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UNDER WHAT AUTHORITY DO FEDERAL FACILITIES PERFORM CERCLA CLEAN UPS?

Mike Lewis¹

The U.S. Court of Appeals for the Ninth Circuit currently is deciding whether section 120² of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides an independent authority for cleanups of federal facilities. The case is *Fort Ord Toxics Project v. California Environmental Protection Agency et al.*³ and involves the clean up at the former Fort Ord, California.

The former Fort Ord is on the National Priorities List⁴. It was conducting a CERCLA clean up that involved moving remediated sand from beach firing ranges to layer a landfill prior to capping. In order to do this, the Army designated the landfill a Corrective Action Management Unit ("CAMU")⁵ after coordination with the California Environmental Protection Agency ("CALEPA"). The Fort Ord Toxics Project ("FOTP") sued CALEPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act ("CEQA")⁶. FOTP named the Army as Real Parties in Interest and sought to enjoin the Army from executing its clean up plan as part of the suit.

The Army immediately removed this challenge to U.S. District Court⁷, and citing CERCLA section 113(h)⁸ sought to have it dismissed. CERCLA section 113(h) provides that: No Federal court shall have jurisdiction under Federal law. . . or under state law which is applicable or relevant and appropriate under section 9621 of this title

¹ Mike Lewis is an alias for Robert Lewis, an irascible old civilian attorney at ELD.

² 42 U.S.C. § 9620 (1998).

³ *Fort Ord Toxics Project et al., v. California Environmental Protection Agency et al.*, No. 98-16100 (9th Cir. 1999).

⁴ The National Priorities List ("NPL") is the prioritized list of sites needing clean up, updated annually, called for in accordance with 42 U.S.C. § 9605(a)(8)(B).

⁵ California state law generally prohibits disposal on the land of all hazardous waste. Cal. Code Regs. Tit 22, § 66264.552(a)(1), however permits the designation of a CAMU into which certain untreated hazardous waste as part of an overall remedy, as a variance from the general prohibition.

⁶ CAL. PUB. RES. Code §§ 21000 – 21178.1. CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

⁷ The basis for the Army's removal was 28 U.S.C. § 1442(a) which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

⁸ 42 U.S.C. § 9613(h).

(relating to clean up standards) to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title,

FOTP responded, among other arguments⁹, that clean up activities on federal facilities are selected under CERCLA section 120 and not section 104. Therefore, FOTP reasoned that the Army could not avail itself of CERCLA section 113(h) which was limited to actions undertaken under section 104 or ordered under section 106.

FOTP argued that remedies on federal facilities are not selected under section 104, but under 120(e)(4)(A)¹⁰ of CERCLA. This section is entitled “Contents of Agreement” and states that “Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following: A review of alternative remedial actions and selection of a remedial action by the head of the relevant agency. . . .” FOTP said that when Congress passed CERCLA section 120 in 1986 to create a special program to address hazardous substances remediation at federal facilities. This separate program, reasoned FOTP, was created in response to concerns both about the magnitude of toxic waste at these sites and about the lack of attention this problem was receiving under CERCLA. The exclusion of section 120 clean ups from the section 113(h) jurisdictional bar was thus, consistent with Congress’s efforts to enhance public oversight of federal facility clean ups. In further support of its position, FOTP pointed out that other sections of CERCLA distinguish between sections 104 and 120, such as section 113(g).¹¹

Unlike FOTP, which relied strictly on statutory interpretation, the Army noted that the issue of section 120 making the clean up of federal facilities outside the reach of section 113(h) has been examined by a number of courts and rejected. See *Hearts of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (W.D. Wash 1993); *Werlein v. United States*, 746 F. Supp 887, 892 (D. Minn. 1992); vacated in part, 793 F. Supp. 898 (D. Minn. 1992); see also, *Worldworks, Inc. v. United States Army*, 22 F. Supp. 2d 104 n.6 (D. Co. 1998). The Army argued that FOTP’s interpretation was directly at odds with the judicially recognized purpose of section 113(h) to expedite clean ups by insulating from judicial review until they have been implemented.

