

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA,

Plaintiff,

v.

EXXON MOBIL CORP., *et al.*,

Defendants.

Civil Action No. 1:20-cv-01932-TJK

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants write in response to the Attorney General’s notice (Dkt. 93) regarding the Fourth Circuit’s decision in *West Virginia State University Board of Governors v. Dow Chemical Company*, --- F.4th ---, 2022 WL 90242 (4th Cir. Jan. 10, 2022), and the Eighth Circuit’s decision in *Buljic v. Tyson Foods, Inc.*, --- F.4th ---, 2021 WL 6143549 (8th Cir. Dec. 30, 2021). These decisions confirm that federal jurisdiction exists here.¹

Dow Chemical involved a challenge to Dow’s operation of a chemical facility adjacent to property owned by West Virginia State University. To operate the facility, Dow was required to, and did, obtain permits from the EPA under the Resource Conservation and Recovery Act (“RCRA”). See 2022 WL 90242, at *2. Dow removed to federal court, invoking federal-officer jurisdiction on the basis that it was “acting under” the direction of the EPA by taking actions required by its EPA permits. *Id.* at *5. The Fourth Circuit rejected Dow’s argument. The court “distinguished between entities subject to ‘intense regulation’ and those ‘acting under’ federal authority,” *id.* at *8, and held that Dow was merely “adher[ing] to minimum remedial measures to operate the facility for [its] own purpose,” rather than serving, as Defendants do here, as “*a private contractor* hired by the federal government to complete tasks to further government projects or goals, like *building military equipment.*” *Id.* at *11 (emphases added). In fact, the court described “matters involving private contractors working on behalf of the federal government” as “*the archetype case*” of “acting under” jurisdiction. *Id.* at *7 (emphasis added).

In *Buljic*, the poultry processor Tyson Foods argued that the federal government’s designation of the meat industry as “critical” during the COVID-19 pandemic and related regulations established it was “acting under” federal officers. The Eighth Circuit disagreed,

¹ By filing this response, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

reasoning that the government never directed Tyson Foods to take the relevant actions, and meat processing was not a “basic governmental task.” *Id.* at *5-6. Critically, however, the court reaffirmed—just like the Fourth Circuit in *Dow Chemical*—that federal-officer jurisdiction exists “where a private contractor provided the government with a product that it needed or performed a job that the government would otherwise have to perform,” but held that Tyson Foods had made no such showing. *Id.* at *5 (emphasis added).

Dow Chemical and *Buljic* confirm that federal-officer jurisdiction exists here. The Attorney General mistakenly argues that Defendants have asserted only that they “protect[ed] the vital national interest of promoting energy security and reducing reliance on oil imported from hostile powers.” Dkt. 93 at 3. But unlike in *Dow Chemical* and *Buljic*, the record before the Court shows far more: Defendants have established that they acted as government contractors in providing products to the government and performing jobs the government otherwise would have had to perform itself to fulfill its core national security responsibilities. *See* Dkt. 51 at 34-46. For example, Defendants produced and supplied large quantities of highly specialized fuels that are required to conform to exact DOD specifications to “satisfy national defense needs.” *Id.* 40. The federal government “enlist[ed] and fundamentally reshap[ed] the industry to produce necessary war products” in World War II and thereafter. *Id.* 35. Defendants also operated National Petroleum Reserve No. 1 at Elk Hills “‘in the employ’ of the Navy,” *id.* 44, and supplied oil for and managed the Strategic Petroleum Reserve for the government, *id.* 45. And Defendants produce oil and gas *owned by the government* from the Outer Continental Shelf at the direction, and under close contractual supervision, of federal officials, to fulfill Congress’s directive to make those government-owned resources “available for expeditious and orderly development.” *Id.* 41 (citing 43 U.S.C. § 1332(3)).

The government would otherwise perform these jobs itself to maintain national security, just as other sovereign countries do through their national oil companies. These are the exact types of activities—*i.e.*, providing the government with products (including “*military equipment*”) and performing jobs on its behalf—the Fourth and Eighth Circuits held are sufficient for federal-officer jurisdiction. *See Dow Chemical*, 2022 WL 90242, at *7-11; *Buljic*, 2021 WL 6143549, at *5-7.

In *Dow Chemical*, the defendants also asserted there was federal jurisdiction under *Grable Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). The Fourth Circuit rejected this argument on the ground that Dow’s facility was merely a RCRA site, and not a CERCLA superfund site. *See* 2022 WL 90242, at *14-16. The court explained that whereas challenges to actions taken pursuant to EPA’s cleanup orders under CERCLA raise substantial federal questions, *see id.* at *14, the RCRA does not provide for the same degree of federal involvement, and challenges to actions taken under RCRA permits do not necessarily raise sufficiently substantial federal questions, *see id.* at *16.

That analysis, focused as it is on the difference between the RCRA and CERCLA, has no application here because, as Defendants have explained, the Attorney General’s claims necessarily raise multiple substantial and disputed federal questions, including Defendants’ alleged liability for statements made to *federal* officials affecting the substance of *federal* policy, Dkt. 51 at 22-23; the propriety of Congress’ and the rest of the federal government’s analysis of the costs and benefits of fossil fuels and myriad decisions in statutes, regulations, and other decisions to promote and encourage their development and sale, *id.* 23-25; and the United States’ foreign-policy determinations regarding energy production and climate change, *id.* 25-26. These important statutory, regulatory, and executive determinations regarding the importance of fossil fuels are more than sufficient to support *Grable* jurisdiction. *See Dow Chemical*, 2022 WL 90242, at *14-

16.

For all of these reasons, *Dow Chemical* and *Buljic* support federal jurisdiction in this matter.

Dated: January 20, 2022

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CERTIFICATE OF SERVICE

I hereby certify that, on January 20, 2022, I caused the foregoing Response to Plaintiff's Notice of Supplemental Authority to be electronically filed using the Court's CM/ECF system, and service was effected electronically pursuant to Local Rule 5.3 to all counsel of record.

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