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### DOCUMENTING THE DECISION NOT TO SUPPLEMENT

LTC David B. Howlett

The Third Circuit Court of Appeals recently affirmed a decision that approved the way a federal agency documented its decision that supplementation of an environmental analysis was not necessary.

In *South Trenton Residents Against 29 v. Federal Highway Administration*,<sup>1</sup> local residents protested against the building of a highway segment called the Riverfront Spur. The Federal Highway Administration (FHWA) had completed an environmental impact statement (EIS) in accordance with the National Environmental Policy Act of 1969 (NEPA)<sup>2</sup> for a complex of highways in 1981. By 1996, all portions of the project had been completed except the Riverfront Spur, but it became very obvious that the spur was needed to alleviate traffic problems.

The New Jersey Department of Transportation (NJ-DoT) held a series of public meetings and prepared an analysis of alternatives for the Riverfront Spur. The analysis, completed in 1997, recommended a four-lane highway, rather than the six-lane design analyzed in the EIS.

The EIS was now 16 years old. Recognizing this, NJ-DoT prepared an Environmental Reevaluation in accordance with FHWA regulations.<sup>3</sup> The purpose of the Reevaluation was to determine whether a supplement to an EIS is needed.<sup>4</sup> The Reevaluation incorporated the NJ-DoT alternatives study as well as new information on issues such as traffic, wetlands, hazardous waste, and air quality. The Reevaluation concluded that the impacts of the proposed four-lane project would be much less than the previously proposed six-lane project. FHWA adopted NJ-DoT's Reevaluation and published a Decision Document in which it found that EIS supplementation was not necessary because there were no significant new adverse impacts from the proposed action.

The plaintiffs brought suit, claiming that EIS supplementation was necessary and that the public meetings and alternatives analysis prepared by NJ-DoT were not adequate.

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<sup>1</sup> 48 ERC 1808 (3<sup>rd</sup> Cir. 1999).

<sup>2</sup> 42 U.S.C. §4321 et seq.

<sup>3</sup> 23 C.F.R. §771.129.

<sup>4</sup> 23 C.F.R. §771.129(a). The regulation requires a written evaluation on the question of whether NEPA supplementation is necessary if the existing environmental document is more than three years old and the project has not begun.

The court began by stating the standard of review: that the agency's decision to revise an EIS must be reasonable under the circumstances.<sup>5</sup> The court then reviewed the FHWA regulations, which require NEPA supplementation only when "substantial changes are made in the proposed action that will introduce new or changed environmental effects of significance to the quality of the human environment, or . . . significant new information becomes available concerning the action's environmental aspects."<sup>6</sup> The key question, according to the court, is whether the proposed roadwork would have significant impact on the environment in a manner not previously evaluated and considered.<sup>7</sup>

The court considered that fact that there had been many changes to the affected environment since the EIS came out. Although this information could in one sense "very important or interesting, and thus significant in one context," supplementation would only be required if there would be a change in anticipated impacts to the action.<sup>8</sup> In this case, the court determined that the worsening pedestrian safety conditions cited by plaintiffs did not require NEPA supplementation because they did not result in the creation of new environmental impact to the project. In fact, the overall impact of the scaled-back project was less than the impact anticipated when the EIS was prepared.

The court upheld the agency decision not to supplement because, through the Environmental Reevaluation, it had taken a hard look at the new information and reasonably determined that there was no significant new environmental information.

In one respect, the decision is troublesome. Plaintiffs had contended that the agency did not adequately consider alternatives to the project, some of which were not known at the time of the original EIS. The court referred to the fact that the NJ-DoT looked at twelve alternative plans in its Environmental Reevaluation and reasonably selected the design it chose. The raises the question of whether the existence of new alternatives itself constitutes significant new information, thus requiring NEPA supplementation. Consideration of these alternatives in a document without the public participation components of a NEPA analysis does not seem sufficient. The court did not consider this question. It would appear that the length and thoroughness of the Environmental Reevaluation led the court implicitly to treat it as if it had been a NEPA document.

The Army NEPA regulation does not have a specific document to memorialize a decision on supplementation. A Record of Environmental Consideration (REC) is required when a determination is made that a proposed action is adequately covered by an existing environmental assessment or EIS.<sup>9</sup> In some sense, this is a decision that supplementation is not necessary, but there is no guidance as to what the REC should contain. To fill this gap, the Army has occasionally produced very large RECs, constituting thorough reviews of all new information and its significance.<sup>10</sup> Without the detailed regulations such as those published by the FHWA, however, the Army runs the risk that a court could find that new information requires NEPA supplementation, even when there is ultimately no new significant impact. The current review of the Army NEPA regulation presents an opportunity to provide this

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<sup>5</sup> The court compared this standard to the "arbitrary and capricious" standard of review, but concluded that in terms of deference to the agency, the distinction between the two is not that great. *South Trenton Residents Against 29 v. Federal Highway Administration*, 48 ERC at 1811, fn. 2.

<sup>6</sup> 23 C.F.R. §771.130. The regulation states "Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA [environmental assessment] to assess the impact of the changes."

