* NDAA FY18, § 3121(a); CAA FY18, § 309(a), 132 Stat. 348, 530 (2018). After the district court issued its preliminary injunction and while this case was pending at the Fourth Circuit, Congress reaffirmed this mandate for fiscal year 2019. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, § 3119, 132 Stat. 1636, 2292 (2018) (requiring continued construction of the MOX Facility unless the waiver requirements prescribed in Section 3121(b) of NDAA FY18 are met).

5 NDAA FY18, § 3121(b)(1); CAA FY18, § 309(b), (c).

6 The district court's reference to "MOXable plutonium" (App. 54a) reflects that, as the court explained, "[t]he plutonium at SRS can be divided into two general categories - the plutonium intended for disposition through the MOX Facility and the plutonium not intended for MOX disposition." App. 63a-64a. For the latter, "non-MOXable" plutonium at SRS, DOE has "assign[ed] Dilute and Dispose as the preferred alternative" in a supplemental Environmental Impact Statement published on April 5, 2016. App. 64a. As the district court further explained, "The ongoing Dilute and Dispose approach is limited in resources and legal authority and is not applicable to the plutonium intended for disposition through the MOX Facility." App. 64a.

7 The district court denied DOE's motion for a stay of the preliminary injunction pending appeal. App. 27a-33a. After briefing and oral argument before the Fourth Circuit, however, that court granted DOE's motion for a stay on October 9, 2018. App. 24a. On October 10, 2018, DOE issued a Project termination notice and began terminating employees at the Project.

8 The Fourth Circuit below erred in relying on *Clapper* not only because *Clapper* involved private plaintiffs but also because the plaintiff in *Clapper* did not assert procedural rights. Lacking procedural rights, the plaintiffs in *Clapper* were subject to a determination in an "injury-in-fact" analysis inapplicable to this case. *Massachusetts v. EPA,* 549 U.S. at 517-18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." (citing *Lujan v. Defenders of Wildlife,* 504 U.S. at 572 n.7)). Moreover, the plaintiffs - as "US persons" - did not fall into a class to which the FISA provision in *Clapper* was directed, and that provision did not create any legal rights or protections for the plaintiffs. But, here, through NDAA FY18 and CAA FY18, Congress established statutory protections specifically for South Carolina, and South Carolina also falls within the class entitled to bring claims for NEPA violations. Accordingly - "special solicitude" or not - South Carolina met all the requirements for Article III and statutory standing

9 Nor does South Carolina's lawsuit present a programmatic challenge of the sort that, if addressed now, would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n,* 523 U.S. at 733. South Carolina challenges a highly discrete agency action - DOE's decision to terminate the MOX Facility.

10 The Second Circuit's ruling on standing was affirmed by an equally divided Court. "Four Members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*.... Four Members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing." *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 420 (2011). The Court reversed the Second Circuit's ruling on the merits, holding that the plaintiffs' federal common-law public nuisance claim was displaced by the Clean Air Act and EPA action authorized under the Act. *Id.* at 420-29.

11 All those elements are indisputably present here. South Carolina has and will continue to provide regulatory oversight on certain aspects of the operations at SRS, such as waste disposal. Much of the supporting infrastructure for SRS is provided by the State of South Carolina or its political subdivisions (such as roads and emergency services). *See generally* Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.*; Atomic Energy Act, 42 U.S.C. §§ 2201 *et seq.*

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12 In the decision below, the Fourth Circuit purports to reserve the question "whether other theories of injury would presently confer standing on South Carolina." App. 19a n.3. There are no "other theories" of standing remaining to the State. Accordingly, DOE has given notice of its intent to move for dismissal of the action for lack of jurisdiction if this Court denies further review. Notice, *South Carolina v. United States,* No. 1:18-cv-01431-JMC (D.S.C. May 1, 2019), ECF No. 45.

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EXHIBIT 11

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2019 WL 4730104 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
September 24, 2019.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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*1 REPLY BRIEF FOR PETITIONER

In this case, a State sues the federal executive branch for statutory violations that deprive it of procedural rights designed to protect its quasi-sovereign interests. This case thus presents the same situation - and presents the same issue of the State's Article III standing - as presented in *Massachusetts v. EPA,* 549 U.S. 497 (2007). This Court's decision in that case would have accordingly controlled analysis of the State's standing if this case had arisen in the Second, Fifth, or Tenth Circuits. *See* Pet. 23-28. In square conflict with those circuits, however, the Fourth Circuit ignored *Massachusetts v. EPA* and failed to accord South Carolina the "special solicitude" to which it was entitled under that case. *Id.* at 521. Had the Fourth Circuit properly applied *Massachusetts v. EPA,* it would have upheld South Carolina's standing to assert the statutory claims upon which, the district court below determined (in rulings not disturbed on appeal), the State is likely to prevail. Pet. App. 59a-72a.

