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

STATE OF SOUTH CAROLINA, Plaintiff, v. UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY; DR. ERNEST MONIZ, in his official capacity as Secretary of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; and LT. GENERAL FRANK G. KLOTZ, in his official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security; Defendants.	)	Civil Action No. 1:16-00391-JMC

THE STATE OF SOUTH CAROLINA'S

MEMORANDUM OF LAW IN SUPPORT

OF ITS MOTION FOR SUMMARY JUDGMENT

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The State of South Carolina (South Carolina or State), by and through its undersigned counsel and pursuant to Rule 56, FRCP, and Local Rules 7.04 and 7.05, submits this Memorandum in Support of its Motion for Summary Judgment in this matter.

INTRODUCTION

After protracted discussions from 2001 through 2003, including a lawsuit, South Carolina agreed to accept surplus, weapons-grade defense plutonium in furtherance of the United States' nuclear weapons and waste policy in reliance on the explicit commitment and obligation of the United States and the United States Department of Energy (DOE)[1] to remove the plutonium through processing or otherwise to prevent South Carolina from becoming a *de facto* permanent repository of nuclear waste. Because of concerns that the United States and DOE would renege on their obligations and fail to implement a disposition strategy, leaving South Carolina as the permanent dumping ground for defense plutonium, the Federal government's commitments were codified in Section 2566 of Title 50 of the United States Code to ensure the enforceability of these obligations against the United States and its agencies and officers.

In Section 2566, Congress mandated that upon failure to achieve certain statutory milestones the Secretary of Energy (Secretary) and DOE **shall** remove one metric ton of weapons-grade plutonium from South Carolina by January 1, 2016. Congress further mandated that the Secretary and DOE **shall** remove an additional one metric ton of weapons-grade plutonium from South Carolina during calendar year 2016 and provide economic and impact assistance payments to South Carolina for each day they fail to remove this plutonium during the first 100 days of the year.

[1] As used herein, DOE is inclusive of its semi-autonomous agency under its rubric, the National Nuclear Security Administration (NNSA), and their respective officials.

Unfortunately, proving accurate the prior concerns expressed by then-Governor Jim Hodges, the Secretary and DOE have ignored and failed to comply with these unequivocal Congressional mandates. South Carolina therefore respectfully requests that this Court do what Congress has directed courts do when faced with such blatant inaction and flouting of the law: compel and order the Secretary and DOE to comply with the law and the statutory mandates.

BACKGROUND

The United States develops a policy and plan for weapons-grade plutonium disposition.

Following the end of the Cold War in the late 1980s, the United States developed a policy goal to dispose of nuclear weapons surplus to its own defense needs as well as those of Russia. Through disarmament, these weapons yielded large amounts of weapons-grade plutonium which threaten the Nation's environment, public health, and the welfare of its citizens. Determining the manner in which to dispose of these materials raised additional concerns, including targeting by terrorists. In an effort to consolidate and eventually reduce both countries' surplus weapons-grade plutonium, the United States and Russia jointly developed a plan for the nonproliferation of weapons of mass destruction worldwide.[2]

Consistent with this joint plan, in the early 1990s, the United States began exploring options for the long-term storage and safe disposition of surplus weapons-grade plutonium. Congress tasked DOE with the responsibility of developing and implementing a plan to dispose of the Nation's weapons-grade plutonium, subject to legislative approval, and DOE conducted numerous studies of plutonium disposition strategies. After evaluating various disposition

[2] *See* Ex. 1, Excerpt from D.J. Spellman *et al.*, *History of the U.S. Weapons-Usable Plutonium Disposition Program Leading to DOE's Record of Decision* 2 (1997) (detailing important events and studies concerning surplus weapons-usable plutonium disposition in United States from end of Cold War to 1997).

technology options, DOE concluded in 1996 that the "preferred alternative" consisted of a dual-path strategy that proposed (1) immobilization of a portion of the surplus plutonium in glass or ceramic materials and (2) irradiation of the remaining plutonium in mixed oxide (MOX) fuel.[3] The following year, DOE announced its intention to pursue this strategy, including the construction and operation of a MOX fuel fabrication facility (MOX Facility).[4] Then, in January 2000, DOE announced its decision to construct and operate the MOX Facility at the Savannah River Site (SRS) in Aiken County, South Carolina to fabricate MOX fuel using approximately 34 metric tons of surplus plutonium.[5]

Contemporaneous with the development of this disposition strategy was the negotiation of an agreement with Russia committing each country to the disposal of surplus weapons-grade plutonium. In September 2000, the United States and Russia formally entered into the Plutonium Management and Disposition Agreement (PMDA) obligating both sides to dispose of at least 34 metric tons of weapons-grade plutonium.[6]

In 2001, Congress enacted the National Defense Authorization Act for Fiscal Year 2002 (NDAA FY02).[7] Section 3155 of NDAA FY02 was titled "Disposition of Surplus Defense Plutonium at Savannah River Site, Aiken, South Carolina" and directed DOE to provide, not

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[3] Ex. 2, *Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site (Feb. 15, 2002) (Report to Congress)*; Ex. 3, DOE, *Record of Decision (ROD) for Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* (*PEIS*) (Jan. 21, 1997), 62 Fed. Reg. 3014.

[4] Ex. 2, *Report to Congress* at 2-1.

[5] Ex. 4, DOE, Excerpt from *Surplus Plutonium Disposition Final Environmental Impact Statement* (*SPD EIS*), Vol. I – Part A, at 1-10 to 1-11; *see also* Ex. 5, DOE, *ROD for SPD EIS* (Jan. 11, 2000), 65 Fed. Reg. 1608 (announcing decision to construct and operate MOX Facility at SRS).

[6] *See* Ex. 6, PMDA.

[7] Pub. L. No. 107-107, 115 Stat. 1378.

later than February 1, 2002, a plan for disposal of surplus defense plutonium located at SRS and to be shipped to SRS in the future. These statutory provisions also required the Secretary to:

- Consult with the Governor of South Carolina regarding "any decisions or plans of the Secretary related to the disposition of surplus defense plutonium and defense plutonium materials located at [SRS]";
- Submit a report to the Congressional defense committees providing notice for each shipment of defense plutonium and defense plutonium materials to SRS;
- If DOE decides not to proceed with construction of the immobilization facilities or the MOX Facility, prepare a plan that identifies a disposition path for all defense plutonium and defense plutonium materials; and
- Include with the budget justification materials submitted to Congress in support of DOE's budget for each fiscal year "a report setting forth the extent to which amounts requested for [DOE] for such fiscal year for fissile materials disposition activities will enable [DOE] to meet commitments for the disposition of surplus defense plutonium and defense plutonium materials located at [SRS]...."[8]

DOE moves to a MOX-only approach for plutonium disposition.

