

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 6, number 7, is reproduced in part below.

EPA Publishes Consolidated Rules of Practice

On 23 July 1999, the EPA published its new Consolidated Rules of Practice (CROP), in Federal Register volume 64, number 141. The rules become effective 23 August 1999. The new CROP includes expanded 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.¹ The rules are important guidance for those environmental law specialists who anticipate practice before an administrative law judge. Major Cotell.

Underground Storage Tank Update

This spring Underground Storage Tanks (UST) issues have been at the forefront. Most of the issues have been resolved favorably to the Army and other federal agencies contesting UST fines from the EPA. Whether this trend 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, Environmental Protection Agency

(EPA) Administrative Law Judge.² Although the Navy had some factual defenses concerning the violations, the primary defense concerned the lack of legal authority for the EPA to impose fines on another federal agency for UST violations. The Chief, Administrative Law Judge heard the arguments and reserved her decision for a later date.

In the meantime, on 16 April 1999, the Office of the Secretary of Defense Office of General Counsel sent a formal request to the Department of Justice (DOJ) Office of Legal Counsel requesting resolution of the dispute between the executive agencies.³ 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 opinion⁴ 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, Administrative Law Judge, and was scheduled for a hearing on 18 May 1999.⁵ Before the hearing, the Office of the Secretary of Defense requested that all military agencies with UST cases pending should request stays of proceedings to allow time for the DOJ to render an opinion. Walter Reed Army Medical Center requested the stay and, surprisingly, EPA concurred.⁶ 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, Administrative Law Judge, in its case. The EPA agreed to the stay, and it was granted.⁷

Approximately a year before both the *WRAMC* and *Oceana* cases, the Air Force had UST cases pending at both Tinker⁸ and

1. 5 U.S.C.A. § 500 (West 1999).

2. Oceana Naval Air Station, EPA Docket No. RCRA-III-9006-062.

3. Letter from General Counsel of the Department of Defense to Office of Legal Counsel, United States Department of Justice, subject: Constitutional and Statutory Validity of Administrative Assessment of Fines Against Federal Facilities Under Sections 6001, 9001, 9006, and 9007 of the Solid Waste Disposal Act for Alleged Violations Relating to Underground Storage Tanks (Apr. 16, 1999).

4. Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, subject: Administrative Assessment of Civil Penalties Against Federal Facilities Under the Clean Air Act (July 16, 1997).

5. Walter Reed Army Medical Center, EPA Docket No. RCRA-III-9006-052, and 9006-054.

6. In the matter of: U.S. Department of the Army, Walter Reed Army Medical Center, Summary of Pre-hearing Conference and Order Granting Motion For Accelerated Decision As To Liability and Granting Request for Stay of Proceedings As To Penalty Issues, EPA Docket No. RCRA-III-9006-052 at 2.

7. Oceana Naval Air Station, EPA Docket No. RCRA-III-9006-062.

8. Tinker Air Force Base, EPA Docket No. UST6-98-002-AO-1.

Barksdale⁹ Air Force bases. In both cases the Air Force submitted motions to dismiss based on the authority to fine issue. For almost a year, the cases were awaiting decision by the administrative law judge. When the Office of the Secretary of Defense Office of General Counsel sent the letter to the DOJ Office of Legal Counsel, Barksdale requested a stay similar to the requests in the *WRAMC* and *Oceana* cases. However, before Tinker could request a stay, the administrative law judge promptly rendered a surprising opinion. The opinion upheld the Office of the Secretary of Defense position on fines between agencies. The administrative law judge concluded that "Congress has not expressed an intent . . . to subject a [f]ederal agency to assessment of punitive penalties by the EPA for past or existing violations of UST requirements."¹⁰

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

The Office of Legal Counsel opinion was expected in July. The month has come and gone and, as of yet, no opinion. In fact, the EPA has not yet issued comments on the Office of the Secretary of Defense request, which are required before Office of Legal Counsel renders an opinion. Accordingly, it may be quite a while before an opinion is issued.

In the meantime, the EPA appears to be unimpressed by the administrative law judge opinion. On 1 July 1999, the EPA issued a \$259,960 UST fine to Fort Drum, New York. It is expected that EPA will concur in a request to stay proceedings

in this case. That EPA is continuing to issue fines indicates, however, that they anticipate a positive result from the Office of Legal Counsel.

For installations facing potential UST fines, the guidance from ELD remains the same. The EPA has no authority to impose the fines and they should not be paid. Likewise no Supplemental Environmental Projects or other settlement arrangements should be made in lieu of such fines. This remains the guidance until Office of Legal Counsel renders an opinion. Major Cotell.

Under What Authority Do Federal Facilities Perform CERCLA Cleanups?

In *Fort Ord Toxics Project v. California Environmental Protection Agency*¹¹ the United States Court of Appeals for the Ninth Circuit is currently deciding whether Section 120 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹² provides an independent authority for cleanups of federal facilities. The case involves the cleanup at the former Fort Ord, California.

The former Fort Ord is on the National Priorities List.¹³ The Army was conducting a CERCLA cleanup that involved moving remediated sand from beach firing ranges to layer a landfill prior to capping. To do this, the Army designated the landfill as a corrective action management unit¹⁴ after coordination with the California Environmental Protection Agency. The Fort Ord Toxics Project (FOTP) sued the California Environmental Protection Agency in state court for an alleged failure to analyze the designation of the corrective action management unit under the California Environmental Quality Act.¹⁵ The FOTP named the Army as a party to the suit and sought to enjoin the Army from executing its proposed cleanup plan.