The United States defends the Fourth Circuit's disregard of *Massachusetts v. EPA* on the ground that *Massachusetts v. EPA* applies only "in a close case." Br. in Opp. 14. Even if this were a close case, which it is not, the United States misreads *Massachusetts v. EPA,* and its defense of the decision below merely highlights the need for "guidance on how lower courts are to apply the special solicitude doctrine to state standing." *New Mexico v. Dep't of Interior,* 854 F.3d 1207, 1219 (10th Cir. 2017). The United States does not dispute the importance and complexity of the issue of the States' standing to sue the federal government. *See, e.g.,* ***2** *United States v. Texas,* 136 S. Ct. 2271 (2016). Nor does the United States impugn South Carolina's showing that this Court's decision in *Massachusetts v. EPA* has bred uncertainty among lower federal courts and that this case provides a good vehicle for clarifying it.

ARGUMENT

I. The Decision Below Conflicts with *Massachusetts v. EPA* and Decisions in at Least Three Circuits.

The United States argues that under *Massachusetts v. EPA,* "a State's status as a plaintiff" affects standing analysis only "in a close case." Br. in Opp. 14. This is not a close case, as discussed in the next section. More fundamentally, the United States misreads *Massachusetts v. EPA,* Under a straightforward reading of that case, the Fourth Circuit erred by failing to accord South Carolina "special solicitude" in analyzing the State's standing, and, in the process, the Fourth Circuit put itself in conflict with decisions in at least three other circuits.

Contrary to the United States' submission, this Court did not hold in *Massachusetts v. EPA* that a State's status as the plaintiff matters only in cases where standing is a close call. The Court broadly said that "States are not normal litigants for purposes of invoking federal jurisdiction," and that it was therefore "of considerable relevance that the party seeking review [there] [wa]s a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. Accordingly, the dissent read the ***3** majority's opinion as "adopt[ing] a new theory of Article III standing for States." *Id.* at 539-540 (Roberts, C.J., dissenting). Thus, the Fourth Circuit below ignored the plain import of *Massachusetts v. EPA* by attaching no significance to South Carolina's status as a sovereign State and failing even to cite this Court's decision. Those failures alone warrant further review. *Cf., e.g.,Horn v. Banks,* 536 U.S. 266, 271 (2002) (summarily reversing because of lower court's failure to apply *Teague v. Lane,* 489 U.S. 288 (1989)); *see also* Stephen M. Shapiro, *Supreme Court Practice* 251 (10th ed. 2013) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari.").

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Moreover, further review is warranted here to clarify that the special solicitude to which States are entitled under *Massachusetts v. EPA* is not limited - as the United States would have it - to "close case[s]." Br. in Opp. 14. Instead, as explained in our petition (at 17-18), special solicitude is required when, as here, the State asserts procedural rights connected with protecting its quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 520. The United States does not directly dispute that South Carolina is asserting procedural rights to protect its quasi-sovereign interests. And the United States' oblique arguments against South Carolina's entitlement to special solicitude are unavailing.

The United States seeks to obscure South Carolina's quasi-sovereign interests by repeatedly referring ***4** only to its general concern about becoming an indefinite repository for weapons-grade plutonium. *See* Br. in Opp. 7, 9, 10, 11, 13 & 15. But that concern stems from "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium," as the Fourth Circuit recognized. Pet. App. 12a (quoting Appellee's Br. at 14). The United States cannot contest that these dangers implicate South Carolina's quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 518-519 ("[I]n its capacity of *quasi*-sovereign … the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.") (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). And here, as in *Massachusetts v. EPA,* those quasi-sovereign interests are reinforced by the State's ownership of property adjacent to, and a road traversing, the Savannah River Site (SRS), all of which property is directly affected by these threats. *See id.* at 519; Pet. App. 47a.

The United States observes that there is no "special statutory right of judicial review" in this case. Br. in Opp. 15. But special solicitude under *Massachusetts v. EPA* does not depend on any such right. What matters is the existence of a "procedural right." *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina has procedural rights under NEPA, which this Court recognized as a source of such rights in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (cited in *Massachusetts v. EPA,* 549 US. at 517-518); and under ***5** statutes enacted expressly and specifically to protect the State's concrete interests in connection with SRS. *See* Pet. 17-18; Br. of *Amicus Curiae* United States Senator Lindsey Graham in Support of Petitioner 4-10 [hereinafter Sen. Graham *Amicus* Br.]. Those procedural rights, together with the quasi-sovereign interests that those rights protect, entitle South Carolina to special solicitude under *Massachusetts v. EPA*.