The District Court found that the clean up was selected under section 104 as delegated to the Secretary of Defense and that section 120 “establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities.”¹² The court agreed with *Werlein* that section 120 “provides a road map for the application of CERCLA and rejected FOTP’s position that *Werlein* was wrongly decided.¹³ The court also rejected FOTP’s reliance on CERCLA section 113(g) as misplaced. The court stated that because this section contained references to both sections 104 and 120 was not dispositive. To contrary, it found the reference in this section to the President taking the action as supporting the Army’s case.¹⁴ Finally, the court rejected FOTP’s reliance on *U.S. v. Allied Signal Corp.* 736 F. Supp. 1553 (N.D. Cal 1990) for the proposition that section 120 governed federal facility clean ups, because it did not directly address the issue of whether Congress, in enacting section 120, intended to by-pass the President.¹⁵

⁹ FOTP also claimed that CERCLA 113(h) does not bar challenges brought under state laws such as CEQA that are not applicable or relevant and appropriate requirements (ARARs), and if it does, this challenge must be remanded to state court.

¹⁰ 42 U.S.C. §9620(e)(4)(A).

¹¹ 42 U.S.C. § 9613(g)(1) distinguishes between investigations under sections 104 and 120.

¹² Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681 RMW May 11, 1998, at 8.

¹³ *Id.*, at 10.

¹⁴ *Id.*

¹⁵ *Id.*, at 12.

FOTP appealed the District Court's order arguing that the lower court erred in not finding that section 120 was a separate authority for remedy selection. FOTP argued that by creating section 120, Congress moved the authority for the selection of remedial action from section 104 to section 120 to prevent the President from delegating authority to select a remedy and that the language and structure of CERCLA demonstrate a clear distinction between actions taken under CERCLA 120 and those taken under 104. The Army reiterated its successful district court position. Oral argument took place on 22 May 1999. A decision is pending. (Mr. Lewis/LIT)

Regulatory Fees, ... or Taxes? Sorting Out the Difference

MAJ Robert J. Cotell and LTC Richard A. Jaynes

In recent months several installation environmental law specialists (ELs) have contacted ELD concerning potential payment of various fees imposed by states for environmental services. The fees vary in name and type to include "hazardous waste management fees," "water pollution protection fees," and "fees for environmental services." This article re-examines the familiar issue of federal liability for state imposed regulatory fees and taxes. The first section provides a review and update of the law of fee/tax liability. The second section provides a template for installation ELs to use in examining fee/tax issues. The final section outlines the steps to obtain HQDA approval to refuse payment of state imposed fees after an EL has concluded that a state or local regulator has imposed an unlawful tax.

I. Fee/Tax Liability

A. General

In general, the federal government is immune from state requirements including fees and taxes. This immunity is constitutionally established through the Supremacy Clause,¹⁶ and the Plenary Powers Clause.¹⁷ In addition, the Supreme Court established very early that "the Constitution and the laws made in pursuance thereof are supreme . . . and control the laws of the respective states, and cannot be controlled by them."¹⁸

Regarding taxes, the federal government cannot be made to pay a tax without a clear "congressional mandate."¹⁹ Likewise, the federal government is not subject to state requirements unless it has clearly consented to such in an unequivocal waiver of sovereign immunity.²⁰ These waivers cannot be implied,²¹ and must be strictly construed in favor of the United States.²²

B. Statutory Scheme

Among the major environmental laws there are four waivers of sovereign immunity concerning the issue of fees that will be reviewed here:

¹⁶ U.S. CONST. art. VI, cl. 2.

¹⁷ U.S. CONST. art. I, § 8, cl. 17.

¹⁸ *McCulloch v. Maryland*, 4 Wheat 316, 426, 4 L.Ed. 579 (1819).

¹⁹ *Kern-Limerick, Inc v. Scurlock*, 347 U.S. 110, 122 (1954).

²⁰ *Hancock v. Train*, 426 U.S. 167, 198, (1976).

²¹ *Missouri Pacific Railroad Co. v. Ault*, 256 U.S. 554 (1920).

²² *U.S. Department of Energy v. Ohio*, 112 S.Ct. 1627, 1633 (1992).