<sup>7</sup> 48 ERC at 1812, citing *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5<sup>th</sup> Cir. 1987): "The new circumstance must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."

<sup>8</sup> 48 ERC at 1813. The quoted language comes from the publication of the FHWA rules in 1987. 52 F.R. 32646, 32656.

<sup>9</sup> Army Regulation 200-2, Environmental Effects of Army Actions, 23 December 1988, ¶2-3d.(1).

<sup>10</sup> These are often referred to as "Mayfield RECs" after the Army lawyer who pioneered their use in the mid-1990s.

guidance and to improve on the FHWA regulations by taking into account newly available alternatives to proposed actions. (LTC Howlett/LIT)

## STRANGE JUSTICE

Mike Lewis

This updates the earlier article<sup>11</sup> reporting that the U.S. Court of Appeals for the Ninth Circuit (hereinafter "9th Circuit") was deciding whether section 120<sup>12</sup> of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides an independent authority for cleanups of federal facilities. The case was *Fort Ord Toxics Project v. California Environmental Protection Agency et al.*<sup>13</sup>. On 2 September 1999, the 9th Circuit held that Section 120 was in fact an independent authority to conduct remedial action.<sup>14</sup>

As you may recall, the former Fort Ord is on the National Priorities List<sup>15</sup>. The Army was conducting a CERCLA remedial action that involved designating a landfill as a Corrective Action Management Unit ("CAMU")<sup>16</sup> after coordination with the California Environmental Protection Agency ("CAL EPA"). The Fort Ord Toxics Project ("FOTP") sued CAL EPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act ("CEQA")<sup>17</sup>. FOTP named the Army as Real Parties in Interest and sought to enjoin the Army's remedy.

The Army immediately removed this challenge to U.S. District Court<sup>18</sup>, and citing CERCLA section 113(h)<sup>19</sup> 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 (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 that, among other arguments<sup>20</sup>, the cleanup 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 taken 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) 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

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<sup>11</sup> *Under What Authority Do Federal Facilities Perform CERCLA Cleanups*, ELD Bulletin Vol. 6, No. 7 (Jul 99).

<sup>12</sup> 42 U.S.C. § 9620 (1998).

<sup>13</sup> *Fort Ord Toxics Project et al., v. California Environmental Protection Agency et al.*, No. 98-16100 (9<sup>th</sup> Cir. 1999).

<sup>14</sup> 1999 U.S. App. LEXIS 20951 (9th Cir., Sept. 2, 1999).

<sup>15</sup> 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).

<sup>16</sup> 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.

<sup>17</sup> CAL. PUB. RES. Code §§ 21000 – 21178.1. CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

<sup>18</sup> 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.

<sup>19</sup> 42 U.S.C. § 9613(h).

<sup>20</sup> 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.

agency. . . .” FOTP said that when Congress passed CERCLA section 120 in 1986 to create a special program to address hazardous substance 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)<sup>21</sup> and section 117.<sup>22</sup>

Unlike FOTP, which relied strictly on statutory interpretation, the Army noted that the issue of section 120 constituting an independent remedial authority for 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 agreed with the Army. It found that the Fort Ord remedy 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.”<sup>23</sup> The court adopted the logic of *Werlein* that section 120 “provides a road map for the application of CERCLA.”<sup>24</sup> The court specifically rejected FOTP’s reliance on CERCLA section 113(g) as misplaced. To the contrary, the court found the reference in this section to the President taking the action as supporting the Army’s case.<sup>25</sup>

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. It argued that the language and structure of CERCLA demonstrate a clear distinction between actions taken under section 120 and those taken under 104. The Army reiterated its successful district court position.

In its opinion, the 9th Circuit found FOTP's other two claims to be without merit, stating that “[w]e do not believe that Congress intended, nor do we believe that statutory language mandates such an absurd rule of law.” Regarding the argument that section 120 was a separate cleanup authority falling outside of the protections of section 113(h), the 9th Circuit said that this argument “like the preceding two, would lead to a rule that is intuitively unappealing.” The 9th Circuit then found this issue to be one of first impression. Though the 9th Circuit had twice previously applied the protections of section 113(h) to remedial actions at federal facilities,<sup>26</sup> it determined that it was not bound by such *sub silentio* holdings on jurisdictional issues.

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<sup>21</sup> 42 U.S.C. § 9613(g)(1).

<sup>22</sup> 42 U.S.C. § 9617.

<sup>23</sup> 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.

<sup>24</sup> *Id.*, at 10.

<sup>25</sup> *Id.*

<sup>26</sup> *McCellan Ecological Seepage Situation v. Perry*, 47 F. 3d 325, (9th Cir. 1995), *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F. 3d 1469 (9th Cir. 1998).

The 9th Circuit noted that those district court decisions that had analyzed section 120 supported the Army's interpretation, as did some legislative history.<sup>27</sup> Having said that, the 9th Circuit then found that the Army's position was not supported by the statutory text.