As shown in our petition (at 23-28), the State would have been accorded this solicitude in, among other courts, the Second, Fifth, and Tenth Circuit. *See also Brackeen v. Bernhardt,* No. 18-11479, 2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019) (relying on *Massachusetts v. EPA* to analyze States' standing to challenge Indian Child Welfare Act and final rule implementing it). The United States argues, however, that precedent from those courts involves different facts from those of this case. Br. in Opp. 16. The argument misses the point. Those other circuits, unlike the Fourth Circuit, would have recognized that it is "of considerable significance that the party seeking review here is a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. By failing to attach any significance to that circumstance, the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and with decisions of other federal courts of appeals. Sup. Ct. R. 10(a) & (c).[1]

6 II. South Carolina Has Article III Standing under *Massachusetts v. EPA.

In holding that South Carolina lacks standing and that its claims are not ripe, the Fourth Circuit reasoned that South Carolina's injuries will not "mature" until 2046, the end date of the period analyzed in a prior Environmental Impact Statement. Pet. App. 19a. Understandably, the United States does not defend this reasoning, which confuses the issue of standing with the issue of the merits of South Carolina's NEPA claim. Pet. 21-22. Instead, the United States argues that South Carolina's injuries will not mature until *2048,* because that is the earliest that the MOX Facility can be completed. Br. in Opp. 11. That argument suffers from the same two flaws that underlay the Fourth Circuit's reasoning.

First, the argument ignores that South Carolina is suffering *current* injuries. Those injuries include the legal wrongs caused by the United States' violations of South Carolina's statutory rights. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action … is entitled to judicial review thereof."). Those legal wrongs create ongoing actual harms and threats ***7** of harm caused by the approximately 10 metric tons of weapons-grade plutonium at SRS. Just as Massachusetts asserted current

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injury in the form of rising sea levels submerging its coast, South Carolina asserts current injuries in the form of excessive radiation contaminating its environment and other dangers associated with the plutonium's continuing (and mounting) presence. *Cf.* *Massachusetts v. EPA,* 549 U.S. at 522-523.

Second, South Carolina also faces imminent *future* injuries traceable to the federal government's May 10 decision to halt construction of the MOX Facility in favor of the unauthorized and untested Dilute and Dispose concept for processing the MOXable plutonium at SRS. There is at least a "reasonable probability" that the May 10 decision to switch horses in midstream will *prolong* the presence of massive amounts of weapons-grade plutonium at SRS, especially considering the federal government's current plan to ship an additional 26 metric tons of plutonium to SRS. Pet. App. 72a. *Clapper v. Amnesty Int'l,* 568 U.S. 398, 432 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 (2010)). This probability exists despite the United States' prediction that "the decision to halt construction of the MOX facility *reduces* the likelihood of injury by allowing the Department to focus its resources on other disposal methods that can begin more quickly and with greater certainty." Br. in Opp. 12 (emphasis in original).

The federal government's prediction partakes of magical thinking. For one thing, it contradicts the ***8** federal government's own prior forecast that the Dilute and Dispose method will not be completed before 2049, a year *after* completion of the MOX Facility is forecast. *See* National Academies of Sciences, Engineering, and Medicine, Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report 17-18 (Washington, D.C.: The National Academies Press, Oct. 2018) [hereinafter NAS Interim Report]. Moreover, the district court below identified multiple legal and practical hurdles that are likely to delay or altogether block implementation of the Dilute and Dispose alternative. Pet. App. 67a (lack of NEPA analysis of alternative); *id.* at 70a-72a (statutory and regulatory changes required before implementation of alternative); *id.* at 75a-76a (lack of congressional approval for alternative); *id.* at 78a (federal government's prior view that alternative violates agreement with Russia); *see also* NAS Interim Report at 2-3, 19-35 (also discussing "barriers" to implementation of Dilute and Dispose alternative). Beyond all this, the federal government's dismal track record strongly suggests that the predicted 2049 completion date for processing all the SRS plutonium under the Dilute and Dispose method is a chimera.[2]

***9** This Court upheld Massachusetts' standing to challenge EPA's failure to address the long-term, global, hard-to-quantify threat of injury assertedly posed by greenhouse gases from new-car engines manufactured in the United States. *Massachusetts v. EPA,* 549 U.S. at 516-526. This case concerns South Carolina's standing to challenge the Department of Energy's failure to address the ongoing, localized, well-established injuries and threat of future injuries posed by the massive and growing amounts of weapons-grade plutonium within South Carolina's borders. Because the injuries asserted here surely are no more speculative or remote than those found sufficient in *Massachusetts v. EPA,* South Carolina's standing follows a fortiori from this Court's decision in that case.

III. South Carolina's Claims Are Ripe.

As discussed in our petition (at 20-23), the Fourth Circuit's ripeness analysis conflicts with this Court's decisions in *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803 (2003), and *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726 (1998). Indeed, the Fourth Circuit failed even to identify clearly why it found a lack of ripeness under this Court's precedent: Its analysis implies that the claims are not "fit" for review, even though the claims (1) challenge discrete agency action that is indisputably final, (2) pose pure questions of law, and (3) do not depend for their resolution on ***10** further factual development. Reflecting the weakness of the Fourth Circuit's ripeness analysis, the United States does not defend it or attempt to reconcile it with this Court's ripeness precedent. Instead, the United States mischaracterizes the Fourth Circuit's decision.