The Army immediately removed this challenge to U.S. District Court,¹⁶ and in accordance with CERCLA Section 113(h)¹⁷

9. Barksdale Air Force Base, EPA Docket No. UST6-98-002-AO-1.

10. Tinker Air Force Base, EPA Docket No. UST6-98-002-AO-1, at 26.

11. Fort Ord Toxics Project v. California Environmental Protection Agency, No. 98-16100 (9th Cir., July 22, 1999).

12. 42 U.S.C.A. § 9620 (West 1999).

13. The National Priorities List is the prioritized list of sites needing cleanup, updated annually, called for in accordance with CERCLA § 105(a)(8)(B). See 42 U.S.C.A. § 9605(a)(8)(B) (West 1999).

14. California state law generally prohibits land disposal of all hazardous waste. The state, however, permits the designation of a corrective action management unit into which certain untreated hazardous waste as part of an overall remedy, as a variance from the general prohibition. CAL. CODE REGS. tit. § 66264.552(a)(1) (1998).

15. CAL. PUB. RES. CODE §§ 21000-21178.1 (1998). The California Environmental Quality Act Section 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

16. The basis for the Army's removal was 28 U.S.C.A. § 1442(a) (West 1999), which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

17. 42 U.S.C.A. § 9613(h) (West 1999).

sought to have it dismissed. Section 113(h) of CERCLA provides:

No [f]ederal court shall have jurisdiction under [f]ederal law . . . or under state law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup 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

The FOTP responded that cleanup activities on federal facilities are selected under CERCLA Section 120 and not Section 104.¹⁸ The FOTP argued 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.

The FOTP argued that remedies on federal facilities are not selected under Section 104, but under Section 120(e)(4)(A)¹⁹ of CERCLA. This section, entitled "Contents of Agreement," states that "[e]ach 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" The FOTP argued that 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. Excluding Section 120 cleanups from the jurisdictional bar contained in Section 113(h) was, therefore, consistent with Congress's efforts to enhance public oversight of federal facility cleanups. In further support of its position, FOTP pointed out that other sections of CERCLA, such as Section 113(g), distinguish between Sections 104 and 120.²⁰

Unlike FOTP, which relied strictly on statutory interpretation, the Army noted that a number of courts rejected the issue of Section 120 making the cleanup of federal facilities outside the reach of Section 113(h).²¹ The Army argued that FOTP's interpretation was directly at odds with the judicially recognized purpose of Section 113(h)—to expedite cleanups by insulating them from judicial review until they have been implemented.

The district court found that the cleanup 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."²² The court agreed with the Army's position and held that *Werlein v. United States* correctly decided that Section 120 "provides a road map for the application of CERCLA." The court rejected FOTP's position that *Werlein* was wrongly decided.²³ 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, it was not dispositive. To the contrary, the court found the reference in this section to the President taking action as supporting the Army's case.²⁴ Finally, the court rejected FOTP's reliance on *United States v. Allied Signal Corporation*²⁵ for the proposition that Section 120 governed federal facility cleanups, because it did not directly address the issue of whether Congress, in enacting Section 120, intended to by-pass the President.²⁶

The 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. The 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. Further, FOTP argued that the language and structure of CERCLA demonstrates a clear distinction between actions taken under CERCLA Section 120 and those taken under Section 104. The Army reiterated its successful district court posi-

18. The FOTP also claimed that CERCLA Section 113(h) does not bar challenges brought under state laws such as California Environmental Quality Act that are not applicable or relevant and appropriate requirements, and if it does, this challenge must be remanded to state court.

19. 42 U.S.C.A. § 9620(e)(4)(A).

20. 42 U.S.C.A. § 9613(g)(1) distinguishes between investigations under Sections 104 and 120.

21. See *Werlein v. United States*, 746 F. Supp. 887, 892 (D. Minn. 1992); *Hearts of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (W.D. Wash. 1993), *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).

22. Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, *Fort Ord Toxics Project v. California Environmental Protection Agency*, No. C-97-20681, May 11, 1998, at 8.

23. *Id.* at 10.

24. *Id.*

25. 736 F. Supp. 1553 (N.D. Cal. 1990).

26. Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681, at 12.

tion. Oral argument took place on 22 May 1999, and a decision is pending. Mr. Lewis.

United States Court of Appeals for the Sixth Circuit Renders Bizarre Decision on Clean Air Act Fines

The long awaited Clean Air Act (CAA)²⁷ sovereign immunity case at Milan Army Ammunition Plant has finally been decided. On 22 July 1999, the United States Court of Appeals for the Sixth Circuit decided that the CAA allows states to impose and to collect civil penalties from federal facilities.²⁸ Tennessee had fined Milan \$2500 for violating the Tennessee Air Quality Act.²⁹ The provision in the CAA that Tennessee relied upon to fine Milan was almost identical to a provision in the Clean Water Act (CWA)³⁰ that the United States Supreme Court had ruled does not permit states to fine federal facilities. For this reason, the Army contested the fine but nevertheless

lost in federal 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 an 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 to fine Department of Defense (DOD) activities. The Army will seek DOD support for appealing this decision to the United States Supreme Court.

In the meantime, for all Army installations outside of the Sixth 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 supplemental environmental projects or other settlements should be negotiated in lieu of such fines. Installations within the Sixth Circuit should consult ELD on all CAA fines. Mr. Lewis.

27. 42 U.S.C.A §§ 7410-7642 (West 1999).

28. *United States v. Tennessee Air Pollution Control Board*, No. 97-5715, 1999 U.S. App. LEXIS (6th Cir. June 22, 1999).

29. T.C.A. § 68-201-101 (West 1999).

30. 33 U.S.C.A. §§ 1251-1387 (West 1999).