Despite the earlier commitment to a dual-path strategy, DOE announced in January 2002 that it was abandoning the immobilization portion of the strategy, leaving the construction and operation of the MOX Facility as the only option to dispose of surplus defense plutonium in the United States. In support of its decision, DOE stated that moving to a MOX-only disposition strategy followed "an exhaustive Administration review of non-proliferation programs, including alternative technologies to dispose of surplus plutonium to the meet the non-proliferation goals agreed to by the United States and Russia."[9] In February 2002, DOE reported to Congress its

[8] *Id.*

[9] Ex. 7, DOE, Release No. PR-02-007 (Jan. 23, 2002).

conclusion that moving to the MOX-only approach was the "preferred option" and advocated for construction of the MOX Facility at SRS.[10]

South Carolina Governor Jim Hodges negotiates to protect the State.

DOE's shift to the MOX-only approach, combined with DOE's decision to ship plutonium from other facilities to SRS without any deadlines for the processing or removal of that plutonium from South Carolina, greatly concerned the State.[11] Then-South Carolina Governor Jim Hodges wrote letters to then-DOE Secretary Spencer Abraham on April 6 and 24, 2001, expressing concern over DOE's decision-making regarding a disposition pathway for plutonium.[12] The Secretary did not respond to either letter. On June 13, 2001, Governor Hodges again wrote Secretary Abraham expressing concern that DOE was reneging on the prior DOE Secretary's commitment to a dual-track approach, which Governor Hodges regarded as "an essential component of [South Carolina's] agreement [to accept the plutonium shipments into the State] since it assured multiple pathways of disposition and decreased the likelihood that South Carolina would become a plutonium dumping ground."[13]

On June 26, 2001, Secretary Abraham finally responded, noting that DOE was "confident that this decision [to move to the MOX-only approach] at the Savannah River Site will not

[10] Ex. 2, *Report to Congress* 5-6 ("MOX is the most advantageous approach to disposition U.S. surplus plutonium."). Regarding the options for long-term storage of plutonium, DOE reported to Congress that "[s]torage in place undercuts existing commitments to the states, particularly South Carolina, which is counting on disposition as a means to avoid becoming the permanent 'dumping ground' for surplus weapons-grade plutonium by providing a pathway out of the site for plutonium brought there for disposition." *Id.* at 5-2.

[11] DOE intended to ship plutonium to SRS from DOE's Rocky Flats facility in Utah so that it could close that facility. Ex. 2, *Report to Congress* 5-8. By quickly shipping the plutonium to SRS, DOE would achieve significant cost savings. Ex. 8, Aff. of Jessie Hill Roberson (ECF No. 10) at ¶18, 1:02-cv-01426-CMC, dated May 24, 2002.

[12] Ex. 9, Ltr. of Hodges to Abraham, dated April 6, 2001; Ex. 10, Ltr. of Hodges to Abraham, dated April 24, 2001.

[13] Ex. 11, Ltr. of Hodges to Abraham, dated June 13, 2001.

jeopardize our overall ability to eliminate surplus plutonium or to comply with the recently signed plutonium disposition agreement with the Russian Federation."[14] Then, in an August 27, 2001 letter from DOE to Governor Hodges, then-Lieutenant Governor Bob Peeler, and then-Speaker of the House David Wilkins, DOE reiterated that it "is committed to a pathway out of South Carolina for not only new material coming into the site for processing, but for all waste material already at the site."[15]

On August 30, 2001, Governor Hodges and then-South Carolina Attorney General Charlie Condon wrote to Secretary Abraham and expressed the State's "fear that plutonium disposition funding will not take place and, in effect, the State of South Carolina will become the permanent repository."[16] The letter further proposed terms for resolution, which included a commitment from DOE to do everything in its power to fully fund the MOX Facility, and if funding was insufficient, to remove plutonium shipped to South Carolina and "cease and desist any future shipments to our State." Further, the State requested that "DOE [ ] agree with the State of South Carolina on immediate, measurable and enforceable milestones, and on penalties for failure to meet such milestones."[17] Secretary Abraham responded by simply reiterating DOE's commitment not to make South Carolina the permanent repository for plutonium.[18]

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[14] Ex. 12, Ltr. of Abraham to Hodges, dated June 26, 2001.

[15] Ex. 13, Ltr. of Card to Hodges, Peeler, and Wilkins, dated Aug. 27, 2001.

[16] Ex. 14, Ltr. of Hodges and Condon to Abraham, dated Aug. 30, 2001.

[17] *Id.*

[18] Ex. 15, Ltr. of Abraham to Hodges, dated Sept. 21, 2001 ("I appreciate your concern that any plutonium shipped to the Savannah River Site ultimately has a disposition path that would ensure its removal from the State of South Carolina. I want to reiterate that the Department of Energy shares that goal."); *see also* Ex. 16, Ltr. of Hodges to Abraham, dated Oct. 26, 2001 ("DOE must recognize and honor their previous commitments to this state and its citizen. . . . South Carolina will not be the nation's plutonium dumping ground.").

Soon after DOE's formal announcement of its decision to move to the MOX-only approach, Secretary Abraham and Governor Hodges met on February 26, 2002, to further discuss the plutonium issues. During that meeting, DOE "promised to set forth in a legally enforceable document mutually agreeable schedules for the funding and construction of the MOX program and for the shipment to and storage of plutonium at the Savannah River Site" and that it "would be bound by law to retake possession of the plutonium if the Federal Government failed to live up to its commitment."[19]

However, DOE quickly reneged on its promise and reversed course on anything that would be legally enforceable. On March 8, 2002, DOE Undersecretary Linton Brooks told the State that the "bottom line here is that our draft is in effect a political agreement whose enforcement mechanism is political."[20] However, the State rebuffed DOE's about-face. Instead, Governor Hodges—in what can only be considered prescient foresight—"insist[ed] upon 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."[21]

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[19] Ex. 17, Ltr. of Hodges to Abraham, dated April 10, 2002; *see* Ex. 18, Ltr. of Abraham to Hodges, dated April 11, 2002 ("I personally assured you that our new approach **would not transport any plutonium to South Carolina unless our plans for fabricating it into MOX fuel were progressing in a fashion that assured that it would be able to be disposed of** through this process.") (emphasis added).

[20] Ex. 17, Ltr. of Hodges to Abraham, dated April 10, 2002.

[21] *Id.* (emphasis added); *see* Ex.19, Ltr. of Hodges to Abraham, dated April 11, 2002 ("We are willing to accept the promises contained in your letter but **we must have confidence that promises made will be promises kept**. . . . [W]e will agree to incorporate the terms of your proposed agreement, along with appropriate remedies and penalties for non-performance, into a Consent Order filed in the Federal District Court in the District of South Carolina.") (emphasis added); *see also* Ex. 20, Ltr. of Bates to Otis, dated April 11, 2002 ("The history of nuclear wastes is that it remains in place indefinitely while its ultimate disposition is endlessly debated.