The 9th Circuit opined that CERCLA, section 120(g)<sup>28</sup>, seemed to "create a grant of authority separate from sections 104 and 106." The 9th Circuit found that other sections of CERCLA identified section 120 as a separate authority for performing cleanups. It cited the sections identified by FOTP, section 113(g)<sup>29</sup> and section 117<sup>30</sup>. The problem with relying on these two sections is that they refer to the President as taking the action. Section 120 does not have the President acting, only the Administrator. The President acts under the authority of section 104 alone. Adding to the strangeness of this opinion is that the 9th Circuit then determined that it could find no authority under section 120 for CERCLA removal actions<sup>31</sup> and held that they were performed under section 104 and therefore fall within the timing of review limitations of section 113(h). The 9th Circuit cited to a Tulane Law Review article<sup>32</sup> to support this interpretation, though the court said that "[w]hether the legislators who voted for section 113(h) subjectively intended this distinction is unclear to us." So here, the 9th Circuit strangely abandoned examining the intent of Congress in analyzing section 120, after performing such an analysis for FOTP's other two arguments.

The Army, Navy, Air Force, Department of Energy, and Department of Agriculture have asked the DOJ to petition the 9th Circuit for a rehearing *en banc* in this case. You will be notified of DOJ's decision in future article in the ELD bulletin. Please notify the author if this strange case is offered as authority to challenge one of your cleanups. (Mr. Lewis/LIT)

## ISSUES REGARDING PERCHLORATE SAMPLING

Ms. Kate Barfield

Recently, certain installations -- particularly some located in the Western States -- have been approached by regulators requesting that their facilities sample water for the presence of Ammonium Perchlorate. Perchlorate is an oxygen-adding component in solid fuel propellant for rockets, missiles and fireworks. The substance is highly soluble and has been found in isolated drinking water sources in California, Texas and Nevada. Questions have been raised about whether Perchlorate can affect thyroid function, but the issue is still being researched. Some State regulators have indicated that they may request Perchlorate sampling at specific military installations.

At present, there are no promulgated standards for Perchlorate testing, though interim levels have been suggested. Normally, testing is not required for chemicals that have no promulgated standard. The Environmental Protection Agency (EPA) has placed Perchlorate on a Contaminant Candidate List, but the agency also acknowledges that further study is required to determine if Perchlorate requires regulation. As a result, DoD has formed an action team to gather scientific data regarding Perchlorate. In the meantime, installation

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<sup>27</sup> In keeping with the strange justice of this opinion, the court, using a form of citation never seen before, "See P.L. 99-499 at 2877", quotes a passage pertaining to CERCLA section 121 and not section 120.

<sup>28</sup> CERCLA section 120(g) states that "no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise...".

<sup>29</sup> CERCLA section 113(g) states that ". . . if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120. . .".

<sup>30</sup> CERCLA section 117 states that "[B]efore adoption of any plan for remedial action undertaken by the President, by a state, or by any other person, under section 9604, 9606, 9620, or 9622 of this title, the President or State, as appropriate, shall . . .".

<sup>31</sup> CERCLA sections 101(23) defining removal actions is distinguished from section 101(24) defining a remedial action in that remedial actions are actions consistent with a permanent remedy.

<sup>32</sup> Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 Tul. Envtl. L.J. 353 (1995).

technical staff should obtain guidance from their respective MACOMs if they are asked to conduct Perchlorate sampling. (Barfield/RNR).

## EPA'S PENALTY POLICIES: GIVING FEDERAL FACILITIES "THE BUSINESS"

LTC Rich Jaynes

### Introduction

Last year, the Environmental Protection Agency (EPA) directed<sup>33</sup> Regional Offices to recover from federal facilities the economic benefits of noncompliance in Clean Air Act (CAA)<sup>34</sup> enforcement actions. EPA also instructed Regions to treat federal agencies "just like" large private businesses, by increasing fines based on the ability to cash in assets to pay penalties. An EPA Region recently used these business-based factors to multiply penalties a hundred-fold beyond the penalty amounts that are normally used to reflect the seriousness of violations. This article comments on EPA's rationale behind these two types of penalties based on business economics, and why EPA Regions simply have no business using them to give federal facilities "the business."

EPA's revolutionary CAA directive states that federal agencies are liable for civil penalties, "including capturing economic benefit,"<sup>35</sup> and instructs EPA Regions to apply a penalty policy that addresses penalty calculations exclusively for private entities.<sup>36</sup> Moreover, EPA's directive requires Regions to apply this private sector penalty policy to federal facilities as if they were "just like any other person."<sup>37</sup> This use of "any" is all-inclusive and invites Regions to equate federal facilities with the largest profit-making corporate empires, with all their assets in bank accounts, stock portfolios, physical inventories, and real estate holdings. The absurdity of this penalty policy is exacerbated by EPA's instruction to also employ a size-of-business penalty factor that assumes federal facilities have almost limitless assets for paying fines, and this justifies Regions in jacking up fines by an additional 50%.<sup>38</sup> This fudge factor is used to guarantee that the errant "deep pocketed" federal agency feels the pinch of the fine sufficiently to deter any future noncompliance.