Clean Water Act (CWA): Congress waived immunity for “. . . all Federal, State, interstate, and local requirements, . . . in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.”²³

Resource Conservation and Recovery Act (RCRA): Federal facilities' solid and hazardous waste programs must comply with “. . . all Federal, State, interstate, and local requirements, . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.”²⁴ Unlike the CWA, the RCRA further defines these "reasonable service charges" to include:

“. . . fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed”²⁵

Safe Drinking Water Act (SDWA): The 1996 amendments to the SDWA added a waiver as to regulatory fees that is virtually identical to the RCRA waiver.²⁶

Clean Air Act (CAA): The CAA waiver may be broader than those found in the CWA, RCRA, or SDWA, because it omits the word "reasonable" from its waiver that requires compliance with:

“. . . all Federal, State, interstate, and local requirements, . . . in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply . . . (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, . . .”²⁷

C. Fees v. Taxes

All of the above waivers of sovereign immunity only concern fees assessed by states against the federal government. Fees are charges for services rendered by state or local governments in administering their environmental programs. As one court put it, the "classic regulatory fee" is a levy "imposed by an agency upon those subject to its regulation" and used to raise money that is then placed into "a special fund to defray the agency's regulation-related expenses."²⁸ Besides such indirect regulatory purposes as targeted revenue raising, fees may also accomplish a direct regulatory purpose such as encouraging or discouraging certain behavior (e.g., waste reduction). By contrast, taxes are enforced contributions to provide for the general support of the entire community. The environmental waivers quoted above do not waive sovereign immunity for state taxation.

In light of the discussion above, drawing the distinction between a fee and a tax is legally important, but is often difficult to accomplish. In 1978 the Supreme Court in *Massachusetts v. U.S.*²⁹ established a test for analyzing all government-imposed fees for services. Under the *Massachusetts* test, if a fee satisfies all of the following three prongs it may be paid as a reasonable service charge:

- (1) Is the assessment non-discriminatory?;

²³ 33 U.S.C. § 1323(a).

²⁴ 42 U.S.C. § 6961(a).

²⁵ *Id.*

²⁶ 42 U.S.C. § 300j-6(a).

²⁷ 42 U.S.C. § 7418(a).

²⁸ *State of Maine v. Department of the Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992).

²⁹ 435 U.S. 444 (1978). The *Massachusetts* case involved state immunity from federal taxation. The Court recognized that the states have a qualified immunity from federal taxation and established a three-pronged test to determine whether the immunity applies. By analogy the same principle may be applied in the context of state taxes on federal facilities. The use of the analogy was adopted by the First Circuit in *State of Maine v. Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992). It should be noted, however, the test was not adopted by the Eighth Circuit in *United States v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990).

- (2) Is it a fair approximation of the cost of the benefits received?; and,
- (3) Is it structured to produce revenues that will not exceed the regulator's total cost of providing the benefits?

The Department of Defense (DoD) issued a guidance document in June 1984 stating that all environmental service charges levied by a state should be evaluated against the three *Massachusetts* criteria.³⁰ In 1996, a DoD Instruction³¹ incorporated these criteria with others in guidance on when environmental fees are payable. Although the waivers of sovereign immunity noted above were passed after the *Massachusetts* case, they are consistent with it and may reflect an attempt by Congress to codify at least part of the test.³² Moreover, the Department of Justice (DoJ) has adopted the *Massachusetts* standard as the method for analyzing fee/tax issues. For example, in litigation involving state hazardous waste fees in New York the DoJ argued that the test was applicable to bar the state from imposing the fees.³³

D. Analysis under *Massachusetts*

Each of the prongs of the *Massachusetts* test has been further illuminated by litigation concerning environmental fees.

1. Discrimination Prong: Under *Massachusetts* the federal government must not be treated any differently in the enforcement of the fee requirement than other regulated entities. For example, in a case involving the imposition of RCRA hazardous waste fees, a federal district court summarily found that a state which exempted itself from imposition of the fees violates the nondiscrimination prong of the *Massachusetts* test.³⁴ Although analysis of this prong under the CAA may lead to a contrary result,³⁵ installations should nevertheless be alert to discriminatory air program fees.