In an attempt to rehabilitate its waning credibility, DOE responded to Governor Hodges and offered five commitments:

> 1. A commitment to construct two facilities at SRS, including milestones;
> 2. A commitment by the Department of Energy, backed up by language in the President's FY 03 budget, to request all needed funds to carry out this program at Savannah River . . . ;
> 3. The establishment of annual funding targets;
> 4. A commitment to notify the State of all plutonium shipments into South Carolina; and
> 5. A commitment to maintain a pathway out of South Carolina for any plutonium brought into the State, including firm dates by which such material would be removed from the State if DOE, for any reason, were to be unable to secure the funding necessary to build the MOX facility.[22]

Importantly, Secretary Abraham and DOE committed to supporting federal legislation that codified these commitments to provide the State with an enforceable mechanism, albeit DOE specifically rejected the proposal of a Federal Court consent decree allowing for immediate accountability and enforceability in the courts.[23] Further, Secretary Abraham stated: "[A]s I have repeatedly assured you, **no plutonium will move into the State of South Carolina without a pathway for that plutonium to come out**."[24] The Secretary also offered commitments in a proposed agreement, of which DOE offered to support its codification, that included the

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Plutonium should not be moved to SRS until there is assurance that this will not be the case here.")

[22] Ex. 18, Ltr. of Abraham to Hodges, dated April 11, 2002.

[23] *Id.* ("[W]e are also prepared to support a legislative fix as well. To that end, the agreement I am forwarding you contains a legislative proposal that specifically requires [DOE] to remove all plutonium brought to [SRS] after April 15, 2002 if the MOX facility is not built and operating on schedule.").

[24] *Id.* (emphasis added).

commitment that it would "transfer no plutonium to the Savannah River Site without a clear path out of South Carolina" and that if DOE fails to adhere to the milestones, DOE will (1) "immediately cease further shipments of plutonium to South Carolina" and (2) "package and remove any plutonium sent to South Carolina under this Agreement."[25]

The work of Governor Hodges, then-Congressman Graham, and Congress results in the codification of enforceable commitments by DOE to the State of South Carolina.

In April 2002, the Honorable Pietro (Pete) V. Domenici, then-United States Senator for the State of New Mexico, discussing the agreement to locate the MOX Facility in South Carolina to comply with the PMDA, acknowledged the assurance received by South Carolina from the United States and DOE as a full guarantee to the MOX Facility:

> It is appropriate for the Governor of South Carolina to insist on every assurance that his State will be treated fairly, and will not simply become the permanent storage site for unwanted nuclear material if for some reason the plutonium agreement should fall apart.
>
> . . . .
>
> The **Governor has gotten the Secretary of Energy to provide South Carolina** all of the assurances they never got from the Clinton administration, including **full funding for the MOX program, a strict construction schedule, and a number of mechanisms, including statutory language and other measures, to ensure that the agreement will be legally enforceable**.[26]

Indeed, through the efforts of South Carolina's Congressional delegation and Governor Hodges, and with the support of DOE, Congress enacted statutory requirements for DOE's construction and operation of the MOX Facility.[27] In support of these requirements, Congress found that the

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[25] *Id.*

[26] Congressional Record (Senate), 148 Cong. Rec. S2820-03, 2002 WL 571890, 107th Congress, Second Session (April 17, 2002) (emphasis added).

[27] Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), Pub. L. No. 107-314, 116 Stat. 2458, Subtitle E, § 3182, *subsequently codified by* National

PMDA with Russia was a "significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists" and that DOE is to dispose of 34 metric tons of weapons-grade plutonium.[28] Specific to the MOX Facility, Congress found:

> (4) The Department has formulated a plan for implementing the agreement with Russia through construction of [the MOX Facility], and a pit disassembly and conversion facility at the Savannah River Site, Aiken, South Carolina.
>
> (5) **The United States and the State of South Carolina have a compelling interest in the safe, proper, and efficient operation of the plutonium disposition facilities at the Savannah River Site**. The MOX facility will also be economically beneficial to the State of South Carolina, and that **economic benefit will not be fully realized unless the MOX facility is built**.
>
> (6) **The State of South Carolina desires** to ensure that all plutonium transferred to the State of South Carolina is stored safely; that the full benefits of the MOX facility are realized as soon as possible; and, specifically, **that all defense plutonium or defense plutonium materials transferred to the Savannah River Site either be processed or be removed expeditiously**.[29]

Section 2566 provides the Congressional mandate for the "construction and operation of [the MOX Facility]" and requires DOE to achieve the "MOX production objective" by producing mixed-oxide fuel from defense plutonium and defense plutonium materials at an average rate of no less than one metric ton of mixed-oxide fuel per year.[30] Section 2566 also requires "a schedule of operations of the [MOX Facility] designed so that 34 metric tons of defense plutonium and defense plutonium materials at the Savannah River Site will be processed

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Defense Authorization Act for Fiscal Year 2004 (NDAA FY04), Pub. L. No. 108-136, 117 Stat. 1392, as 50 U.S.C.A. § 2566 (Section 2566).

[28] NDAA FY03, Subtitle E, § 3181.

[29] NDAA FY03, Subtitle E, § 3181 (emphasis added).

[30] 50 U.S.C.A. § 2566(a), (h).

into mixed-oxide fuel by January 1, 2019."[31] In the event the MOX Facility construction or operations fell behind schedule, Congress directed DOE to develop a corrective action plan addressing any deficiencies and continuing the MOX Facility's construction to allow plutonium to be removed from SRS.[32] Section 2566 also imposed specific deadlines for the removal of defense plutonium and defense plutonium materials from South Carolina as well as the provision of economic and impact assistance payments to the State should the MOX production objective not be achieved.[33]

DOE recognized these explicit instructions from Congress and its obligations under Section 2566 in 2003, stating:

> Finally, DOE/NNSA takes note of [NNDA FY03, Subtitle E]. That Subtitle, entitled ''Disposition of Weapons-Usable Plutonium at Savannah River, South Carolina,'' ... **directs the Secretary to take certain actions if that schedule is not being met, which . . . may include** preparation of a corrective action plan, **cessation of further transfers of weapons-usable plutonium to SRS** until the Secretary certifies that the MOX production objective can be met, **removal of weapons-usable plutonium transferred to SRS,** and **payment of economic assistance to SRS from funds available to the Secretary.** In DOE/NNSA's view, enactment of this legislation demonstrates strong congressional interest in seeing DOE/NNSA proceed with the MOX facility as promptly as is reasonably possible, and DOE/NNSA is proceeding accordingly.[34]

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[31] 50 U.S.C.A. § 2566(a)(2)(B).

[32] 50 U.S.C.A. § 2566(b), (c).