<sup>33</sup> Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (CAA), Office of Enforcement and Compliance Assurance, 9 October 1998 (hereinafter "Penalty Memo"). *Included in:* U.S. Environmental Protection Agency, *The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities*, EPA 315-B-98-011, **Error! Bookmark not defined.**, at Appendix B (Feb. 1999) (hereinafter "Yellow Book").

<sup>34</sup> 42 U.S.C. §7401-7671q. Prior to its 1998 guidance, EPA Headquarters had no written policy on the topic of applying EPA's penalty policies based on economic aspects of businesses to federal facilities. EPA Regions, however, have pursued these types of economic-based fines in a few RCRA enforcement actions against Army facilities. Historically, economic-based penalties have generally been minor components of RCRA penalties.

<sup>35</sup> Penalty Memo, *supra* note 1.

<sup>36</sup> U.S. Environmental Protection Agency, Clean Air Act Stationary Source Civil Penalty Policy, 25 October 1991, **Error! Bookmark not defined.** (hereinafter "CAA Penalty Policy"). This penalty policy makes no mention of federal facilities, and all discussions of economic-based penalties are couched in terms of private commercial enterprises.

<sup>37</sup> Penalty Memo, *supra* note 1. In adopting this policy, EPA appears to have taken a strained view of CAA § 118(a), which requires federal facilities to comply with the CAA "in the same manner, and to the same extent as any nongovernmental entity." 42 U.S.C. § 7418(a). This statutory text, however, was not a mandate from Congress to force fit economic-based penalty criteria to federal agencies, and thereby create a unique type of fine that effectively ignores the significant differences between federal agencies and the private sector. The fallacy of this approach is compounded by EPA's directive to apply penalty policies that make no attempt to tailor applications to the unique financial aspects of federal facilities. The CAA's § 118(a) was not an open invitation by Congress for EPA to mechanically treat federal facilities "just like" private industry across the board, but a requirement to give equal treatment after making appropriate adjustments for the significant differences between federal facilities and the private sector. The net effect of EPA's policy directive is discriminatory, because there are no regulated commercial entities that are created by, funded by, and accountable directly to Congress.

<sup>38</sup> *Id.* The Penalty Memo states: "Regions should consider the size of violator when determining the appropriate penalty against a Federal agency. In many instances, Federal agencies would be considered large violators; in these cases, the Regions should apply the 50% formula...."

Army installations should not pay penalties based on these business considerations because they are legally and factually relevant only to the private sector. Army objections to these fines are threefold:

1. Applying recapture of economic benefit and size-of-business penalty assessment criteria to federal facilities is contrary to the plain language of the CAA and the intent of Congress;
2. No factual basis exists for recovering these types of fines from federal agencies; and,
3. Pursuit of fines based on economic benefit and size of business from federal facilities effects bad public policy by unduly interfering with the missions and appropriations prescribed by Congress.

The discussion below examines the use of the economic benefit and size-of-business penalty assessment criteria under the CAA. Although EPA has authority to assess fines against federal facilities under the Safe Drinking Water Act (SDWA)<sup>39</sup> and the Resource Conservation and Recovery Act (RCRA),<sup>40</sup> the penalty assessment criteria in the CAA are more extensive than in these other statutes. The focus here is on the CAA also because it is only with respect to fines under the CAA that EPA has published specific guidance directing EPA Regions to recover these penalties from federal facilities. As for the discussion regarding the second and third objections noted above, EPA's use of business-based penalty criteria against Army installations under any of these three statutes is without factual basis and effects bad public policy.<sup>41</sup>

### **1. Contrary to Statutory Authority.**

Congressional amendments to the CAA in 1990 added several penalty assessment criteria in §113(e)(1). Those criteria include penalties that reflect the "seriousness of the violation,"<sup>42</sup> a factor that the Army agrees is relevant to assessing penalties against federal facilities. The statutory penalty criteria also include two business-related factors that have no relevance to federal facilities: "economic benefit of noncompliance," and "the size of the business."<sup>43</sup> With these business-related criteria, Congress was telling EPA to carefully weigh all economic consequences of enforcement actions on a business that may have violated the CAA. The first "business" factor is the economic benefit of noncompliance, a consideration targeted to assist companies that comply with the CAA by taking away the competitive advantage gained by those businesses that chose not to invest the money necessary to achieve timely compliance. The second factor (i.e., "size of business") seeks to make a penalty proportional to a company's ability to pay a fine, and is based on the company's net worth. Neither penalty criteria has anything to do, however, with the underlying seriousness of the any environmental violations. Instead, both economic factors are equitable in nature, designed to either remove financial gains or to make penalties proportional to a company's stash of assets available to pay fines.

The CAA's legislative history augments a plain reading of the statute with respect to the economic benefit of noncompliance. After the 1990 CAA amendments were approved by the

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<sup>39</sup> 42 U.S.C. § 300h-2(c)(4)(B). The penalty assessment criteria listed in SDWA allow EPA to assess penalties as follows: "In assessing any civil penalty under this subsection, the Administrator shall take into account appropriate factors, including (i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require."