³⁰ Department of Defense Memorandum, Subject: State Environmental Taxes, dated 4 June 1984. Although this letter from the Assistant Secretary of Defense for Installations to Service Secretaries does not specifically mention the *Massachusetts* case, it details the *Massachusetts* criteria as the basis for determining whether fees from a state are reasonable service charges or taxes.

³¹ DoD Instruction 4715.6, Environmental Compliance (Apr. 24, 1996) states that it is DoD policy to:

- “4.7. Pay reasonable fees or service charges to State and local governments for compliance costs or activities except where such fees are:
 - 4.7.1. Discriminatory in either application or effect;
 - 4.7.2. Used for a service denied to a Federal Agency;
 - 4.7.3. Assessed under a statute in which the Federal sovereign immunity has not been unambiguously waived;
 - 4.7.4. Disproportionate to the intended service or use; or
 - 4.7.5. Determined to be a State or local tax. (The legality of all fees shall be evaluated by appropriate legal counsel).”

³² For example, the fee waivers in RCRA and SDWA define reasonable service charges to include “nondiscriminatory charges,” an apparent codification of the first prong of the *Massachusetts* test. Also, these statutes also enumerate several types of fees that are payable, which may reflect a conclusion as to the benefits that such fees would provide to regulatory programs (i.e., addressing the second and third prongs of the test).

³³ *New York State Department of Env'tl. Conservation v. United States Dep't of Energy*, 850 F. Supp 132, 135 (N.D. NY)(1994). The case involved fees imposed prior to a 1992 amendment to RCRA that created waiver quoted in section B, above. The court was construing a previous waiver that obligated the federal government to pay “reasonable service charges.”

³⁴ *New York State Department of Env'tl. Conservation v. United States Dep't of Energy*, 89-CV-194 to 197, 1997 U.S. Dist. LEXIS 20718, at *22 (N.D. NY Dec. 24, 1997). Ironically, the court ordered the U.S. to pay the fees because the state had corrected the discriminatory practice by retroactively paying the fees during the litigation.

³⁵ *U.S. v. South Coast Air Quality Management District*, 748 F.Supp. 732 (C.D. Cal. 1990). The court held that it was not discriminatory to exempt a state from air fees while the U.S. must pay. The court reasoned that the CAA waiver of sovereign immunity was “to the same extent as any nongovernmental

The practice of states exempting their own programs is not uncommon. A recent ELD review of a Kansas statute revealed exactly this discrimination.³⁶ Analysis under the discrimination prong is generally the easiest aspect of fee/tax review because a problem may be plain from statutory text. An ELD reviewing a state statute should be careful to look for any provisions of state law which exempt out any particular entity: government or private. If the entity is in the same legal position as the federal government (i.e., a user of regulated substances, generator of regulated pollutants, or an applicant for environmental permits) it must be subject to the same fees.³⁷

2. Benefits Prong: The fee charged must be a fair approximation of the benefits received in order to be considered "reasonable." In announcing the three-part test in *Massachusetts*, the Supreme Court stressed that "[a] governmental body has an obvious interest in making those who *specifically benefit* from its services pay the cost . . ." (emphasis added).³⁸ Indeed, courts have determined that the "benefits to be examined in applying the test are those on whom the charges are imposed, not merely benefits to the public at large."³⁹ Over the years, however, a strict application of the benefits prong has eroded. Litigation in New York illustrates this point, where a federal district court found that hazardous waste generator and transporter fees were permissible even though federal facilities received no specific service.⁴⁰ According to the court ". . . the second prong of the Massachusetts test does not require an exact correlation, . . . between the costs of the overall services provided and the fees assessed for such services."⁴¹ The court noted that whether a federal entity actually uses any state services is irrelevant, because they constitute a "benefit" as long as the U.S. *could* use the state's services in the future, if needed. Likewise, a simple showing that the dollar value of specific services rendered by the state was less than charges for those services was not enough to establish a lack of benefit. Such a showing does not take into account "overall" benefits that facilities receive as a result of program availability.⁴² According to the court, the state need only show ". . . a rational relationship between the method used to calculate the fees and the benefits available to those who pay them."⁴³ The First Circuit pursued similar reasoning in a RCRA fee case.⁴⁴

