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ELD Fines and Settlements Report Major Robert Cotell

In January, ELD published its Fines and Settlements Report for the First Quarter FY 1999. This report indicated that Army installations received two new fines and settled seven cases during the quarter. In addition, for the first time, the report deemed five other cases closed due to the failure of states to pursue fines after installations had raised a sovereign immunity defense.

Each of the sovereign immunity cases deemed closed in the ELD Quarterly Fines and Settlements Report involved asserted violations of the Clean Air Act (CAA). Sovereign immunity has been waived for CAA enforcement by state regulators, but not for payment of state punitive fines. In each of the closed cases discussed in ELD's Report, Army installations had invoked sovereign immunity under the CAA, but then heard nothing further from their respective state regulators.

The decision to close these pending cases was made on an individual basis. Accordingly, it does not mean that all cases involving sovereign immunity are deemed resolved. The decision to close each case was made on a variety of factors. Such factors include the length of time that has passed since the violation, lack of contact from the state and the likelihood the state will revive the action in the future.

A number of installations are currently facing uncertainty in determining closure for specific cases that may involve sovereign immunity. In most of these cases, the installation has sent a letter to state regulators informing them that sovereign immunity precludes payment of fines, but the states have simply not responded. In general, the best practice under these circumstances is to maintain contact with state officials and attempt to receive official acknowledgment (by letter, motion, or otherwise) that the fine is no longer pending.

In some cases, however, it may be wise to “let sleeping dogs lie.” Over time, the failure of the state regulators to pursue an outstanding Notice of Violation may be deemed acquiescence to the United States’ position on sovereign immunity. (MAJ Cotell/CPL)

Invoking Sovereign Immunity in Clean Air Act Issues Major Robert Cotell

As the previous article has discussed, States have failed to close Clean Air Act (CAA) cases pending against installations -- even though the sovereign immunity defense has been raised. The reason for the States’ failure varies. Sometimes they are unfamiliar with the concept of sovereign immunity, believing that dismissal of a case will somehow affect their “rights.” Other times, the States believe that they may be able to resurrect an action if the CAA cases currently under appeal are decided in their favor. There is some truth to these assertions.

One invalid reason States keep cases open, however, results from the installation’s failure to adequately explain the scope of sovereign immunity. Once a state is told that the federal government is invoking “immunity” from State action, some regulators experience undue panic. States often, incorrectly, jump to the conclusion that they are powerless to regulate an installation. This issue becomes particularly dangerous when State regulators believe that their only regulatory recourse is to deny CAA permits after an installation invokes sovereign immunity.

In light of the above, it is important that the installation ELS adequately explain the sovereign immunity issue when an installation receives a CAA Notice of Violation from a state regulator. The ELS should stress to the regulator that, under the CAA, sovereign immunity applies only to the imposition of fines. In all other areas of the CAA, immunity has been waived. States may require corrective action and other measures to compel immediate compliance. It is in the best interest of the installation to acknowledge these requirements and express a willingness to cooperate. In addition, it is important to note that the installation is powerless to effect a waiver of sovereign immunity. This power rests only with Congress. Accordingly, a diplomatic letter can express to the State that this issue is beyond an installation’s control -- this is likely to have a positive effect on future dialogue with the regulators. Here is a sample letter that should be used by installations to invoke sovereign immunity. Obviously, the letter must be tailored by each installation to address the specifics of its case. (MAJ Cotell/CPL)

Sample Letter to State Regulators Invoking Sovereign Immunity for Cases Concerning the Clean Air Act

Date

Address of state regulatory agency

Dear _____,

This is in response to a Notice of Violation (NOV) issued from your office on (date) to (Installation) for violations of (cite state reference) pursuant to the Clean Air Act (CAA) and for demand of a fine in the amount of (amount).

The (Installation) takes very seriously its obligation to maintain compliance with environmental laws and regulations. In the area of environmental law, Congress has frequently waived sovereign immunity to require federal agencies to comply with state, interstate, and local pollution control laws. Indeed, the CAA's federal facilities provision (42 U.S.C Section 7418(a)) contains a partial waiver of sovereign immunity that directs federal agencies to comply with air pollution control programs "to the same extent as any non-governmental entity." In addition, it subjects federal facilities to administrative fees or charges to defray the costs of air pollution control programs, as well as the "process and sanctions" of air program regulatory agencies.

In light of the above, to the extent that (Installation) has violated the CAA, it has a duty and obligation to correct the deficiencies expeditiously and in accordance with all applicable state laws. The violations in the above noted NOV are being handled by (Director of Installation Environmental Program) and specific action is being taken to bring (Installation) into immediate compliance and to correct deficiencies.