The United States says the Fourth Circuit "understood petitioner to challenge a decision to make South Carolina 'the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site.' " Pet. 13 (quoting Pet. App. 21a). But that is wrong. The Fourth Circuit correctly recognized that South Carolina challenges a much more narrow, discrete decision: the decision to halt construction of the MOX Facility. Pet. App. 2a. And the Fourth Circuit also correctly understood that ripeness analysis applies to South Carolina's legal *claims,* not its assertions of injury. *See id.* at 19a. Where the Fourth

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Circuit erred was in apparently concluding that South Carolina could not satisfy the hardship prong of ripeness analysis. *See* Pet. 21-22. That conclusion rested on "reasons similar to those that" led it to conclude that South Carolina lacks standing (Pet. App. 19a), and is flawed for the same reasons that its conclusion on standing is flawed.

IV. This Case Is an Excellent Vehicle for Addressing an Issue of Exceptional Importance.

The United States does not impugn South Carolina's showing that the Fourth Circuit's decision is ***11** final and that the question presented was properly raised below. *See* note 1 *supra.*

Nor does the United States contest the importance of the question presented, which concerns the justiciability of suits by States against the federal executive branch. The importance of that question is established by the long line of decisions by this Court on that issue. *See* Pet. 29. Its importance is reinforced by the growing number of suits by States against the federal government - many of which have reached this Court[3] - and by uncertainties among lower federal courts and commentators about *Massachusetts v. EPA* and related precedent. *See Ariz. State Legis. v. Ariz. Indep. Redisricting Comm'n,* 135 S. Ct. 2664, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government … are hard to reconcile.") (internal quotation marks omitted).

This case arises in a setting that vividly illustrates the close connection between State standing and federalism. As set forth in the brief of *amicus curiae* U.S. Senator Lindsey Graham in support of South Carolina's Petition, the federal statutes violated by the federal government were intended to protect South Carolina from exactly what is occurring here - the federal government abandoning its statutory obligations and leaving South Carolina to deal with the ***12** consequences. Sen. Graham *Amicus* Br. 3-10. These statutes were enacted after high-level negotiations between the federal government and the State, and were specifically enacted to provide the State with recourse should the federal government fail to construct and begin operations of the MOX project. *Id.* at 5-10.

Allowing the federal government to shirk its statutory responsibilities to the State in an instance where Congress's clear intent was to protect it sets a dangerous precedent for other States and their relations with the federal government. For, if the federal government is free to violate statutes resulting from negotiations between the federal government and a sovereign State and that are specifically designed to protect the State's sovereign interests with no judicial recourse available to the State once protection is necessary, then the practicality of such negotiations becomes obsolete and the State's sovereign interests may never be protected against injuries caused by the federal government. This contravenes the principles of federalism upon which this nation was established.

***13 CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alan Wilson

Robert D. Cook

T. Parkin Hunter

Attorney General for he State of South Carolina

Post Office Box 11549

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Columbia, South Carolina 29211-1549

Telephone: (803) 734-3970

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Randolph R. Lowell

Counsel of Record

Tracey C. Green

John W. Roberts

Willoughby & Hoefer, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

Telephone: (803) 252-3300

rlowell@willoughbyhoefer.com

tgreen@willoughbyhoefer.com

jroberts@willoughbyhoefer.com

Counsel for Petitioner

September 24, 2019

Footnotes

1 The United States admits that, in South Carolina's brief for the Fourth Circuit, South Carolina cited *Massachusetts v. EPA* in support of its standing, but the United States criticizes South Carolina's failure to give *Massachusetts v. EPA* more prominence. Br. in Opp. 14. The criticism is misplaced. South Carolina satisfied this Court's "traditional rule" limiting certiorari to issues "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992). The issue of South Carolina's standing under *Massachusetts v. EPA* was presented to the Fourth Circuit, and the Fourth Circuit's disregard of that decision warrants further review because it creates a split among the circuits over a "significant issue." *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 530 (2002).

2 In holding that South Carolina's threat of future injury was speculative, the Fourth Circuit partly relied on the statutory provision requiring removal by January 1, 2022, of weapons-grade plutonium shipped to SRS between April 15, 2002, and January 1, 2022 for processing at the MOX Facility. Pet. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)); *id.* at 21a. Significantly, the United States does not rely on that provision in defending the Fourth Circuit's holding (Br. in Opp. 11), presumably because if the executive branch has

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its way that provision is not long for this world. After all, the federal government has not altered its plans to ship an additional 26 metric tons of plutonium to SRS, notwithstanding the looming January 1, 2022, deadline. Pet. App. 72a.

3 *E.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 139 S. Ct. 2779 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *see also* Tara L. Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851, 852 (2016) ("State suits against the federal government are on the rise.").

End of Document

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EXHIBIT 12

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140 S.Ct. 392
Supreme Court of the United States.

SOUTH CAROLINA, Petitioner
v.
UNITED STATES, et al.