The federal government has had little success in challenging environmental fees on the basis that they are excessive or do not approximate the costs of benefits received. The cases noted above demonstrate that federal courts may be expected to apply deferential standards when analyzing the "reasonableness" of environmental fees. An installation contesting a fee solely on the basis that there are little or no benefits should be alert to these

entity . . ." Accordingly, under the CAA, a state may be treated differently as it is considered a "governmental entity."

³⁶ Environmental Law Division Memorandum, Subject: Kansas Solid Waste Tonnage Fee, dated 2 August 1999. The memorandum notes that "[t]he State of Kansas has established a statutory scheme that allows for the collection of solid waste tonnage or "tipping" fees of \$1.00 for each ton of solid waste disposed in any landfill in the state (KSA section 65-3415b(a)). . . . The statute provides, however, that these fees do not apply to "construction and demolition waste disposed of by the state of Kansas, or by any city or county in the state of Kansas, or by any person on behalf thereof." KSA Section 65-3415b(c)(5)." The memorandum concludes that the fee is discriminatory and should not be paid.

³⁷ DoD's success in encouraging the State of California to revamp its hazardous waste fees to remove discriminatory provisions is another example of this approach.

³⁸ *Massachusetts v. U.S.*, 435 U.S. 444, 462 (1978).

³⁹ *United States v. State of Maine*, 524 F. Supp. 1056 (1981).

⁴⁰ *New York State Dept. of Env'tl. Conservation v. United States*, 850 F.Supp 132 (N.D.NY 1994).

⁴¹ *Id.* at 142.

⁴² *Id.* at 136.

⁴³ *Id.* at 143.

⁴⁴ *State of Maine v. Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992). See also *New York State Dept. of Env'tl. Conservation v. United States*, 772 F.Supp 91 (N.D. NY 1991), for a discussion of the second and third prongs of the *Massachusetts* test.

broad standards. Given the current state of the law the overwhelming majority of "benefits" analyses will lead to the conclusion that the state may levy the fee.

3. Fee Structure Prong: Is the fee structured to produce revenues that will not exceed the total cost to the state of the benefits supplied? If this prong is addressed strictly in terms of total program revenues as compared to expenditures, relief from payment of fees will be unlikely as long as there is a "rough relation between state regulatory costs and the fees charged."⁴⁵ This analytical approach has not received much attention in practice probably because obtaining the fiscal information necessary to pursue it successfully would be difficult.

Problems associated with the third prong are more easily identified when a state fails to restrict the use of environmental fees to related environmental programs. For example, ELD concluded that installations in Georgia should not pay certain hazardous waste fees because these revenues are placed into a fund from which the state legislature may make general appropriations. Similarly, DoJ's Office of Legal Counsel opined that a District of Columbia CAA program of charging monthly fees for parking spaces was essentially designed to create a subsidy for its mass transit system.⁴⁶ ELSs should raise concerns whenever state statutes allow environmental fees to be used for broad purposes or comingled with unrelated state funds.

II. Fee/Tax Template

The following summarizes the foregoing discussion into a template for analyzing fee/tax issues:

A. Closely examine the applicable waiver of sovereign immunity.

That is, look at the waivers reviewed above for the CWA, RCRA, SDWA, or CAA to see if the fee in question is clearly within the general scope of the waiver.

B. Does the levy pass each of the prongs in the Massachusetts v. U.S. test?

The following three prongs reflect a lens for further examining waivers of sovereign immunity for regulatory fees based on judicial decisions. If the answers to all three of the primary questions are yes, then the fee is a payable service charge, not an unlawful tax.

1. Is the levy imposed in a nondiscriminatory fashion?
 - Are there regulated entities within the state on whom the fee is not imposed?
 - Are those entities similarly situated with the federal government (i.e., do they generate regulated substances and apply for environmental permits)?
 - Is the state government required to pay its own fees?