Please note that although the waiver of sovereign immunity in the CAA includes subjecting federal facilities to "process and sanctions," the precise meaning of these words has been the subject of litigation in federal courts. Indeed, the position of the United States taken in pending litigation on this matter will prevent (Installation) from paying the fines requested in the NOV in this case. The terms "process and sanctions" were first interpreted by the United States Supreme Court when it examined the federal facilities provision of the Clean Water Act (CWA) in *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992). The Court found that this aspect of the CWA's waiver of sovereign immunity, which is virtually identical to the waiver in the CAA, did not subject federal facilities to "punitive fines" imposed as a penalty for past violations. This was based on a finding that the CWA did not contain a clear and unequivocal congressional waiver of sovereign immunity on that point.

The Supreme Court's decision in *DoE v. Ohio* was formally extended to the CAA in *U.S. v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995), holding that the CAA does not authorize Federal agencies to pay punitive fines. More recently, a federal district court in California similarly held that the CAA does not authorize federal agencies to pay punitive fines. *Sacramento Metropolitan Air Quality Control District v. U.S.*, 29 F. Supp. 652 (E.D. Cal. 1998). Although a contrary result was reached in

another federal court case where a district court judge deviated from the model analytical approach of the U.S. Supreme Court, that case is currently pending appeal before the Federal Court of Appeals for the 6th Circuit. *U.S. v. Tennessee Air Pollution Control Board*, 967 F. Supp. 975 (M.D. Tenn. 1997), appeal pending, No. 97-5715 (6th Cir.). The position of the United States, as articulated by the Department of Justice in defense of litigation on this matter, is that Congress has not waived sovereign immunity under the CAA for the payment of punitive fines imposed by states.

(Installation) is bound by this position. No individual installation may waive sovereign immunity. Indeed, not even an agency such as the Army or the Department of Defense may waive sovereign immunity. Only Congress has that power, and, until Congress exercises it, (Installation) cannot legally pay the fines requested in the NOV.

The lack of a waiver of sovereign immunity for punitive fines in no way exempts federal agencies from full compliance with the CAA. Federal agencies are bound to comply with all laws and regulations for air pollution control, and are subject to payment of administrative fees and any court-imposed coercive fines. Where deficiencies are noted in a federal facility's air pollution control activities, the facility has the same obligation as non-governmental entities to expeditiously correct all infractions. Again, (Installation) remains firmly committed to environmental compliance and will work closely with your agency to assure all compliance issues related to this matter are quickly resolved.

Sincerely,

Installation Commander/Staff Judge Advocate

Puerto Rican Case Explores CERCLA Jurisdictional Limit
Lieutenant Colonel David Howlett

A recent case in the Federal District Court in Puerto Rico explores the jurisdictional limits of Section 113(h) in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In *M.R. (VEGA ALTA), Inc. v. Caribe General Electric Products, Inc.*, the plaintiffs sued both private defendants and the United States Environmental Protection Agency (EPA), alleging that these parties were responsible for solvent contamination in plaintiffs' water supply. In addition to bringing CERCLA claims and a variety of tort claims against private defendants, plaintiffs also used CERCLA's citizen suit provision, CERCLA §310(a)(1), to challenge the EPA. This precedent is important to the Army since we have been delegated the same authority exercised in this case by the EPA.

Here are some of the facts behind this case. The EPA had ordered the private defendants to implement a remedial action in 1988. The EPA modified its remedial approach several times over the next ten years, although the remedial action was still underway. So, plaintiffs brought suit to compel the private defendants to carry out the agency's remediation order, under the CERCLA's citizen suit provision, CERCLA §310(a)(1). In addition, plaintiffs sued the EPA under CERCLA §310(a)(2), alleging that EPA had not selected an adequate remedy, had not implemented selected remedies, and had failed to perform required five-year reviews. Plaintiffs also sued the EPA under the Administrative Procedure Act.

The Court began its discussion of the citizens' suit claims by stressing that CERCLA's grant of federal jurisdiction is limited by CERCLA §113(h). As for the claim against the private defendants, the Court found that it was allowable since that claim sought to enforce an EPA order issued under CERCLA §106.

Regarding the claim against the EPA, the District Court began by examining CERCLA's legislative history. The Court determined that, according to CERCLA §113(h)(4), it had no jurisdiction over the plaintiffs' challenge to an ongoing response action, stating:

Plaintiffs wish to require the EPA immediately to (1) initiate control of soil contamination by use of certain technologies, (2) initiate extraction and treatment of contaminated groundwater, and (3) conduct and act upon the findings of a remedy review. In order to provide this type of relief, we could not avoid interfering with the EPA's cleanup efforts and running afoul of the mandate of section 113(h).

The Court also found that the Administrative Procedure Act claim was barred since CERCLA §113(h) refers to "any challenges" to a removal action -- not just those brought under CERCLA.