<sup>40</sup> The civil penalty authority established in RCRA does not contain any penalty assessment criteria. See, 42 U.S.C. § 6928(g).

<sup>41</sup> This article does not address state fines under the CAA because the lack of a waiver of sovereign immunity prevents states from legally imposing any fines under the CAA. While this article focuses on EPA's use of economic-based penalty assessment criteria, the second and third objections would also apply to state-imposed penalties under RCRA or SDWA. To date, however, EPA has been the only regulatory authority to make extensive use of business-based penalties against Army installations.

<sup>42</sup> 42 U.S.C. §7413(e)(1).

<sup>43</sup> *Id.*

joint House-Senate conference committee, the Senate Managers to the conference committee made the following statement about the penalty assessment criteria of §113(e):

"This section requires the [EPA] Administrator and the courts to consider a number of factors when arriving at an appropriate penalty, including, in particular, the economic benefit gained as a result of the violation. **Violators should not be able to obtain an economic benefit vis-a-vis their competitors** as a result of their noncompliance with environmental laws."<sup>44</sup> [emphasis added]

Congress clearly intended to authorize EPA to only recover economic benefit from business entities that compete commercially with other businesses. Indeed, a common thread throughout many of EPA's economic benefit penalty policies reflects Congress' admonition that the target is competition among businesses in the private sector, and the removal of competitive advantages from noncompliance.

EPA's policy to seek "size-of-violator"<sup>45</sup> penalties from federal facilities is also contrary to the intent of Congress because it expands the application of the CAA's "the size of the business"<sup>46</sup> penalty factor to all non-business violators. That is, Congress specifically defined a penalty assessment criterion as "the size of the business." By renaming this "size of violator" and applying this penalty factor federal agencies, EPA's CAA directive impermissibly expands this part of the statute.

## 2. No Factual Basis.

EPA's Rules of Practice<sup>47</sup> for administrative litigation require EPA to use only statutory criteria for determining penalties.<sup>48</sup> Further, in administrative hearings on penalties, these rules require in all cases that EPA has "the burdens of presentation and persuasion that a violation has occurred as set forth in the complaint and that the relief sought is appropriate."<sup>49</sup> When it comes to business-based penalty criteria, however, EPA will come up empty when it tries to sustain its burden of proof.

Seeking to recover economic benefit from federal agencies is factually insupportable because of the fundamental legal and practical differences between federal facilities and the private sector. In order for there to be a tailored application of economic-based penalty assessment criteria to federal facilities, EPA Regions must account for the "special institutional characteristics of federal agencies -- their political accountability and the unique role of Congress in setting, with the Executive, their missions and budget," that make them factually incomparable to the private sector.<sup>50</sup> Indeed, for over a decade, EPA's own federal facilities enforcement strategy highlighted the following three inherent distinctions between federal facilities and the private sector:

<sup>44</sup> Congressional Research Service of the Library of Congress for the Committee on Environment and Public Works, U.S. Senate, in A Legislative History of the Clean Air Act Amendments of 1990, P.L. 101-549, 104 Stat. 2399, 1990 CAA Leg. Hist. 731 (Oct. 27, 1990).

<sup>45</sup> Penalty Memo, *supra* note 1.

<sup>46</sup> 42 U.S.C. § 7413(e)(1).

<sup>47</sup> 40 CFR Part 22, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits. See, rule revisions at 64 Fed. Reg. 40138 (July 23, 1999).

<sup>48</sup> *Id.*, at § 22.19(a)(4).

<sup>49</sup> *Id.*, at § 22.24(a).

<sup>50</sup> A few months before becoming EPA's Deputy Administrator, Mr. F. Henry Habicht testified before Congress in his role as an Assistant Attorney General on the issue of federal facility compliance with environmental laws. See, Statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Congress, 1st Session concerning "Federal Facility Compliance with Environmental Laws," at 1 (April 28, 1987). This was included as Appendix H of: U.S. Environmental Protection Agency, Federal Facilities Compliance Strategy (Nov. 1988).

(1) Congress creates a federal agency after determining that "the underlying mission is a special one which cannot be entrusted to the private sector;"<sup>51</sup>

(2) Congress is the sole means of financial support for federal agencies, and accountability to Congress as "an integral partner" in the environmental compliance process is a "compelling enforcement tool;"<sup>52</sup> and,

(3) federal agencies are also accountable to the Executive for their performance in assisting the President, whom the Constitution holds accountable "for their missions and actions."<sup>53</sup>

These three essential characteristics effectively preclude any factual basis for seeking penalties for economic benefit or hiking up fines based on federal assets. Commanders and managers of Army installations are only able to look to appropriations from Congress to fund all their mission-essential operations, including environmental compliance. Consequently, numerous fiscal law requirements regulate how and when a federal facility can obligate its funds. Funding flexibility is particularly rigid in the case of large construction projects, which require line-item approval from Congress. Aside from military construction projects, normal operating expenses are funded through Operations & Maintenance appropriations.