No. 18-1531
|
October 15, 2019

Case below, 912 F.3d 720.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

All Citations

140 S.Ct. 392 (Mem), 205 L.Ed.2d 214

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EXHIBIT 13

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

1:25

INJUNCTION HEARING SEPT. 30 AT 10:00 A.M. BARNWELL COUNTY ET AL. V. ALAN WILSON

VW

Vicky Ware
vmware@williamsattys.com

To: rlowell@willoughbyhoefer.com
tyoung@tomyounglaw.com
Cc: You cbhutto@williamsattys.com

Friday, September 25, 11:10 AM

Please see the email below from Judge Newman with hearing date in the above matter.
Thank you
Vicky

WILLIAMS & WILLIAMS
ATTORNEYS AT LAW

VICKY WARE LEE

Reply to All

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EXHIBIT 14

Subject: Hearing on Temporary and Preliminary Injunctions
Date: Friday, September 25, 2020 at 4:57:38 PM Eastern Daylight Time
From: James Carpenter <james.carpenter@carpenterlawfirm.net>
To: aleelc@sccourts.org <aleelc@sccourts.org>
CC: Alan Wilson <AWilson@scag.gov>, Jim Griffin <jgriffin@griffindavislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>
Attachments: image001.jpg, 2020-09-25_Motion for TRO Preliminary Injunction.pdf

Dear Judge Lee:

Today the South Carolina Public Interest Foundation and John Crangle filed a Summons and Complaint (Case Number 2020-CP-40-04603) and a Motion for Temporary and Preliminary Injunctions objecting to the Attorney General's anticipated payout of $75 million in attorneys' fees from funds which we believe belong to the State of South Carolina. I attach a copy of the Motion.

The money is expected to arrive in South Carolina by October 1, or shortly thereafter. We are seeking Temporary and Preliminary Injunctions to maintain the status quo during the litigation and prevent the payout of $75 million, which, once paid out, would probably be very difficult to reclaim.

We are flexible on scheduling. We have notified the Attorney General of our filing the case and the motion.

Please telephone me to discuss scheduling a time for a hearing on our Motion for Temporary Injunction.

Respectfully submitted,

Jim Carpenter
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Mobile: (864) 380-4880
www.carpenterlawfirm.net



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EXHIBIT 15

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 4:02:53 PM Eastern Daylight Time
From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>, Emory Smith <ESmith@scag.gov>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, jgriffin@davislaw.com <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, McCaslin, Debra Secretary (Danita O. Martin) <dmccaslinsc@sccourts.org>, Fitzgerald, Roderick <rfitzgerald@sccourts.org>

All,

Below is the link to join the Virtual Courtroom via WebEx for tomorrow's hearing at 3:00 PM. Please join several minutes prior to ensure you are able to properly connect, and contact me If you have any questions

https://scjudicial.webex.com/scjudicial/onstage/g.php?MTID=ec472dac763c1e4f902b0e7479f1f27cd

Best,
Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:56 PM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

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We prefer to go forward tomorrow at 3pm via WebEx.

Thank you.

Jim Griffin

Get Outlook for Android

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From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44:11 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>; jgriffin@davislaw.com <jgriffin@davislaw.com>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com
Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 16

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 12:06:55 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Badge Humphries <bhumphries@griffinhumphries.com>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Jim Griffin <jgriffin@griffinhumphries.com>, James Griffin <jgriffin@griffindavislaw.com>
Attachments: image002.jpg

I will accept service as of today.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Badge Humphries <bhumphries@griffinhumphries.com>
Sent: Monday, September 28, 2020 12:01 PM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; Jim Griffin <jgriffin@griffinhumphries.com>; James Griffin <jgriffin@griffindavislaw.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

Emory,

Please see attached, and please advise if you are willing and able to accept service on behalf of the Attorney General.

Thanks.

Badge

BADGE HUMPHRIES
ATTORNEY

Griffin Humphries LLC
2113 Middle Street, Ste. 305
Sullivan's Island, SC 29482
o. 843.883.7424 f. 843.883.7462 c. 843.991.7080
BHumphries@griffinhumphries.com
www.griffinhumphries.com

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this e-mail message in error, please notify us immediately at the telephone number listed above to arrange for the return and/or deletion of the original message. Thank you for your cooperation.

From: Emory Smith <ESmith@scag.gov>
Date: Monday, September 28, 2020 at 10:13 AM
To: "aleelc@sccourts.org" <aleelc@sccourts.org>
Cc: "james.carpenter@carpenterlawfirm.net" <james.carpenter@carpenterlawfirm.net>, "jgriffin@davislaw.com" <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 17

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 3:46:03 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>
CC: James Carpenter <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 3:44 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

OK.

Who should we speak with then?

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 3:03 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

As I said below, I cannot agree to a temporary hold on the monies.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 2:23 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I have spoken with Brad Hutto and we both would like to reach an agreement with your office to prevent disbursement of the money until the cases are determined on the merits.