[33] 50 U.S.C.A. § 2566(c), (d). Should the MOX production objective not be achieved by January 1, 2014, Section 2566(c) requires DOE to remove one metric ton of defense plutonium or defense plutonium materials from the State by January 1, 2016. Should the MOX production objective not be achieved by January 1, 2016, Section 2566(d) requires DOE to remove an additional one metric ton of defense plutonium or defense plutonium materials from the State during calendar year 2016 and each following year and to provide economic and impact assistance payments to the State for each day that DOE fails to remove the plutonium for the first 100 days of each year. To date, DOE has not achieved the MOX production objective.

[34] Ex. 21, DOE, *Am. ROD for SPD EIS* (April 24, 2003) (emphasis added).

DOE then began transferring plutonium to SRS for conversion into MOX fuel.[35]

In short, everyone, including DOE, recognized the United States' commitments to the State of South Carolina codified in Section 2566 and the importance of moving forward with the MOX Facility and the MOX program. For example, in 2005, an exchange occurred in the United States Senate between Senator Domenici and the Honorable Lindsey Graham, Senator from the State of South Carolina, on the Conference Report for the Energy and Water Development Appropriations Act. This discussion reiterated and affirmed the statutory duties and obligations of the United States to the State of South Carolina:

> Mr. GRAHAM.
> Mr. President, I rise today to express my concern regarding the Mixed Oxide fuel project. This project is vital to reduce the threat of terrorists or rogue nations obtaining nuclear weapon materials. By resulting in the disposal of 34 metric tons . . . of surplus weapon-grade plutonium, enough for thousands of nuclear weapons, the MOX program helps accomplish one of our most important nonproliferation goals. This plutonium, once converted into fuel for commercial nuclear power plants, is a real "swords into plowshares" program.
>
> Mr. DOMENICI.
> I have been a forceful advocate of the permanent disposal of the 34 tons of excess weapons-grade plutonium from the U.S. and Russian stockpiles. This material equals the same amount of plutonium as contained in 8,000 warheads. . . . Excess weapons grade plutonium in Russia is a clear and present danger. For that reason, the committee considers the Department's material disposition program of utmost importance.
>
> Mr. GRAHAM.
> Despite this importance, the Department of Energy has not requested full funding for this project in the President's Fiscal Year 2004, Fiscal Year 2005 and Fiscal Year 2006 budget request as originally proposed in the report to Congress entitled "Disposition of Surplus Defense Plutonium at Savannah River Site, February 2002." The funding shortfalls will add to the existing 3-year delay

[35] Ex. 22, DOE, *Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis* (Sept. 5, 2007).

caused by the negotiations between the Russian and U.S. Governments regarding liability for the project. However, with agreement between the U.S. and Russia on liability, the administration has no reason not to request full funding in next year's budget. It is vital that in the next budget the administration proposes fully funding the MOX program at a level that will bring this project closer to its original schedule.

Mr. DOMENICI.
I agree with the Senator from South Carolina that the administration needs to fully fund this project in fiscal year 2007 and thereafter. Without a viable disposal solution, the cleanup of the Hanford Site and arrangements for decreasing inventories of plutonium at Lawrence Livermore National Laboratory and the Pantex Plant will cost taxpayers hundreds of millions of dollars annually for storage and related security costs.

Mr. GRAHAM.
Never hesitant to support missions in support of our national defense, **the residents of South Carolina took considerable risk by allowing shipments of defense plutonium to be sent to the Savannah River Site** from Rocky Flats and other DOE sites **in advance of the construction of the MOX plant**. In addition to supporting DOE's efforts to consolidate plutonium and accomplish the goals of the plutonium disposition program, this agreement greatly assisted DOE's efforts to expeditiously close Rocky Flats, resulting in considerable cost savings for DOE.

In a sign of good faith to the State of South Carolina, **language was negotiated between the State of South Carolina and the Federal Government that required the Department of Energy 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 of the State simply sought reassurances that weapons-grade plutonium would not remain at SRS indefinitely. **South Carolina would not have accepted plutonium without this statute**. However, until the plant is operational, it is critical to maintain the protections provided in Section 4306 of the Atomic Energy Defense Act, 50 USC 2566. This is the reassurance the Federal Government gives to South Carolina that it is DOE's intention to see this project through.

> Mr. DOMENICI.
> I recognize the importance of that language. The appropriations bill includes a 3-year delay in the penalty payment language to reflect the delays caused by the Russians in negotiating a liability agreement. This delay does not allow DOE to withdraw support for the program. **Any effort to eliminate funding for this project will likely foreclose a disposal pathway for plutonium stored at Savannah River causing the Department to pay the State of South Carolina up to $100,000,000 per year in fines** starting in 2014.[36]

Similarly, in the discussions regarding appropriations for the 2007 fiscal year, the Honorable John Spratt, Congressman from the State of South Carolina, made the following statement regarding the MOX Facility:

> Mr. SPRATT.
> In 2002, the state of South Carolina, in an arrangement with the Department of Energy and Congress, agreed to allow 34 tons of weapons grade nuclear material for MOX processing be stored at the Savannah River Site. **In exchange, the state of South Carolina received assurances that the MOX fuel plant would be completed on schedule. And to be sure, we put in place penalty payments for the Department of Energy if the MOX fuel plant's construction delayed beyond 2011**.
>
> . . . .
>
> When South Carolina agreed to take the Nation's plutonium, it did not do so to become plutonium's final burial place. **We only took the plutonium with the promise that a processing facility and ultimate removal would be forthcoming. The penalty payments imposed on the Department of Energy were our ace in the hole to make sure this happened**. In the Defense Authorization bill, we even included language attesting to the fact that the South Carolina MOX facility was worth doing on its own, separate of the Russian facility if need be.[37]

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[36] Congressional Record (Senate), 151 Cong. Rec. S12740-01, 2005 WL 3039286 (Nov. 14, 2005) (emphasis added).

[37] Congressional Record (House), 152 Cong. Rec. H3156-04, 2006 WL 1420552 (May 24, 2006) (emphasis added).

Construction of the MOX Facility makes significant progress, but DOE turns its back on the Facility and reneges on the commitments to the State of South Carolina.

Construction on the MOX Facility began on or about August 1, 2007. Currently, the MOX Facility, located in Aiken County, is approximately 68% complete and employs approximately 1,800 persons residing in and around Aiken, South Carolina and surrounding communities.[38] Since 2007, Congress has invested billions of dollars in the MOX Facility.