The inapplicability of economic benefit to federal facilities, in light of these distinct differences with the private sector, is readily apparent in view of the assumptions upon which the recovery of economic benefit is based. The discussion below reviews the typical methodology for calculating economic benefit to illustrate the difficulty EPA Regions will encounter in seeking to recover economic benefit from federal facilities. Although EPA's policies on economic benefit contain no discussion of federal facilities and provide no guidance to EPA Regions in tailoring enforcement actions to reflect the unique aspects of federal facilities, EPA's 1998 CAA directive appears to instruct EPA Regions to simply find some way to calculate economic benefit for federal facilities "just like" they would for the private sector.

The problems with seeking recapture of economic benefit from federal facilities arise primarily from two assumptions that the penalty calculation methodology makes:<sup>54</sup>

1. Business Competition. The purpose of recovering economic benefit is to "capture the actual economic benefit of noncompliance"<sup>55</sup> by targeting the recovery of "illegal profits."<sup>56</sup> This seeks to "remove" the unfair financial advantages that inure to a violator through noncompliance vis-a-vis the violator's competition who comply with environmental requirements.<sup>57</sup> The economic benefit component of a fine does not seek to punish the seriousness of the violation in any way, but is an equitable penalty that is designed to

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<sup>51</sup> *Id.* at 3.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Id.*

<sup>54</sup> See, 64 Fed. Reg. 32947, Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases (June 18, 1999) (hereinafter "1999 BEN Notice"). EPA uses its "BEN" computer model to calculate the economic benefits of noncompliance from business entities. One of the purposes of the 1999 BEN Notice was to provide comments submitted in response to a notice published in 61 Fed. Reg. 53026, Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases (Oct. 9, 1996) (hereinafter "1996 BEN Notice"). Note that the 1996 BEN Notice, at 53026 and 53028, invited comments on the BEN model's calculation methodology as well as the basic assumptions. Although DoD representatives on several occasions have voiced concerns about EPA's application of the BEN model to federal facilities, so far EPA has maintained the position that BEN applies to federal facilities. and U.S. Environmental Protection Agency (EPA), Office of Regulatory Enforcement, BEN User's Manual (April, 1999) (hereinafter "BEN Manual").

<sup>55</sup> CAA Penalty Policy, *supra* note 4, at 11.

<sup>56</sup> *Id.* at 12.

<sup>57</sup> 1996 BEN Notice, *supra* note 22, at 53026. A virtually identical statement is in the 1999 BEN Notice, *supra* note 22, at 32948.

"remove or neutralize"<sup>58</sup> an actual financial gain to a business. This component represents that amount of money that must be taken back from the business to place the business in the same position financially as competitive businesses that achieved timely compliance.<sup>59</sup>

2. Net Financial Gains from Noncompliance. Economic benefit recaptures the measurable "savings" or "net gain" from delayed compliance and avoided costs during the period of noncompliance.<sup>60</sup> Fundamental to this assumption is that "all resources not spent on achieving compliance are spent on alternative profitable ventures."<sup>61</sup> This means that delayed and avoided costs always result in the yield of monetary return<sup>62</sup> at a presumed rate,<sup>63</sup> and that this return of net gain inures to the financial benefit of the business until an enforcement action is brought.<sup>64</sup>

Neither assumption is appropriate as applied to federal facilities. Army installations do not have the means to acquire, save, or invest "profits." All funds available to federal agencies come from Congress, and any money that is not programmed for environmental compliance is applied toward other mission-related requirements. Environmental noncompliance at an Army installation does not cause it to realize any financial gain that can then be saved or invested to augment the appropriations of Congress. There is simply no economic benefit to recover.

EPA's CAA Civil Penalty Policy uses its size-of-business factor to effect an increase in the overall fine "in proportion to the size of the violator's business."<sup>65</sup> Application of this factor depends on an analysis of a corporation's "stockholder's equity or 'net worth'" as "calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings."<sup>66</sup> The policy provides a table for arriving at a "size of violator" fine, which is based on the "net worth (corporations); or net current assets (partnerships and sole proprietorships)."<sup>67</sup> Larger net worth automatically adds larger fines to the gravity-based and economic benefit components already calculated. For extremely large corporations, Regions are to simply add

<sup>58</sup> 1996 BEN Notice, *supra* note 22, at 53027. See also, 1999 BEN Notice, *supra* note 22, at 32950.

<sup>59</sup> BEN Manual, *supra* note 22, at 1-2.

<sup>60</sup> 1996 BEN Notice, *supra* note 22, at 53027.

<sup>61</sup> 1999 BEN Notice, *supra* note 22, at 32966. Federal case law underscores the importance of this assumption to the assessment of economic-based penalties. See *United States v. Dean Dairy Products, Inc.*, 150 F.3d 259 (3d Cir. 1998), where the court, citing *United States v. Smithfield Foods*, 972 F. Supp. 338 (E.D. Va.1997), stated that "the goal of the economic benefit analysis is to prevent a violator from profiting from its wrongdoing." In explaining what it means to "profit from wrongdoing", the court elaborated by focusing on concepts relevant primarily to business enterprises, such as "leveling the economic playing field"; "preventing violators from gaining an unfair advantage"; and "earning a return on funds that should have been spent to purchase, operate, and maintain appropriate pollution control devices." *Id.* at 263.