2. Is the levy based on a fair approximation of the costs of the benefits (i.e., is it associated with a discernible benefit to the payor)?
 - Characteristics associated with benefits to the payor (i.e., "user" fees):
 - payments are made in return for government-provided benefits
 - duty to pay arises from voluntary use of services (e.g., receipt of a permit)
 - failure to pay results in termination of services
 - levy is imposed by an *agency* in capacity as vendor of goods and services

⁴⁵ State of Maine v. Department of the Navy, 973 F.2d 1007, 1013 (1st Cir. 1992).

⁴⁶ **DoJ Opinion of the Office Of Legal Counsel, Subject: Whether the District of Columbia's Clean Air Compliance Fee May Be Collected from the Federal Government, 1996 OLC LEXIS 10 (23 Jan. 1996). This opinion, while it did not specifically track with the structure of the Massachusetts test, is an excellent discussion of the legal principles that support it.**

- payments are calculated to recoup actual costs of regulating the payor
- services, though not actually used by payor, are available to the payor
- payments, though not actually equal to direct services received, support overall general benefits of the regulatory program

- Characteristics not associated with benefits to the payor (i.e., taxes):
 - liability arises from status (e.g., assessments for property owners)
 - failure to pay results in penalties
 - duty to pay arises automatically, regardless of services provided
 - levy is imposed by the *government* in capacity as a sovereign agent
 - payments are fixed and charged the same to all users
 - payments are used to provide benefits to the public at large
 - services are not available to the payor

3. Is the levy structured to produce revenues that will not exceed the total cost to the state government of the benefits to be supplied to the payor?

- Does it demonstrably support only the cost to the state of administering the regulatory program? or,
- Does it produce net revenues to the state for potentially unrelated uses (i.e., nonregulatory government programs or the general public)?

III. Procedures for Approval to Not Pay Unlawful Fees

In resolving environmental fee/tax issues, it is essential that all DoD facilities within a state act in unison. Inconsistent approaches among installations to a fee/tax issue is a recipe for long-term contentious relations between the non-paying installation and the regulatory agency. To maintain an installation's credibility and to avoid acrimony that can spill over into all media programs, thorough coordination among all DoD (and, preferably, all federal) installations and with headquarters is required before deciding to not pay fees. Moreover, the ability of the U.S. to successfully litigate fee/tax cases may be thwarted by installations that take inconsistent positions on issues that arise.

As noted at the outset, the four environmental statutes discussed here all contain waivers of immunity for the payment of regulatory fees. In practice, installations should be paying all environmental fees assessed by states under these programs unless ELD, in consultation with other DoD Services, makes a written determination that they are unlawful taxes. In general, when a state agency requests the payment of a regulatory fee, the installation ELS should be the first to analyze the issue of liability using the template outlined in the previous section. The ELS should research the state law, make copies of relevant statutes, and examine prior versions of the statutes to determine if there has been a recent change. In addition, the ELS should determine whether the installation has paid the fee in the past, and note any other relevant background information.

If the ELS concludes that the fee should not be paid, the ELS should diplomatically ask the regulatory agency to delay enforcement of the fee until it has been reviewed by higher federal authorities. Often times the state agencies will not be familiar with the concept of sovereign immunity, or the *Massachusetts* test. The ELS should explain the laws and request cooperation. The ELS should stress that the installation has a duty and obligation to maintain compliance with all state laws and regulations, but that a sovereign immunity issue affects the installation's authority to pay the fee, and must be addressed at higher levels.⁴⁷

The ELS should next forward the ELS's legal opinion detailing the specific statutory sections and relevant facts to the servicing Army Regional Environmental Coordinator (REC)

⁴⁷ William D. Benton and Byron D. Baur, *Applicability of Environmental "Fees" and "Taxes" To Federal Facilities*, A.F. L. REV. 253, 261 (1989). This article includes many practical tips on resolving fee/tax issues.

and the MACOM. The Army REC should alert ELD and all Army installations within the jurisdiction to the issue and find out whether each installation has been paying the fees in question. Based on input from other Army installations, the Army REC should augment the factual summary and legal opinion with additional information and legal analysis. The Army REC then coordinates the issue with the designated DoD REC,⁴⁸ who has responsibility for developing a DoD position on issues of common concern to all military installations and RECs.⁴⁹ The DoD REC should serve as the primary point of contact with the state on the issue, to ensure that all military installations speak with one voice.⁵⁰ Should differences arise among DoD Services as to whether a fee in question should be paid, the DoD REC will have the primary responsibility to resolve those differences.