In 2010, the United States and Russia amended the PMDA agreeing to begin plutonium disposition in 2018 and confirming once again that **the MOX approach was the only option for plutonium disposition**. The amended PMDA entered into force on July 13, 2011.[39]

In July 2012, DOE once again concluded that the "MOX Fuel Alternative is DOE's Preferred Alternative for surplus plutonium disposition."[40] DOE added that "[i]t is important that [the MOX Facility] begin operations to demonstrate progress to the Russian government, meet U.S. legislative requirements, and reduce the quantity of surplus plutonium and the concomitant cost of secure storage."[41] This adherence to the MOX approach came after 5 years of additional analysis and public comment. DOE stated that the "purpose and need for action remains . . . to reduce the threat of nuclear weapons proliferation worldwide by conducting disposition of surplus plutonium in the United States in an environmentally sound manner, ensuring that it can never again be readily used in nuclear weapons."[42]

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[38] *See* Ex. 23, Ltr. of Trice to Congressman Wilson, dated Oct. 9, 2015.

[39] *See* Ex. 24, Amended PMDA; Ex. 25, CRS PMDA Report.

[40] Ex. 26, DOE, Excerpt from *Draft SPD Supplemental EIS* S-33 (July 2012).

[41] *Id.* at S-12.

[42] *Id.* at S-2.

In early 2013, however, DOE began indicating that it was shifting its plutonium disposition strategy. This policy shift began to occur notwithstanding the almost 20 years DOE had committed to the MOX program, the significant progress towards completion of the MOX Facility, the confirmation in the amended PMDA in 2011 that the MOX approach was the only option for plutonium disposition, and the conclusion as late as July 2012 that the MOX approach was still the "preferred alternative." As reflected in the President's Budget Proposal for Fiscal Year 2014, DOE sought significantly less funding for construction of the MOX Facility, stating that it was "slow[ing] down the MOX project and other activities associated with the current plutonium disposition strategy" to assess alternative strategies.[43]

Then, in early 2014, DOE sought to undermine and abandon construction of the MOX Facility altogether by recommending in the President's Budget Proposal for Fiscal Year 2015 that the MOX Facility be funded at a reduced level sufficient to place the MOX project into "cold standby,"[44] which was the equivalent to an indefinite suspension of construction and the MOX project.[45] Notwithstanding the absence of any change in funding or Congressional authorization to suspend the MOX project, DOE announced its intentions to accelerate the President's proposal and place the MOX Facility into immediate cold standby even before the end of Fiscal Year 2014. If this proposal had taken effect, it would have led to the abandonment of the MOX Facility with no plan for the removal of the plutonium from the South Carolina. South Carolina would have been relegated to a permanent repository for the plutonium.

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[43] Ex. 27, Excerpt from FY 2014 DOE Budget Justification.

[44] Ex. 28, Excerpt from FY 2015 DOE Budget Justification.

[45] *See South Carolina v. U.S. Dep't of Energy*, 1:14-cv-00975-JMC.

In response, by letter dated March 6, 2014, United States Senators Lindsey O. Graham (S.C.), Tim Scott (S.C.), Mary Landrieu (La.), Richard Burr (N.C.), Kay Hagan (N.C.), Saxby Chambliss (Ga.), and Johnny Isakson (Ga.) objected to the cold standby proposal:

> Under both the FY2014 National Defense Authorization Act and the FY2014 Consolidated Appropriations Act, funding is provided for construction activities at the MOX facility. . . .
>
> Further, the budget submission claims the "Administration remains committed to the U.S.-Russia Plutonium Management and Disposition Agreement." We remind you that under the terms of this agreement, MOX is the only acceptable disposition path for the 34 metric tons of American weapons grade plutonium. If the Administration does remain committed to this agreement, it does not make sense to stop construction of this facility at this time.[46]

On March 18, 2014, in light of DOE's stated intentions, the State of South Carolina filed a lawsuit against the DOE and its officials to force DOE to comply with the legal obligations, international agreement with Russia, and public policy for the expeditious disposal of weapons-grade plutonium.[47] After the filing of the lawsuit and a motion for summary judgment by the State, DOE agreed to continue construction of the MOX Facility in compliance with law, and the pending case was resolved through a stipulation of dismissal.[48]

Following DOE's unilateral attempt in 2014 to terminate the MOX program, Congress has specifically prohibited DOE from utilizing any appropriations designated for the construction of the MOX Facility for any other purposes, thereby denying and rebuffing further attempts by DOE to utilize Congressional appropriations to terminate to the MOX project.[49] Nevertheless,

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[46] Ex. 29, Ltr. to Moniz, dated March 6, 2014.

[47] *South Carolina v. U.S. Dep't of Energy*, 1:14-cv-00975-JMC (ECF No. 1).

[48] *Id.* (ECF No. 19).

[49] *See, e.g.*, Ex. 30, Excerpt from Consolidated Appropriations Act, 2016, Pub. L No. 114-113, 129 Stat. 2242 (CAA FY16); Ex. 31 CAA FY16, Explanatory Statement (providing

DOE has continuously sought to undermine construction of the MOX Facility, culminating in DOE's announcement earlier this year that, **despite having no viable and legally authorized or approved alternative to the disposition of defense plutonium or defense plutonium materials other than through the MOX Facility**[50] **and no agreement with Russia**,[51] DOE is proposing to terminate the MOX program.

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that the $340 million for construction of the MOX Facility "shall be available **only** for construction and for project support activities." (emphasis added)).

[50] Ex. 32, Excerpt from FY 2017 DOE Budget Justification. DOE claims that a process called "downblending" is an alternative, but downblending does not comply with the international agreement with Russia (the PMDA, which DOE previously told this Court was vitally important for national security), DOE lacks state authority to pursue downblending (as the final disposition takes place in New Mexico), and downblending poses technical and nuclear criticality risks. *See* Ex. 33, High Bridge Associates, Inc., *Independent Assessment of the Impact of Disposing of Surplus Plutonium at WIPP*, dated Nov. 16, 2015. Indeed, as Senator Graham recently summarized:

> So what we're doing is stopping a program that there's questions about the actual cost; we're coming out with an alternative that nobody has any idea of if it will work; the Russians are not onboard; nobody's really run this through the Russian system; New Mexico, which would be the new site for disposal, hasn't been consulted; there are legal changes that I don't know if we could accommodate or not; and we don't know if it works.

Ex. 34, Excerpt from Senate Armed Services Strategic Forces Subcomm. Hrg, Tr. at pp. 10:23-25, 11:1-7 (Feb. 24, 2016). Senator Graham also has repeatedly called for DOE to be accountable, to no apparent avail. *Id.* at p. 13:9-12, 15-16 ("[T]his is an example of the government just completely out of touch with reality. Anybody in the private sector would be fired . . . . Somebody needs to be fired.").

[51] *Id.* As this exchange between Senator Graham and Defendant Klotz of NNSA demonstrates, DOE's proposed path violates the PMDA.

> SENATOR GRAHAM: So let's see if I've got this. We're going to change the entire program. Then we're going to go to the Russians and see if they're okay with it? Is that the plan?
>
> GENERAL KLOTZ: I -- that is the plan.
>
> SENATOR GRAHAM: That's the plan. **That's a lousy plan. That is absolutely the dumbest frigging plan I could think of**, to change course and hope the Russians would agree and not know what they're going to charge you for it.