<sup>62</sup> 1996 BEN Notice, *supra* note 22, at 53027. See also, 1999 BEN Notice, *supra* note 22, at 32940-50.

<sup>63</sup> 1996 BEN Notice, *supra* note 22, at 53027 and 53029. See also, 1999 BEN Notice, *supra* note 22, at 32950.

<sup>64</sup> 1996 BEN Notice, *supra* note 22, at 53027. See also, 1999 BEN Notice, *supra* note 22, at 32949.

<sup>65</sup> CAA Penalty Policy, *supra* note 4.

<sup>66</sup> *Id.* at 16. The policy states: "Size of violator: A corporation's size is indicated by its stockholder's equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets." *Id.*

<sup>67</sup> *Id.* at 21. The table assesses a fine amount for this factor of \$2,000 if net worth/current assets are under \$100,000. For businesses with larger assets, the fines are shown in parentheses: net worth/current assets of \$100,001-\$1 million receive (\$5,000 fine); \$1,000,001-\$5 million (\$10,000); \$5,000,001-\$20 million (\$20,000); \$20,000,001-40 million (\$35,000); \$40,000,001-\$70 million (\$50,000); \$70,000,001-\$100 million (\$70,000); if net worth/current assets exceed \$100 million, the fine is \$70,000 + \$25,000 for every additional \$30 million in assets, or fraction thereof.

in an additional 50% to the fines already tabulated,<sup>68</sup> which results in the fines based on seriousness of the violations and economic benefit to be multiplied by a factor of 1.5.

Simply stated, the size-of-business factor assumes that corporations with large financial assets are in a better position to draw upon those assets to pay for fines. Consequently, larger fines are necessary to make them feel the regulatory bite with sufficient financial "pain" to effect deterrence. Obviously, this penalty factor is only appropriate when a penalty based on the seriousness of the violation (i.e., gravity component) is small in proportion to a company's ability to pay. Even as applied to the private sector, however, EPA has been taken to task by its own administrative law judges for acting arbitrarily and contrary to statutory authority when "automatic consideration of the size of violator's business" becomes "a major factor in determining the violation's extent level and gravity based penalty...."<sup>69</sup>

Even though the size-of-business logic may work in some instances for the business community, applying this factor to Army facilities achieves absurd results. This is because it assumes that installations can raise additional revenues by selling tanks and helicopters, by laying off employees, by mortgaging real estate, or by passing the costs of doing business on to our customers. In a recent case, application of this penalty factor led an EPA Region to conclude that an installation had billions of dollars in assets that it could sell or mortgage to get into compliance and to pay penalties. This approach completely ignores the fact that Army installations must get their funding for large environmental projects from Congress as a line-item military construction projects, and are not at liberty to have a yard sale of their tactical equipment to raise the money either pay the costs of compliance or pay fines. As with economic benefit, there is simply no evidence available that would support EPA's assumption that Army installations can cash in their "net worth" to augment Congressional appropriations.

### 3. Effects Bad Public Policy.

In the context of federal facilities, the purpose of a fine based on the seriousness of a violation is to get the federal facility manager to request from Congress the necessary funds for capital improvements and operating expenses to comply with environmental requirements. By Executive Order 12088,<sup>70</sup> the heads of federal agencies are required to ensure they request sufficient funds to carry out environmental compliance. When this fails to occur, the foremost enforcement objective is to get a federal facility that is in violation to rearrange priorities and bring the facility into compliance. Indeed, EPA's own federal facilities policy echoes this enforcement goal.<sup>71</sup>

In cases involving federal facilities, assessing punitive fines based on the seriousness of the violations adequately addresses the enforcement purpose of deterrence by focusing on the nature of the violation and the conduct of the alleged violator. Such gravity-based penalties reflect legitimate factors that are tailored to the offense such as the risk of environmental harm from the violations, the extent of deviation from regulatory requirements, length of violation, and the violator's history of noncompliance. This is the penalty factor that

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<sup>68</sup> In situations "[w]here the size of the violator figure represents over 50% of the total preliminary deterrence amount" (i.e., the economic benefit and gravity components), then EPA "may reduce the size of the violator figure to 50% of the preliminary deterrence amount." *Id.* at 22.

<sup>69</sup> In the Matter of Troy Chemical Corp., Docket No. II-EPCRA-98-0101, U.S. EPA, 1999 EPA ALJ LEXIS 7 (Jan. 28, 1999).

<sup>70</sup> Executive Order 12088, Federal Compliance with Pollution Control Standards, 43 Fed. Reg. 47707 (Oct. 13, 1978).