Thanks

Jim

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 12:04 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I may have misunderstood about the request to hear both matters at the same time, but having both matters heard at the same time before Judge Newman makes sense and would serve judicial economy. I don't know the process for referral of the Richland case to Judge Newman. I don't know if it could come from Judge Lee or a party.

An email just came in that you may have seen that a hearing can be held tomorrow at 3pm before Judge McCaslin. I have not responded, but believe that having Judge Newman would be better b/c he could consider both matters and avoid the possibility of differing orders in the two cases.

I have not been involved in this matter until your suit and the Barnwell suit were brought. I am just the lawyer on these cases, and I am not involved in the handling of funds. I cannot agree to a temporary hold on the monies.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 11:30 AM
To: Emory Smith <ESmith@scag.gov>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I don't know where you heard that we intended to request that our motion for TRO be heard before Judge Newman at the same time. Frankly, we had not give it any thought.

I did speak with Brad today about the possibility of reaching an agreement with you that covers both his case and ours. We are certainly amenable to an agreement that the funds not be dispersed until the cases are heard on the merits.

If we cannot reach an agreement, we are certainly fine with Judge Newman hearing our motion as well, if this is a possibility. But our case is a Richland County case and Brad's case is in Barnwell County.

I think we would need a special assignment from Court administration or the Chief before Judge Newman could hear our Richland County motion.

Jim

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: aleelc@sccourts.org
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 18

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ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Tuesday, September 29, 2020 at 6:59:35 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

For the information of all, I note that following the WebEx hearing earlier today, the law firm reported that it had received the money. I don't understand the information reported in Mr. Griffin's email about the money still being at the Treasurer's Office.

As noted in our call today, our Office sent the it to the CG through the system for doing so at 11:21 am on Friday, before this suit was filed. The Executive Budget Office had approved the funds earlier that morning following this Office's request on Sept. 17.

Emory Smith

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 6:43 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
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Please see a revised order. I apologize for the earlier draft. Please use this one.

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Please find a proposed order from the Plaintiffs' granting a TRO.

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Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is asking to hold a conference via WebEx to discuss this matter tonight, tentatively at 7:00

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PM. I will be sending invitations to each of you immediately. I will also be reaching out via telephone to all parties to alert them of this conference in case they do not have access to email. Please contact me as soon as possible to confirm receipt of this message.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

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Mr. Crangle was informed that the funds may have been "wired" out of the AG's litigation account but that they have not yet been received by the Treasurer. The Treasure expects to receives the fund tomorrow in the Treasurer's bank account and then will wire to the law firms as requested by the AG.

Also, he was informed that normally payment is made via check and takes approximately 22 days. Here, there has been a request for an expedited wire.

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Subject: RE: SCPIF v. Wilson 2020CP4004603

Judge McCaslin

Our client Mr Crangle has just been informed by an official in Treasurers office that the money has not been wired. They received an expedited request for a wire and it is scheduled to be sent either tomorrow or Thursday.

We would therefore request that the Court enter an injunction ASAP to enjoin the Treasurer's office from making the transfer.

We are available if the Court wishes to reconvene the hearing.

Thank you

Jim

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Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

In addition to the grounds for and against imposing a constructive trust, Judge McCaslin is requesting both parties submit brief proposed Orders as quickly as possible. Please contact me if you have any questions.

Best,

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Law Clerk to the
Honorable Debra R. McCaslin
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Your Honor:

I have just submitted for efiling the attached documents. I am sorry that I have not submitted them earlier but had a computer glitch that delayed me a little while. Will look forward to seeing the Court and counsel at the hearing via WebEx at 3 pm.

Respectfully,

Emory Smith
Counsel for Attorney General Wilson

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
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From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

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From: Jim Griffin <jgriffin@griffinhumphries.com>
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Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to

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have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

Best,

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Eleventh Judicial Circuit
Lexington County Courthouse
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Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
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EXHIBIT 19

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Wednesday, September 30, 2020 at 9:27:04 AM Eastern Daylight Time
From: Jim Griffin <jgriffin@griffinhumphries.com>
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, Emory Smith <ESmith@scag.gov>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>

Judge McCaslin

I received confirmation this morning from the State Treasurer that the funds were wired to the Willoughby & Hoefer yesterday just hours prior to the hearing.

Mr. Loftis informed two members of the State Senate of the following in writing: "The Treasurers office received a warrant for payment from the Comptrollers Office Monday night. We processed and wired the funds on Tuesday morning to the law firm's account. This was a standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires."