On the other hand, the Court found that the request for a five-year review did not constitute a challenge to the ongoing response action. On this matter, the Court stated: "[r]equiring the EPA to produce a five-year review in accordance with CERCLA § 121(c), 42 U.S.C. § 9621(c), would not affect the remedial action or unduly compromise the EPA's limited resources, in contravention of congressional policy behind section 113(h)."

Under the logic of this case, a challenge can be brought to compel CERCLA procedural requirements as long as there is no interference with the implementation of the remedy. This could require an inquiry into whether requested relief interferes with a remedy and is not preferable to a "bright-line" rule that would bar all CERCLA challenges to an ongoing remedy. This decision represents an erosion of CERCLA §113's protections.
(LTC Howlett/LIT)

Longhorn Pipeline Settlement Reached Major Silas DeRoma

On 5 March 1999, the United States District Court for the Western District of Texas approved a settlement among the parties to the Longhorn Partners Pipeline (LPP) dispute. Originally, the plaintiffs sued to stop the operation of a proposed 700-mile pipeline, claiming that the project violated the requirements of the National Environmental Policy Act. The

suit named several federal defendants: the Army, the Environmental Protection Agency (EPA), the Department of Transportation (DOT), and the Federal Energy Regulatory Commission. Among other things, the plaintiffs alleged that Army involvement in the case stemmed from an LPP application for a six-mile right-of-way across Fort Bliss, Texas and from actions by the plaintiffs that fell within the jurisdiction of the Army Corps of Engineers.

The District Court granted the injunction in August 1998 and ordered the EPA “and/or” DOT to prepare an Environmental Impact Statement addressing the construction and operation of the pipeline. Under the terms of the settlement, the plaintiffs have agreed to accept preparation of an Environmental Assessment (EA) by EPA and DOT. This EA will include an analysis of the affected environment and a consideration of alternatives to construction (such as re-rerouting the pipeline around environmentally sensitive areas), as well as alternative measures to mitigate any identified impacts. EPA and DOT expect the EA to be completed in a seven-month period. The Army will be a cooperating agency under the agreement. (MAJ DeRoma/LIT)

Environmental Law Division, U.S. Army Legal Services Agency, Quarterly Fines and Settlements Report, (1st quarter, 1999). This report is available upon request by emailing the author at: cotelrj@hqda.army.mil.

42 U.S.C. §7401, et. seq.

The Supreme Court first articulated this view in *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992), where it interpreted a congressional waiver of sovereign immunity for the Clean Water Act, 33 U.S.C. §1251, et. seq., which was similar to the CAA. The Supreme Court’s decision was formally extended to the CAA in *U.S. v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995).

One recent case required a detailed letter from the DoD Deputy General Counsel (Installations and Environment) explaining the concept of sovereign immunity to state regulators and addressing their erroneous assumptions about the immunity’s scope.

M.R. (VEGA ALTA), Inc. v. Caribe General Electric Products, Inc., 31 F. Supp. 2d 226 (D.P.R. 1998); 1998 U.S. Dist. LEXIS 19863 (Dec. 3, 1998).

42 U.S.C. §§ 9601-9675.

Plaintiffs were represented by Ms. Margaret Strand, a Washington D.C. practitioner familiar to many Army lawyers, through her educational activities.

42 U.S.C. § 9659(a)(1); CERCLA §310(a)(1). This note does not discuss the private defendant claims or the Federal Tort Claims Act count against the EPA.

See, Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

The EPA is required to review all remedial actions that result in hazardous substances remaining on the site no less than every five years after the remedial action is initiated. Such review is meant to assure that human health and the environment are being protected by the remedial action being implemented. 42 U.S.C. § 9621(c); CERCLA § 121(c). See also, 40 C.F.R. § 300.430(f)(4)(ii).

5 U.S.C. § 706.

42 U.S.C. § 9613(h); CERCLA §113(h) states:

No Federal court shall have jurisdiction under Federal Law . . . to review any challenges to removal or remedial action . . . , or to review any order . . . , in any action except one of the following:

- (1) An action under section 9607 of this title [CERCLA] to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- 3) An action for reimbursement under section 9606(b)(2) of this title.
- (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this [Act]. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

See, 42 U.S.C. § 9613(h)(2); CERCLA § 113(h)(2), *supra*, note 12.

M.R. (VEGA ALTA), Inc. v. Caribe General Electric Products, Inc., 1998 U.S. Dist. LEXIS 19863 at *22-23.

Id. at *23, quoting, *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995).

Id. at *23.

Spiller v. Walker, No. A-98-CA-255-SS (W.D. Tx. 1999).
42 U.S.C. §§ 4321-4370d.