Even before this announcement by DOE and before the Secretary and DOE missed the January 1, 2016 deadline to remove plutonium from SRS, South Carolina was concerned that the Secretary and DOE had no plans to comply with the obligations imposed on them by Section 2566. On September 4, 2015, South Carolina Attorney General Alan Wilson sent a letter to the Secretary requesting that DOE provide an assurance that "DOE will abide by its legal duties, Congressional directives, and meet its statutory obligations to South Carolina."[52] Neither the Secretary nor anyone else at DOE responded to the letter.

On December 14, 2015, South Carolina Governor Nikki Haley also wrote to the Secretary to again inform him of South Carolina's intent to enforce these statutory obligations.[53] Over a month later, by letter dated January 19, 2016, the Secretary responded to Governor Haley's letter but did not address DOE's statutory obligation to remove plutonium from the State by January 1, 2016, nor did he mention the economic and impact assistance payments. Instead, the Secretary repeated the empty promise from DOE that it was "committed to removing surplus weapons-grade plutonium from South Carolina." [54]

Ex. 35, Excerpt from Senate Appropriations Subcomm. Hrg, Tr. at pp. 4:24-25, 5:1-8 (March 16, 2016) (emphasis added).

[52] Ex. 36, Ltr. of Wilson to Moniz, dated Sept. 4, 2015.

[53] Ex. 37, Ltr. of Haley to Moniz, dated Dec. 14, 2015.

[54] Ex. 38, Ltr. of Moniz to Haley, dated Jan. 19, 2016.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is governed by Rule 56, FRCP which provides in pertinent part that this Court "shall grant summary judgment if the [State] shows that there is no genuine dispute as to any material fact and the [State] is entitled to judgment as a matter of law." Here, South Carolina presents questions of law in seeking an order mandating that the Secretary and DOE comply with the law. The relevant material facts—those related to the noncompliance of the Secretary and DOE with Section 2566—cannot be disputed. Thus, this matter is ripe for adjudication.

JURISDICTION AND AUTHORITY

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C.A. § 1361; *In re First Federal Sav. and Loan Ass'n of Durham*, 860 F.2d 135, 138 (4th Cir. 1988).[55] Mandamus is appropriately imposed where a federal official or agency has refused to perform a statutory duty. *In re Aiken Cty.*, 725 F.3d 255, 258 (D.C. Cir. 2013) ("Mandamus is an extraordinary remedy" but "may be granted to correct transparent violations of a clear duty to act") (internal quotation marks and citations omitted). "**If**, after studying the statute and its legislative history, the court determines that **the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance**, thus effectuating the congressional purpose." *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (emphasis added).

[55] "No waiver of sovereign immunity is necessary when 'a plaintiff seeks a writ of mandamus to force a public official to perform a duty imposed upon him in his official capacity . . . .'" *Al Jabari v. Chertoff*, 536 F. Supp. 2d 1029, 1033 (D. Minn. 2008) (quoting *Wash. Legal Found. v. U.S. Sentencing Comm'n,* 89 F.3d 897, 901 (D.C. Cir. 1996)).

Additionally, because South Carolina is "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," it is "entitled to judicial review" under the Administrative Procedures Act (APA).[56] 5 U.S.C.A. § 702; *see* 5 U.S.C.A. §§ 701, 704; *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011) ("The [sovereign immunity] waiver in § 702 . . . applies . . . in cases involving constitutional challenges and other claims arising under federal law."); *see also* 50 U.S.C.A. § 2566 (contemplating the State of South Carolina bringing suit and obtaining injunctive relief). The APA provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C.A. § 706. "The reviewing court shall . . . compel agency action unlawfully withheld" and hold unlawful agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* This Court therefore has jurisdiction and authority to award declaratory and injunctive relief for the Secretary and DOE's illegal action and inaction.

[56] "Agency action" is defined by the APA to include the "failure to act." 5 U.S.C.A. § 551(13).

ARGUMENT

While the history of the nation's plutonium disposition efforts is lengthy, the legal issue presented by the current state of affairs is simple. None of the pertinent and material facts are subject to dispute:

(1) The Secretary and DOE failed to achieve the MOX production objective by January 1, 2014.

(2) The Secretary and DOE failed to achieve the MOX production objective by January 1, 2016.

(3) The Secretary and DOE have failed to remove any defense plutonium or defense plutonium materials from the State of South Carolina pursuant to its obligations under Section 2566.

(4) The Secretary and DOE have failed to provide economic and impact assistance payments to the State of South Carolina pursuant to the Secretary and DOE's obligations under Section 2566.

Congress chose to employ the term "**shall**" in Section 2566 when speaking of the Secretary and DOE's obligations to the State of South Carolina. *See In re Rowe*, 750 F.3d 392, 396 (4th Cir. 2014) ("We begin, as we must, with the plain meaning of the statutes. . . . The starting point for any issue of statutory interpretation is the language of the statute itself. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal quotation marks and citations omitted); *see Air Line Pilots Ass'n, Int'l v. U.S. Airways Grp., Inc.*, 609 F.3d 338, 342 (4th Cir. 2010) ("Because the statutory language does not admit of doubt as to Congress's intended meaning, it must be regarded as conclusive. . . . In short, we assume Congress said what it meant and meant what it said.").

In doing so, **Congress imposed on the Secretary and DOE mandatory, non-discretionary duties to carry out the requirements of this statute**. *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress used 'shall' to impose discretionless obligations . . . ."); *United*

States v. Monsanto, 491 U.S. 600, 607 (1989) (by using "shall," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory"); *see In re Rowe*, 750 F.3d at 397 ("Young children learn early on that 'may' is a wonderfully permissive word. 'Shall,' by contrast, is more sternly mandatory." (internal quotation marks and citation omitted)); *Air Line Pilots*, 609 F.3d at 342 ("It is uncontroversial that the term 'shall' customarily connotes a command . . . ."); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("The Supreme Court . . . [has] made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command."); *United States v. Myers,* 106 F.3d 936, 941 (10th Cir.) ("It is a basic canon of statutory construction that use of the word 'shall' . . . indicates mandatory intent.").

Not only did Congress compel action on the part of the Secretary and DOE under Section 2566, it also imposed unambiguous deadlines for when this mandatory action must be taken, which the Secretary and DOE cannot disregard or ignore. *Forest Guardians*, 174 F.3d at 1190 **("[W]hen Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion.** The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld.") (emphasis added); *NRDC v. U.S. Envtl. Protection Agency*, 966 F.2d 1292, 1299 (9th Cir. 1992) ("EPA does not have the authority to ignore unambiguous deadlines set by Congress."); *In re Paralyzed Veterans of Am.*, 392 F. App'x 858, 860 (Fed. Cir. 2010) ("Congress clearly imposed on the Secretary a date-certain deadline. . . . Under such circumstances, the agency has no discretion in deciding to withhold or delay . . . , and failure to comply is unlawful."); *Tang v. Chertoff*, 493 F.Supp.2d 148, 155 (D. Mass. 2007) (noting that "where agency delay violated a fixed deadline

set out in a separate statute or regulation" that would constitute "agency action unlawfully withheld . . . .").