<sup>71</sup> The Yellow Book, *supra* note 1, at V-12, contains guidance on the "impact of fund availability" for federal agencies. The EPA policy quotes Executive Order 12088 that requires the head of each agency to "ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget." *Id.* The Yellow Book observes that the objective of EPA regional enforcement authorities should be to simply "require that the responsible Federal official seek any additional funds necessary to correct violations." *Id.* This policy correctly notes that the goal of an EPA enforcement action against a federal facility should be to capture the attention of federal facility managers and give them incentive to reorder priorities in order to achieve environmental compliance.

Congress allows EPA to use to get the attention of a federal facility to ensure an expeditious compliance schedule and to deter the facility from future violations. Deterrence in the federal facility context means using penalties only to the extent necessary to ensure that the facility's agency complies with Executive Order 12088, by requesting sufficient funds from Congress to construct necessary pollution control devices and operate those devices. Because of the unique nature of federal facilities, penalties that stretch beyond gravity-based factors erode the ability of the agency to fulfill the mission given to it by Congress.

Dollar for dollar, punitive fines have a disproportionate impact on federal facilities as compared to private industry. Although federal facilities have significant assets, those assets are "invisible" in terms of assisting in any way to satisfy a fine. While private industry has options to raise money to satisfy a fine without interfering with its operations, this is much more complicated for the federal facility. In an era of austere budgets, there is never enough money at military installations to attend to all the bona fide requirements. Installation commanders must carefully balance available resources against the missions mandated by Congress and the President, and work within the allocations available. To pay a fine, the installation commander must look to operating funds that are earmarked for other uses, such as fuel for vehicles or maintenance of training ranges. Simply put, every dollar paid for a penalty is a dollar's worth of mission degradation somewhere else. There are no savings accounts, no carried over surpluses, and very little budget flexibility. As the result of Executive and DoD policies, the funds for paying penalties for environmental violations must come from agency mission O&M accounts. While DoD has significant assets and budgets, they are subject to careful Congressional scrutiny, and the size of those assets and budgets does not equate with the proverbial corporate "deep pocket."

Any time that Congress authorizes payment of penalties by federal facilities to EPA, it implicitly authorizes the passing of some appropriated funds, intended to support an agency's mission, directly back to the U.S. Treasury. This deters future noncompliance by requiring the federal facility manager to experience the discomfort that accompanies a requirement to rearrange priorities and forego some planned mission-related purchases or actions. It is not implicit, however, that Congress ever intended to authorize fines that go beyond deterrence. Economic benefit fines, imposed to recover a net financial gain that does not exist, serve only to degrade federal missions.<sup>72</sup> The same applies to size-of-business fines that are based on an assumption that federal facilities have access to investments or property that could otherwise be used for commercial purposes. Any payment of these business-based fines needlessly diverts dollars Congress appropriated in support of the military mission back to the U.S. Treasury. A policy that seeks this result does not serve the goal of assuring compliance, unnecessarily prevents agencies from carrying out other Congressionally mandated missions, is contrary to the letter and spirit of the law, and simply effects bad public policy.

Inherent in EPA's charter as an enforcement agency is the understanding the EPA will not ignore the unique nature of federal agencies' funding and missions. Contorting these business-based penalties so as to apply them to federal facilities improperly interferes with the missions assigned and funds allocated by Congress. In addition, these penalties impose a type of punishment on federal facilities that is unique and discriminatory, because there are no businesses in the private sector that have the same missions and funding characteristics as federal agencies. Thus, applying EPA's business-based policies to federal facilities serves no legitimate public purpose.

## Summary

In light of the special institutional characteristics of federal agencies, it is clear that EPA enforcement authorities must strike a delicate balance when bringing an enforcement action against a federal facility. On one side of the scale, Congress has given EPA enforcement tools, including penalty authority, to get the attention of the alleged violator and achieve

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<sup>72</sup> Imposing economic benefit also effectively precludes the use of supplemental environmental projects (SEPs) as a means of settling enforcement actions, because EPA's SEP policy directs that the economic benefit component of a fine cannot be offset by SEPs. See, 63 Fed. Reg. 24796, Final EPA Supplemental Environmental Projects Policy (May 5, 1998).

compliance. In the context of federal facilities, this means that Congress has authorized the use of punitive fines based on the seriousness of violations as an "attention getter" where it is necessary. On the other end of the scale, however, overloading a federal facility with a large penalty inherently interferes with some aspect of a Congressional mission that the President is required to manage within the funds allocated by Congress. Achieving this balance requires EPA to approach federal facility enforcement with tools that are carefully tailored for that purpose. In contrast, adopting a philosophy that treats federal facilities "just like" private industry, and implementing the procedures that ignore fundamental differences between the two sectors, allows unauthorized intrusion into the funds Congress entrusts to government agencies for their missions. Applying business-based penalty criteria to federal facilities serves only to multiply penalties far beyond deterrence and inflicts damage to federal agency missions. This form of "hyper-deterrence" has no analog in the private sector, and Army installations should not enter into settlement agreements that require payment of these penalty components. (LTC Jaynes/Compliance)