

**THE ENVIRONMENTAL LAW DIVISION  
BULLETIN**

August 1998  
Number 10

Volume 5,

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

---

**DEBATE OVER EPA UST PENALTY AUTHORITY CONTINUES**

CPT William Richards

The Environmental Protection Agency (EPA) has been assessing fines against several Department of Defense (DoD) installations for alleged violations of the underground storage tank (UST) provisions of the Resource Conservation and Recovery Act (RCRA).<sup>1</sup> This action was fueled by an opinion from the Justice Department's Office of Legal Counsel (OLC) which defined the EPA's Clean Air Act (CAA) enforcement authorities. The DoD is now challenging the EPA's enforcement actions, while engaging in discussions over EPA's authority to assess punitive penalties against Federal agencies. This debate, however, has no effect on installations' inability to pay state-imposed fines for alleged UST violations.

In early 1997, EPA began issuing Notices of Violation (NOVs) to Army, Air Force, and Navy installations for alleged "minor" violations of the RCRA UST requirements. The EPA requested payment of relatively small (i.e., generally less than \$1,000) punitive penalties. All DoD Services protested, questioning EPA's authority to impose such punitive fines on other Federal agencies, as well as the agencies' statutory authority to pay such penalties. EPA responded by telling the Services that if they did not promptly pay these "field citations," then the affected installations would be assessed inflated penalties as part of formal enforcement actions. The Army and Navy chose to pay their fines, but made it clear that these payments were made "under protest." The Air Force declined to pay a \$600 field citation and soon afterward was assessed a \$70,734 administrative fine. The Air Force and Army have each received an additional NOV assessing over \$90,000 for alleged UST violations. The authority of EPA to issue UST NOVs is now being challenged in three pending enforcement actions against Air Force and Army installations.

EPA's shift toward assessing UST fines was a spin-off from a debate with DoD over EPA's CAA penalty authorities. This discussion led the OLC to write an opinion in July of 1997, which was favorable to the EPA.<sup>2</sup> In reaching its conclusions, OLC relied upon the language of certain CAA provisions<sup>3</sup> granting EPA with authority to impose penalties against

---

<sup>1</sup> 42 U.S.C. § 6991, *et seq.*

<sup>2</sup> See, DoJ, Memorandum for Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, Judith A. Miller, General Counsel, Department of Defense, from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, Re: Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (July 16, 1997).

<sup>3</sup> See, 42 U.S.C. § 7413; 42 U.S.C. § 7602(e).

“persons” -- a definition that includes Federal agencies. OLC further examined CAA legislative history to conclude that Congress had made a sufficiently “clear statement” of its intent to allow EPA to penalize other agencies. EPA’s power could be exercised constitutionally because sufficient controls existed to preclude the need for litigation between agencies.

Relying on OLC’s CAA opinion, EPA now asserts that a sufficiently “clear statement” of EPA’s authority exists under the RCRA UST statutes. Specifically, the EPA asserts that it is authorized to include penalties in compliance orders issued for UST violations,<sup>4</sup> that these compliance orders apply to any “person,”<sup>5</sup> and the definition of “person” includes, for purposes of the UST statutes, “the United States Government.”<sup>6</sup> The EPA further argues that RCRA expressly provides it with authority to commence an administrative enforcement proceeding against any Federal agency “pursuant to the enforcement authorities contained in this Act.”<sup>7</sup> EPA asserts that these “authorities” include the RCRA’s UST sections.

DoD’s Office of General Counsel takes the position that the CAA situation does not track with UST statutory provisions. Congress amended RCRA via the Federal Facilities Compliance Act (FFCA)<sup>8</sup> to address the limitations of RCRA recognized in *U.S. Department of Energy v. Ohio*.<sup>9</sup> There, the U.S. Supreme Court had ruled that RCRA did not sufficiently express an intent to allow state regulators to enforce punitive penalties against Federal agencies.<sup>10</sup> In amending RCRA, Congress targeted the language of 42 U.S.C. § 6961(a), which relates only to RCRA requirements involving “disposal or management of solid waste or hazardous waste.” Congress did not similarly amend the related provision under the RCRA UST section.<sup>11</sup> In the UST-specific language, RCRA’s applicability to Federal facilities is more limited. In *U.S. Department of Energy v. Ohio*, the U.S. Supreme Court found that the imposition of punitive penalties was improper in the face of language that limits legal applicability. The DoD concludes that the RCRA UST section does not contain the “clear statement” of the Congressional intent that would allow EPA to assess punitive fines against other agencies. Thus, the RCRA example is distinct from its CAA counterpart.

The DoD has also expressed concern over whether it can legally authorize its components to pay punitive penalties for alleged UST violations, citing Comptroller General authority, the requirements of 31 U.S.C. § 1301, and Article I of the U.S. Constitution. Finally, DoD has raised sovereign immunity issues. It contends that by imposing punitive UST penalties, EPA has violated the FFCA requirement that grants federal agencies the opportunity to confer with the EPA Administrator before an administrative order or decision (such as a penalty) becomes final.<sup>12</sup>

---

<sup>4</sup> 42 U.S.C. § 6991e(c).