As noted above, Army RECs should coordinate their factual summaries and legal opinions with ELD as well as the DoD REC. This will allow ELD to make coordination with the headquarters elements of the other DoD Services, if needed.⁵¹ In addition, for RCRA fee/tax questions, ELD effects any necessary policy coordination with the Army Secretariat (the DoD-designated Executive Agent for RCRA issues)⁵² through the Army General Counsel. ELD also consults with DoJ to determine if a particular position will be supported in the event of litigation over RCRA-based fees.

The key to efficiently resolving fee/tax issues is the initial research and opinion by the ELS, followed by further development and active coordination of the issue by both the Army and DoD RECs. Following the procedures outlined above will allow the installation to resolve each fee/tax issue while minimizing damage to working relationships with regulators. That is, regulators should be instructed that fee/tax issues are significant legal and policy matters that are addressed by "higher headquarters," and that decisions to withhold payments for particular fees are not made at the installation level. (MAJ Cotell and LTC Jaynes/CPL)

EPA Publishes Consolidated Rules of Practice

Major Robert Cotell

On 23 July 1999 the EPA published its new Consolidated Rules of Practice ("CROP"), in Federal Register Vol. 64, No. 141. The rules become effective 23 August 1999. The Rule revises the existing CROP and includes expansion of the procedural rules to include certain permit revocation, termination and suspension actions, and new rules for administrative proceedings not governed by section 554 of the Administrative Procedure Act. The rules are important guidance for the ELS who anticipates practice before an Administrative Law Judge. (MAJ Cotell/CPL)

Underground Storage Tank Update

Major Robert Cotell

⁴⁸ Where the Army REC is also the DoD REC, that office would perform dual functions. *See*, DoD Instruction 4715.2, DoD Regional Environmental Coordination, paragraph 4.3.1 (May 3, 1996). Under this Instruction, the Army REC also serves as the DoD REC for EPA Regions 4, 5, 7, and 8. Air Force RECs are also DoD RECs for Regions 2, 6, and 10. Navy RECs are also DoD RECs in Regions 1, 3, and 9. *Id.* at paragraph 3.1.

⁴⁹ *Id.* at paragraph 5.4.1. Under this policy, the DoD REC for each region is responsible for monitoring and coordinating the consistent interpretation and application of DoD environmental policies on military installations.

⁵⁰ *Id.* at paragraph 5.2.1.

⁵¹ Coordinating fee/tax issues typically results in ELD preparing legal opinions on whether a particular fee is payable. Sample analyses for fee issues in Georgia, California, and Kansas are available on request.

⁵² DoD Instruction 4715.6, Environmental Compliance, enclosure 2 (Apr. 24, 1996).

The spring has been filled with much activity in the area of Underground Storage Tanks (UST). Fortunately, most of the news has been favorable to the Army and other federal agencies contesting UST fines from the EPA. Whether this will continue in the future, however, remains to be seen.

In April the Navy contested a UST fine at the Oceana Naval Air Station before the Chief, EPA Administrative Law Judge. Although the Navy had some factual defenses concerning the violations, the primary defense concerned the lack of legal authority of the EPA to impose fines on another federal agency for UST violations. The Chief, ALJ heard the arguments and reserved her decision for a later date.

In the meantime, on 16 April 1999, the OSD Office of General Counsel sent a formal request to the Department of Justice Office of Legal Counsel (OLC) requesting resolution of the dispute between the executive agencies. The letter urged that Congress had made no "clear statement" that it intended one executive agency be able to fine another for UST violations. The "clear statement" standard had been articulated by the DoJ in an earlier opinion regarding the Clean Air Act and was determined to be the standard applicable for deciding the authority to fine.