As described below, the Secretary and DOE are willfully disregarding their statutory obligations under Section 2566(c) and (d). **When faced with such naked contempt of the law, courts are left with only one option: compel the unlawfully withheld action.** *Forest Guardians*, 174 F.3d at 1190 ("[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act."); *NRDC,* 966 F.2d at 1300 ("This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements."); Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 Wm. & Mary L. Rev. 1545, 1572-73 (2001) ("When an agency misses a statutory deadline, it has unlawfully withheld action. There is no need for judicial discretion in such a case because there is clear law to apply. An agency's refusal to follow congressional timetables is thus untouched by balancing and discretion. Courts simply must compel an agency to act when there is a specific deadline set by Congress.").

I. THE SECRETARY AND DOE HAVE FAILED TO PERFORM A MANDATORY, NON-DISCRETIONARY DUTY TO REMOVE ONE METRIC TON OF WEAPONS-GRADE PLUTONIUM FROM SOUTH CAROLINA BY JANUARY 1, 2016.

Section 2566(c) requires that "[i]f the MOX production objective is not achieved as of January 1, 2014, the Secretary **shall**, consistent with the National Environmental Policy Act of 1969 and other applicable laws, **remove from the State of South Carolina**, for storage or disposal elsewhere . . . **not later than January 1, 2016**, not less than **1 metric ton of defense plutonium** or defense plutonium materials." 50 U.S.C.A. § 2566(c) (emphasis added).

The MOX production objective was not achieved as of January 1, 2014.[57] Consequently, the Secretary and DOE had a mandatory, non-discretionary duty pursuant to Section 2566(c) to remove at least one metric ton of defense plutonium or defense plutonium materials from South Carolina by January 1, 2016. The Secretary and DOE did not remove by January 1, 2016 (and, to date, have not removed) ***any*** defense plutonium or defense plutonium materials from the State,[58] and thus, the Secretary and DOE indisputably have unlawfully failed to perform their non-discretionary, mandatory duty under Section 2566(c). Because the Secretary and DOE have disregarded their non-discretionary duty under Section 2566(c), this Court, as mandated by

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[57] The Secretary and DOE knew, and admitted and acknowledged, as early as 2006 that they could not meet the MOX production objective until at least 2017. Ex. 39, DOE/NNSA Report to Congress (Oct. 3, 2011). The Secretary and DOE therefore had almost ten years to remove the one metric ton of defense plutonium or defense plutonium materials from South Carolina by January 1, 2016, yet they chose not to make any attempt or effort to comply with the statute or move the defense plutonium from South Carolina.

[58] In fact, the Secretary and DOE made no effort to remove any defense plutonium or defense plutonium materials from the State by January 1, 2016, nor have they announced any date by which any defense plutonium or defense plutonium materials will be removed. Rather, the Secretary and DOE have gone outside the country to obtain more plutonium and are currently shipping that plutonium into the State. *See* Ex. 40, NNSA, *Environmental Assessment for Gap Material Plutonium – Transport, Receipt, and Processing* (Dec. 2015).

Congress, must compel the Secretary and DOE to immediately perform this duty. 28 U.S.C.A. § 1361; 5 U.S.C.A. § 706(1); *see* discussion *supra* pp. 23-24.

II. THE SECRETARY AND DOE HAVE FAILED TO PERFORM A MANDATORY, NON-DISCRETIONARY DUTY TO PROVIDE ECONOMIC AND IMPACT ASSISTANCE PAYMENTS TO SOUTH CAROLINA.

Section 2566(d)(1) states:

> If the MOX production objective is not achieved as of January 1, 2016, 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 2021 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.A. § 2566(d)(1) (emphasis added).

The MOX production objective was not achieved as of January 1, 2016. This failure triggered the Secretary and DOE's statutory obligations under Section 2566(d) to: (1) remove at least one metric ton of defense plutonium or defense plutonium materials from South Carolina during calendar year 2016;[59] and (2) provide economic and impact assistance payments to South Carolina of $1 million per day until this one metric ton of defense plutonium and defense plutonium materials is removed, up to $100 million. Section 2566(d) therefore provides a clear choice to the Secretary and DOE as to how their duties are performed.

[59] The one metric ton of defense plutonium and defense plutonium materials required to be removed from the State during calendar year 2016 pursuant to Section 2566(d) is in addition to the one metric ton required to be removed by January 1, 2016 pursuant to Section 2566(c). 50 U.S.C.A. § 2566(c), (d)(1).

While the Secretary and DOE must remove one metric ton of defense plutonium and defense plutonium materials during this year and additional plutonium in each of the following years through 2021, the Secretary and DOE can choose when during each year to remove the defense plutonium and defense plutonium materials and, consequently, dictate the amount of economic and impact assistance payments required to be provided to the State. Specifically, for each day during the first 100 days of the year, the Secretary and DOE can decide to either: (1) remove the one metric ton of defense plutonium or plutonium materials; or (2) provide the $1 million economic and impact assistance payment to South Carolina.

To date, the Secretary and DOE have not removed any defense plutonium or defense plutonium materials from the State and therefore must comply with the mandatory, non-discretionary statutory obligation to provide the daily $1 million economic and impact assistance payments. *See* 50 U.S.C.A. § 2566(d)(1); discussion *supra* pp. 23-24. Yet, to date, the Secretary and DOE have failed to provide any economic and impact assistance payments to the State (or even acknowledge that obligation).

It therefore cannot be disputed that the Secretary and DOE have unlawfully failed to perform their non-discretionary, mandatory duty under Section 2566(d)(1). It also cannot be disputed that the Secretary and DOE have a continuing obligation to provide $1 million per day in economic and impact assistance to South Carolina for each day (up to the first 100 days of the calendar year) that one metric ton of defense plutonium or defense plutonium materials is not removed from the State. Therefore, as with Section 2566(c), the Court is left with only one option: compel the unlawfully withheld action, *i.e.*, payment to the State of the economic and impact assistance.

The Congressional mandates to the Secretary and DOE, as well as to the Court, do not cease simply because the Secretary and DOE have made a unilateral decision to disregard their statutory obligations to South Carolina. Congress, not the Secretary or DOE, establishes the policy of the United States. *In re Aiken Cty.*, 725 F.3d at 260 ("Congress sets the policy … [and] the President and **federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress**.") (emphasis added); *see Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016) ("Federal agencies must obey the law, and congressionally imposed mandates and prohibitions trump discretionary decisions."); *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) ("Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform.").