<sup>5</sup> 42 U.S.C. § 6991e(a).

<sup>6</sup> 42 U.S.C. § 6991(6).

<sup>7</sup> 42 U.S.C. § 6961(b)(1).

<sup>8</sup> 42 U.S.C. § 6961, *et seq.*

<sup>9</sup> 503 U.S. 607 (1992).

<sup>10</sup> The Court was looking to the language in 42 U.S.C. § 6961(a).

<sup>11</sup> 42 U.S.C. § 6991(f).

<sup>12</sup> 42 U.S.C. § 6961(b)(2).

At present, the question of EPA's authority to impose punitive sanctions on other Federal agencies for UST violations has not been submitted to DoJ's OLC. If an installation receives an NOV (or other notice of an EPA administrative action) seeking to impose penalties for UST violations, the Environmental Law Specialist (ELS) should immediately consult the servicing MACOM ELS and ELD for further assistance. (CPT Richards/CPL).

### **CONTRACTING-OUT INITIATIVE**

LTC Allison Polchek

The DoD is engaged in the process of examining all employee positions for opportunities to contract out those positions to the private sector.<sup>13</sup> All positions are to be examined, and must be coded in one of three ways: as inherently governmental in nature, a commercial activity exempt from competition under OMB Circular A-76, or a commercial activity eligible for competition. Even installation environmental staffs, normally considered governmental in nature, are being coded during this process.

Environmental Law Specialists (ELs) should be aware of current statutory and regulatory authority which designate many positions on environmental staffs as governmental in nature. Under the Sikes Act, positions responsible for the implementation and enforcement of integrated natural resource management plans cannot be contracted out.<sup>14</sup> This interpretation is further supported by explicit legislative history that states that fish and wildlife management and policy related activities are inherently governmental responsibilities.<sup>15</sup> Department of Defense Instruction 4715.3 and Army Regulation AR 200-3 also reiterate this point.<sup>16</sup> ELSs should ensure that responses to the DoD tasker accurately code these positions. (LTC Polchek/RNR).

### **FINES AND PENALTIES UPDATE**

MAJ Mike Egan

At the close of the third quarter of FY 1998, four new fines had been assessed against Army installations. Of the 172 fines assessed against Army installations since FY 1993, Response Conservation and Recovery Act (RCRA) fines (96) continue to predominate, followed

---

<sup>13</sup> As part of the Defense Reform Initiative Directive (DRID) #20, the services are directed to submit an inventory of inherently governmental and commercial activities not later than 31 Oct 98.

<sup>14</sup> Sikes Act: Extension and Amendments, Pub.L. No. 99-561, § 3, 100 Stat. 3149, 3150-51 (1986) (codified as amended at 16 U.S.C. § 670a (d)).

<sup>15</sup> H.Rep.No. 129(I), at 6 (1986), reprinted in 1986 U.S.S.C.A.N. 5254, 5257.

<sup>16</sup> DODI 4715.3 states that functions regarding the management and conservation of natural and cultural resources shall not be contracted. U.S. Dep't of Defense, Inst. 4715.3, Environmental Conservation Program (3 May 1996). Similarly, paragraph 2-7 of AR 200-3 states that management and conservation of natural resource functions are inherently Governmental functions. U.S. Dep't of Army, Reg. 200-3, Natural Resources-Land, Forest and Wildlife Management, para. 2-7a (28 Feb 95).

by the Clean Air Act (44), the Clean Water Act (23), the Safe Drinking Water Act (6), and, finally, the Comprehensive Environmental Response and Compensation and Liability Act (3).

Interestingly, in the latest reporting quarter, fines have been assessed under the Clean Air Act (CAA) almost as frequently as those assessed under RCRA. Because these two statutes have differing waivers of sovereign immunity, the scope of Federal liability also differs. The fact that an installation can pay punitive fines and penalties assessed under RCRA, but not the CAA, can create some confusion for state regulators. Installation Environmental Law Specialists must get involved with state agencies early in the process to ensure that they are aware that payment of fines and penalties by Army installations is governed by, *inter alia*, the Supreme Court decision of *U.S. Department of Energy v. Ohio*.<sup>17</sup> (MAJ Egan/CPL).

### HOW TO TELL ONE SUPERFUND PRELIMINARY ASSESSMENT FROM ANOTHER

Ms. Kate Barfield

This is a quick guide to help you distinguish two documents that bear similar names – the Preliminary Assessment (PA) and the Preassessment Screen (PAS). Each consider different aspects of a hazardous substance cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.<sup>18</sup> A PA supports the selection of a cleanup remedy. The second document, a Natural Resource Damage (NRD) PAS, is an initial examination of environmental damages that may remain after cleanup. Both the PA and PAS can dovetail. For example, the CERCLA Response PA can focus on remedying environmental concerns caused by contamination. Conversely, the NRD PAS uses the CERCLA remedy as a baseline when determining residual damages to natural resources. With so much overlap, confusion naturally arises. So, here is a run-down on how to tell your PAs from your PASs.