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 9:29 PM
To: Emory Smith <ESmith@scag.gov>; Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Evening,

Please find attached Judge McCaslin's Order in the above referenced matter which is to remain in effect until a final Order is issued in this matter, no later than 5:00 PM on Friday, October 2, 2020. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
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From: Emory Smith <ESmith@scag.gov>
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Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

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Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
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Columbia, South Carolina 29202
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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com
Subject: SCPIF v. Wilson 2020CP4004603

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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Exhibit B

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated,	)	C/A No. 2020CP4004603
Plaintiffs,	)	
v.	)	**MEMORANDUM OF ATTORNEY GENERAL IN OPPOSITION TO MOTION FOR A TRO OR TEMPORARY INJUNCTION**
Alan Wilson, Attorney General for the State of South Carolina	)	
Defendant.	)	

Without waiving any other defenses that may exist to this suit, the Attorney General, as named herein, opposes this Motion for injunctive relief for the reasons set forth below. At the outset, the Attorney General wants the Court to be aware that the fees are a part of a binding contract signed with outside counsel several years ago when no one anticipated a settlement anywhere nearly as high as $600 million. The fee at issue is required by the binding contract, and the Attorney General has the authority to withdraw it from the settlement and pay it having obtained Executive Budget Office approval as discussed below. See Plaintiffs' Exs. 7 and 8. The Plaintiffs have not established grounds for this Court to take the extraordinary step of issuing an injunction here.

BACKGROUND

The motion asks that this Court "prohibit[] the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action . . . ." The settlement monies are from an agreement in a suit brought by the State of South Carolina against the United States (U.S. Court of Claims, Fed. Cir. No. 19-2324) for payments due to the

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storage of plutonium or plutonium materials at the Savannah River Site for the purpose of MOX facility that has not been built and will not be constructed. Ex. 1 to Complaint. The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the $600 million in settlement money to the State of South Carolina with each party to pay its own costs and attorney fees. Ex. 1, p. 2, ¶5a. The Agreement for Voluntary Dismissal filed today states that the settlement agreement required payment by the United States which is inclusive of amounts for interest, attorneys' fees and costs. Exhibit 1, attached. The statute under which settlement was reached provides for payment of funds to the State of South Carolina. 50 U.S.C. 2566.

Prior to the filing of this action, the Executive Budget Office approved the withdrawal of attorney's fees from the settlement proceeds under S.C. Code Ann. §2-65-10 which states as follows: "[a] state agency may receive and spend unanticipated federal funds, and funds from private foundations or industries, which are not included in the appropriations act, but state agencies must submit expenditure proposals to the board [the Executive Budget Office (§2-65-15(4)] and receive authorization from the board before expenditure of funds." Exhibit 2, attached. I have just been informed this morning that the money for the fees has been transferred to the attorneys. Therefore, this matter is now moot.

A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION SHOULD BE DENIED

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. . . . For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at

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law. . . ." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (2004)(emphasis added). Plaintiffs fail to meet these standards.

A

Plaintiffs Have No Likelihood of Success1**This matter is moot because the Executive Budget Office has approved the withdrawal of fees from the settlement monies and the fees have been transferred to the attorneys**

As noted above, the Executive Budget Office approved the withdrawal of fees before this action was filed, and undersigned counsel was informed this morning that the fees have been transferred to the attorneys. Therefore, this matter is moot and nothing remains for this court to decide. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758-59 (2013) ("A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court."). Although this case is moot, the following arguments are included should this Court, *arguendo*, which to consider them.

2

"The Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case. . ." Order of the Honorable G. Thomas Cooper, *Cephalon. v. Wilson*, Civil Action No. 2012CP4007317, June 6, 2014 (Exhibit 3)

Judge Cooper approved the withdrawal of fees from a settlement in the attached Order recognizing his authority in the above quote which is stated again below:

> In short, the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case. . . .

Order at p. 9. The Court based its ruling on S.C. Code Ann. § 1-7-170 (Approval by AG of engagement of outside counsel for department or agency), §1-7-85 (AG may obtain reimbursement of costs in representing the State) and *Cooley v. S.C. Tax Comm.,* 204 S.C. 10, 28 S.E. 2d 445, 447-48 (AG has authority as State's chief legal officer to appoint and approve private counsel to represent the State) as well as other authority cited therein. Order at pp. 8 and 9. As further stated in the Order, "the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85." Order at p. 14. Accordingly, most significantly, the Order states that §1-7-150(B) "provides that all monies, except investigative costs or the costs of litigation, must be deposited into the general fund. As the costs of litigation include attorneys' fees, this statute expressly provides the Attorney General the authority to pay attorneys' fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund." (emphasis added). Contrary to Plaintiffs contention that this statute does not apply arguing that the fees were not "awarded the State of South Carolina by judgment or settlement . . .," the settlement provides that each party bears its own fees thereby authorizing just what was done. Moreover, as noted above, the Agreement Dismissing the appeal states that the settlement agreement includes amounts for attorneys' fees and costs. See Ex. 1, attached. Moreover, the Executive Budget Office, as noted above, has authorized this payment.

Accordingly, the Attorney General has the authority to withdraw attorney's fees for outside counsel without depositing the money into the general fund. To enjoin him from doing so would be contrary to the above authority. Nothing in the above authority and the statutes

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cited authorize a court to review the reasonableness of the fee, particularly in a collateral action such as this one in which Plaintiffs have no standing. Therefore, this Court lacks authority to review the fee. As noted above, the amount of the fee is controlled by contract.