At the time of the letter to the DoJ, another UST case involving Walter Reed Army Medical Center (WRAMC) was pending before the same Chief, ALJ, and was scheduled for a hearing on 18 May 1999. Prior to the hearing the OSD General Counsel requested that all military agencies with UST cases pending should request stays of proceedings in order to allow time for the DoJ to render an opinion. WRAMC requested the stay and, surprisingly, EPA concurred. According to the EPA counsel at the WRAMC hearing, the EPA had been requested by the DoJ to concur in all motions to stay UST proceedings. Shortly after the WRAMC stay was granted, the Navy requested a stay of the penalty portion of the forthcoming opinion of the Chief, ALJ in its case. The EPA agreed to the stay, and it was granted.

Approximately a year prior to both the WRAMC and Oceana cases, the Air Force had two UST cases pending a Tinker and Barksdale Air Force bases. In both cases the Air Force had submitted motions to dismiss based on the authority to fine issue. For almost a year the cases were awaiting decision by the ALJ. When the letter was sent by OSD OGC to DoJ OLC Barksdale requested a stay similar to the WRAMC and Oceana cases. However, before Tinker could request a stay, the ALJ promptly rendered a surprising opinion. The opinion completely upheld the OSD position on fines between agencies. The ALJ concluded "Congress has not expressed an intent ... to subject a Federal agency to assessment of punitive penalties by the EPA for past or existing violations of UST requirements."

The decision in the Tinker case has given an unexpected boost to the OSD's chances of having a positive result from the OLC opinion. Now, if the OLC should uphold an authority of the EPA to fine another federal agency, it will be necessary to rebut not only the arguments of the OSD OGC letter, but those of the EPA's own ALJ as well. On the other hand, however, most of the rationale put forward in the OSD letter and the ALJ opinion are the same, and the OLC is committed to neither.

Early speculation was that the OLC opinion would be issued in July. The month has come and gone and, as yet, no opinion. In fact, so far, the EPA has not yet issued comments on the OSD request, which are required before OLC renders an opinion. Accordingly, it may be quite a while before there is an opinion.

In the meantime EPA appears to be unimpressed by the ALJ opinion. On 1 July 1999 EPA issued a \$259,960 UST fine to Ft. Drum, NY. It is expected that EPA will concur in a request to stay proceedings in this case. However, the fact that EPA is continuing to issue fines indicates that they anticipate a positive result from the OLC.

For installations facing potential UST fines the guidance from ELD remains the same. There is no authority for EPA to impose the fines and they should not be paid. Likewise no SEPs or other settlement arrangements should be made in lieu of such fines. This remains the guidance until OLC renders an opinion. (MAJ Cotell/CPL)

Court of Appeals Renders Bizarre Decision on CAA Fines

Mike Lewis

The long awaited Clean Air Act Sovereign Immunity case at Milan Army Ammunition Plant has finally been decided. On 22 July 1999, the U.S. Court of Appeals for the Sixth Circuit decided that the Clean Air Act (CAA) allows states to impose and collect civil penalties from federal facilities. Tennessee had fined Milan \$2500 for violating the Tennessee Air Quality Act. The provision in the CAA on which Tennessee relied to fine Milan was almost identical to a provision in the Clean Water Act (CWA) that the United States Supreme Court has ruled does not permit states to fine federal facilities. For this reason, the Army contested the fine and lost in U.S. district court. The Army appealed. The Sixth Circuit, however, affirmed the lower court ruling holding that the CAA differed sufficiently from the CWA to permit states to fine federal facilities. The Sixth Circuit relied upon a here-to-fore unknown "state suit" provision within the CAA section 304(e) to find a waiver. This decision will embolden states in their efforts to regulate and fine DoD activities. The Army will seek DoD support for appealing this decision to the Supreme Court.

In the meantime, for all Army installations outside of the 6th Circuit, the guidance from ELD remains the same. Sovereign Immunity has not been waived for the Clean Air Act. No fines should be paid and no SEPs or other settlements should be negotiated in lieu of such fines. Installations within the 6th Circuit should consult ELD on all CAA fines. (Mr.Lewis/LIT)