A **CERCLA Response Preliminary Assessment** is the initial screening device used to determine the level of cleanup needed to counter a hazardous substance release.<sup>19</sup> The EPA uses the Response PA to determine if a site should be placed on a list for priority cleanup. A lead agency uses this PA to determine whether cleanup is needed at a particular site, and whether it should initiate a removal or remedial action.<sup>20</sup> The PA provides a review of existing data, including management practices and information from potentially responsible parties (PRPs) and this information forms the basis for later response actions.<sup>21</sup>

There are two types of CERCLA Response PAs: the Remedial PA and Removal PA. Both are prepared at the beginning of a cleanup and involve an initial assessment of a site.<sup>22</sup> The Remedial PA looks at available facts to determine the level of cleanup. This includes information on the source and nature of the release, exposure pathways and targets, and

<sup>17</sup> 503 U.S. 607 (1992).

<sup>18</sup> 42 U.S.C. §§ 9601-9675 (1994).

<sup>19</sup> 40 C.F.R. § 300.5 (1996).

<sup>20</sup> 42 U.S.C. §§ 9616(b) (1994); 40 C.F.R. §§ 300.410(a); 300.420(a),(b) (1996).

<sup>21</sup> See, 40 C.F.R. § 300.410(c)(2) (1996).

<sup>22</sup> See generally, 40 C.F.R. §§ 420(b); 300.410(a),(b) (1996).

recommendations on further action.<sup>23</sup> The Removal PA examines the same sort of information, but focuses on immediate threats to health or the environment to determine if quick action is needed. When a response action is unclear, the PA provides the first informational round-up for a decisionmaker who will later choose between a removal or remedial action. All of these PAs have one thing in common, though -- they focus on public health concerns posed by a release.<sup>24</sup>

Like the PA, an **NRD Preassessment Screen (NRD PAS)** is an initial information screen. It is generally compiled for the benefit of the NRD Trustee – usually a federal/state official or Native American tribe.<sup>25</sup> (A PA is generally used by a lead agency.) According to the Department of Interior's regulations, the NRD PAS provides a Trustee with data about the natural resources affected by a hazardous substance release, identifies other potential Trustees, and gives guidance on whether a CERCLA response remedied environmental injuries.<sup>26</sup> The PAS also states whether a Trustee could maintain a successful legal claim<sup>27</sup> which would justify undertaking a more rigorous damage assessment.<sup>28</sup>

Unlike the CERCLA Response PA, the NRD PAS is primarily focused on environmental injuries, rather than matters of human health. Likewise, it does not focus on a risk assessment, but examines whether contamination at a site exceeds specific concentration levels for pollutants.<sup>29</sup> Another key difference is timing. The NRD PAS follows the remedy that the Response PA helped to define. This is because the NRD PAS looks to residual damages -- environmental damages not corrected by the CERCLA remedy --though it may use relevant information gathered in the Response PA.<sup>30</sup>

#### **Five Similarities Between the PA and the PAS:** Both documents...

1. Look to existing data, including exposure pathways and initial sampling.
2. Seek to detect and quantify a potential hazardous substance release.
3. Identify some of the key players (lead agencies, trustees, PRPs).
4. Provide the first compilation of information for later documents.
5. Act as a screen to determine subsequent action, including emergency responses

---

<sup>23</sup> 40 C.F.R. § 300.420(a),(b) (1996).

<sup>24</sup> 40 C.F.R. §§ 410; 415(a) (1996).

<sup>25</sup> 42 U.S.C. § 9607(f)(1),(2) (1996). For more information on NRD Trustees, see, 40 C.F.R. §300.615 (1996).

<sup>26</sup> 43 C.F.R. §§ 11.23(b); 11.23(e)(1)-(5) (1996).

<sup>27</sup> 43 C.F.R. § 11.23(b) (1996).

<sup>28</sup> For general guidance on assessments, see, 43 C.F.R. §§ 11.30-11.84 (1996).

<sup>29</sup> 43 C.F.R. §§ 11.25(e); 11.22(b); 11.23(e)(3) (1996).

<sup>30</sup> 43 C.F.R. §§ 11.23(e)(5) (1996). See also, *In Re Acushnet River and New Bedford Harbor*, 712 F. Supp. 1010, 1035 (D. Mass. 1989).

**Five Differences Between the PA and the PAS:**

1. The CERCLA Response PA concerns multifaceted elements of a cleanup action, while the NRD PAS examines restoration of the environment.
2. The CERCLA Response PA focuses on how to respond to any potential threats to human health and environment. The NRD PAS examines the environmental damages remaining after that response action is complete.
3. The CERCLA Response PA is more action-oriented than its NRD counterpart. The Response PA guides the lead agency's decision to undertake a removal or remedial action, or it justifies no-action. The NRD PAS informs the Trustee on whether to write another document -- the NRD Assessment.
4. The CERCLA Response PA focuses on potential human and environmental risks. The NRD PAS does not examine risk *per se*, but predetermined exposure levels.
5. A CERCLA Response PA focuses on cleanup, not subsequent legal claims. The opposite is true for the PAS. The NRD Trustee uses the PAS, in part, to demonstrate the likelihood of success in making a claim for damages.

If you have any further questions about PAs or PASs, contact this office. (Kate Barfield/RNR).