3

Plaintiffs have no standing and present no justiciable controversy

> Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). No statute confers standing on these Plaintiffs. Constitutional standing and public interest standing also fail.

> The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., *supra*, 380 at 195-96, 669 S.E.2d at 339). "Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006).

Whether Plaintiffs are alleging constitutional standing is not clear from the Complaint, but they cannot succeed because have not alleged a direct injury or the immediate danger that a

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direct injury will be sustained so as to establish standing. As noted, they are not parties to the Federal suit nor are they parties to the settlement agreement. They also lack taxpayer standing. In another suit brought by Plaintiff South Carolina Public Interest Foundation, the Supreme Court found SCPIF and the individual "are unable to show they suffered a concrete and particularized injury distinct from that shared by other taxpayers; therefore, we find Petitioners do not have constitutional standing." *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). Moreover, an "interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019, 140 L. Ed. 2d 210 (1998). With the settlement of the *State v. U.S.* action, Plaintiffs have no standing to challenge the fees and no case or controversy exists.

> For these same reasons, public interest standing is lacking.
>
> > The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341. Although the Court found that a need existed for future guidance in that bridge inspection case, public interest standing is lacking in the instant case because no need exists for "future guidance" in that this settlement is in a non-recurring matter, the matter is moot, and as discussed, *infra*, ample authority supports this payment. As stated by this Court in *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C.

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343, 360, 815 S.E.2d 446, 455 (2018) in finding no public interest standing: "we 'must be cautious with this exception, lest it swallow the rule.'"

Standing fails for the above reasons. Accordingly, Plaintiffs have also not alleged a case or controversy. *ACT S, supra; see also Steele, supra.*

Irreparable Harm

Plaintiffs do not state that they will suffer irreparable harm. Therefore, they have failed to satisfy a critical element of the showing needed to obtain a TRO or temporary injunction.

CONCLUSION

Plaintiffs must show both a likelihood of success and irreparable harm. They have shown neither and this matter is moot. Because they fail to meet those requirements, they are not entitled to a TRO or a temporary injunction, and adequacy of a remedy need not be addressed.

Respectfully submitted,

s/ J. Emory Smith, Jr.
S.C. Bar No. 5262
Deputy Solicitor General

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
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Attorneys for the Attorney General

September 29, 2020

Exhibit C

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Jim Griffin

From: Lee, Alison Renee <ALeeJ@sccourts.org>
Sent: Wednesday, October 28, 2020 1:33 PM
To: Todd Rutherford
Cc: Emory Smith (ESmith@scag.gov); William H. Davidson II; kwoodington@dml-law.com; Jim Griffin; Badge Humphries; james.carpenter@carpenterlawfirm.net; Gerald Malloy; John Simmons; Lee, Alison Renee Law Clerk (Austin Nichols); Strom, Pete
Subject: RE: SCPIF and John Crangle v. Alan Wilson, et al. Docket No. 2020CP4004603

Good afternoon,
I am not considering any motions to intervene or motions to dismiss. Please file any memoranda you want considered on those motions. The orders were not solicited by me and will not be considered at this time as they are pre-mature. At this point only the motion to reconsider filed October 23, 2020 is under consideration.
Thank you.

Alison Renee Lee
Circuit Court Judge
1701 Main Street, Suite 324
Post Office Box 192
Columbia, SC 29202
(803) 576-1765

From: Todd Rutherford <todd@rutherford.law>
Sent: Wednesday, October 28, 2020 1:04 PM
To: Lee, Alison Renee <ALeeJ@sccourts.org>
Cc: Emory Smith (ESmith@scag.gov) <ESmith@scag.gov>; William H. Davidson II <wdavidson@dml-law.com>; kwoodington@dml-law.com; Jim Griffin <jgriffin@griffinhumphries.com>; Badge Humphries <bhumphries@griffinhumphries.com>; james.carpenter@carpenterlawfirm.net; Gerald Malloy <gmalloy@bellsouth.net>; John Simmons <jsimmons@simmonslawfirm.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Strom, Pete <petestrom@stromlaw.com>
Subject: SCPIF and John Crangle v. Alan Wilson, et al. Docket No. 2020CP4004603

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Dear Judge Lee,

Attached for your consideration is a proposed order that grants the pending Motion to Dismiss filed on behalf of my client, Willoughby & Hoefer, P.A., and a virtually identical Motion to Dismiss filed by the law firm of Davidson, Wren & DeMasters, P.A. in this matter. This proposed order was filed with the Court's e-filing system earlier today. For your ease of reference, I have also attached copies of the motions to dismiss that were filed by the law firms last week.

If the Court needs any further information from us, please let us know.

Thank you in advance for your consideration of this most important matter.

J. Todd Rutherford, Esq.
RUTHERFORD LAW FIRM
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