Here, Congress's plutonium disposition policy and direction to the Secretary and DOE could not be clearer: construct the MOX Facility and, if the statutory deadlines for processing the plutonium are missed, expeditiously remove defense plutonium and defense plutonium materials from the State and provide economic and impact assistance to the State. The Secretary and DOE failed to meet the statutory deadlines for processing, and thus, Section 2566 **requires** them to remove plutonium from the State and to pay to the State $1 million per day in economic and impact assistance for each day in which the Secretary and DOE do not remove the plutonium, for up to 100 days in each year. 50 U.S.C.A. § 2566. Simply put, Congress recognized that the present state of affairs might occur, and Congress expressly mandated the result—removal of the plutonium and payment of economic and impact assistance to the State.

Moreover, Congress has appropriated to the Secretary and DOE the funds to comply with the statutory directives. Section 2566 is part of the United States' "Atomic Energy Defense Provisions" and, as discussed above, includes Congress's specific directives, authorizations, and

deadlines for the MOX program and the provision of the economic and impact assistance to the State. For Fiscal Year 2016, Congress appropriated significant funds to DOE to meet its "Atomic Energy Defense" obligations.[60]

Specifically, Congress appropriated approximately $30 billion to fund DOE's programs and activities. *See* Ex. 30, CAA FY16, Division D, Title III – Department of Energy; Ex. 31, CAA FY16, Explanatory Statement. From this amount, Congress directed that $12.5 billion would be for "Atomic Energy Defenses Activities," of which $1.9 billion would be for "Defense Nuclear Nonproliferation." *Id.* Included within the "Defense Nuclear Nonproliferation" appropriation account was $316.6 million for "Material Management and Minimization" activities and $340 million for construction of the MOX Facility.[61] *Id.*

As is customary, Congress largely left it to the Secretary and DOE's discretion as to how to use and spend the amounts within the "Defense Nuclear Nonproliferation" appropriation account to meet DOE's obligations. *See Lincoln v. Vigil,* 508 U.S. 182, 192 (1993) ("[A] fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restriction . . . ."); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.) ("Congress has recognized that in most instances it is desirable to maintain

[60] "Congress finances federal programs and activities by providing 'budget authority' which grants agencies authority to enter into financial obligations that will result in immediate or future outlays of government funds." U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 2-1 (4th ed. 2016) (*GAO Red Book*). Appropriations are the most common form of budget authority and are a federal agency's "authority to incur obligations and to make payments from the Treasury for specified purposes." *GAO Red Book*, Glossary.

[61] An "appropriation account" is "[t]he basic unit of an appropriation generally reflecting each unnumbered paragraph in an appropriation act" and "typically encompasses a number of activities or projects." *GAO Red Book*, Glossary.

executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for unforeseen developments, changing requirements, . . . and legislation enacted subsequent to appropriations.").

However, Congress included several specific prohibitions and restrictions as to how certain amounts are obligated. For example, Congress provided that the $340 million for construction of the MOX Facility "shall be available **only** for construction and for project support activities." Ex. 31, CAA FY16, Explanatory Statement (emphasis added). Congress also "prohibit[ed] funds from being used to dilute plutonium that could otherwise be used for MOX feedstock or used to meet U.S. commitments under the Plutonium Management Disposition Agreement [with Russia]." *Id.* And, to state the obvious, **the Secretary and DOE must use the available appropriated funds to meet their statutory obligations**. *See Lincoln*, 508 U.S. at 193 ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."); *Donovan*, 746 F.2d at 861 ("[W]hen Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language."); *GAO Red Book*, 3-42 ("Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation, but, of course, **administrative discretion may not transcend the statutes**, nor be exercised in conflict with law . . . ." (quoting 18 Comp. Gen. 285, 292 (1938) (emphasis added)).[62]

[62] Additionally, among appropriations that may be available for a number of programs or activities, "[m]andatory programs take precedence over discretionary ones" and "[w]ithin the group of mandatory programs, more specific requirements should be funded first, **such as those with specific time schedules**, with remaining funds then applied to the more general requirements. . . . These principles apply equally of course, to the allocation of funds between

In sum, Congress expressly directed and authorized the Secretary and DOE to remove defense plutonium and defense plutonium materials from the State pursuant to the deadlines set forth in Section 2566 and to provide economic and impact assistance to the State. Congress also appropriated funds for DOE to meet its "Atomic Energy Defense" and "Nuclear Defense Nonproliferation" obligations, which include the Section 2566 obligations. And although Congress imposed certain affirmative restrictions on the use of federal funds for certain particular activities (*e.g.*, those for construction of the MOX Facility), Congress did not prohibit DOE from using its remaining available appropriations to fund the mandatory removal of plutonium from South Carolina or the mandatory provision of economic and impact assistance payments to the State. Accordingly, the Secretary and DOE have no choice but to utilize these available appropriations to meet their obligations under Section 2566.

Therefore, as with Section 2566(c), Congress already has dictated the outcome of this case. Pursuant to Section 2566(d), Congress mandated that the Secretary and DOE remove one metric ton of defense plutonium or defense plutonium materials from the State during calendar year 2016 and provide economic and impact assistance of $1 million per day to the State until such plutonium is removed, up to $100 million. Because, to date, the Secretary and DOE have not removed any defense plutonium or defense plutonium materials from the State but have not yet provided the $1 million per day economic and impact assistance payments, the Secretary and DOE have failed and continue to fail to perform their statutorily imposed duty. Accordingly, pursuant 28 U.S.C.A. § 1361 and 5 U.S.C.A. 706(1), Congress has mandated that the Court compel the Secretary and DOE to perform this duty.

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mandatory and nonmandatory expenditures within a single-program appropriation." *GAO Red Book*, 3-53 (emphasis added).

CONCLUSION

For the reasons set forth above, South Carolina respectfully requests that the Court:

1. declare that the Defendants have failed to comply with their mandatory, non-discretionary duties pursuant to 50 U.S.C.A. § 2566;
2. declare and order the Defendants to immediately remove from the State one metric ton of defense plutonium or defense plutonium materials pursuant to their obligations under to Section 2566(c);
3. declare and order the Defendants to remove an additional one metric ton of defense plutonium from the State by December 31, 2016 pursuant to their obligations under Section 2566(d);
4. declare and order the Defendants not to move or transfer any plutonium to South Carolina, regardless of origin, until this Court enters an order finding the Defendants are in full compliance with Section 2566;
5. declare and order the Defendants to pay to the State of South Carolina, by and through the Attorney General of the State of South Carolina, economic and impact assistance in the amount of $1 million per day, beginning on January 1, 2016, for each day the Defendants fail to remove one metric ton of defense plutonium or defense plutonium materials from the State during the first 100 days of the year; and
6. retain continuing jurisdiction over this matter regarding the Defendants' ongoing and continuous compliance with Section 2566.

Respectfully submitted,

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