

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 4, number 12, is reproduced in part below.

CERCLA Section 113(h) Protects the Army from Challenges to Ongoing CERCLA Remedial Actions

In an effort to allow federal agencies to conduct cleanups without constantly having to defend their cleanup decisions in court, Congress enacted Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as part of the 1986 Superfund Amendments and Reauthorization Act. Section 113(h) of the CERCLA deprives federal courts of subject matter jurisdiction over ongoing CERCLA response actions. This somewhat controversial provision in the CERCLA has caused a split in the federal courts and continues to be a key issue in litigating cases that relate to ongoing cleanups.

Much of the controversy surrounding Section 113(h) began with the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Colorado*.¹ In that case, the Tenth Circuit upheld a Resource Conservation and Recovery Act (RCRA) challenge to an ongoing CERCLA remedial action that was being conducted by the Army at Rocky Mountain Arsenal. As a result, the Army was required to obtain, and to comply with, a RCRA Part B permit, even though the cleanup was a CERCLA response action.² Despite Army arguments that this case is limited to its unique set of facts,³ *United States*

v. Colorado continues to be cited as authority for bringing non-CERCLA challenges to ongoing CERCLA cleanups.

More recent authority suggests that *United States v. Colorado* is indeed a very limited precedent. In *McClellan Ecological Seepage Situation v. Perry*,⁴ for example, the Ninth Circuit held that "any challenge" to a CERCLA cleanup is subject to CERCLA Section 113(h), even if the challenge is brought under a statute other than the CERCLA.⁵ In *McClellan*, a local environmental group brought an action to require the Air Force to comply with various environmental laws while conducting a CERCLA cleanup at McClellan Air Force Base, located near Sacramento, California. The Air Force asserted the CERCLA Section 113(h) defense, arguing that the court lacked jurisdiction to entertain challenges to an ongoing CERCLA cleanup. The plaintiffs argued in response that CERCLA 113(h) operates only as a bar to challenges brought under the CERCLA. In holding for the Air Force, the Ninth Circuit concluded that "Section 113 withholds federal jurisdiction to review any of [McClellan Ecological Seepage Situation's] claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute 'challenges' to ongoing CERCLA cleanup actions."⁶

While cleanups may be conducted under the authority of any of a number of statutes, including the Defense Environmental Restoration Account, the RCRA, and various Base Realignment and Closure statutes, the CERCLA should be cited as the primary authority under which environmental cleanups are conducted. This will increase the likelihood that the Army will be allowed to conduct its cleanup in relative peace, without repeated interruptions by litigation. Captain Stanton.

Stakeholder Meetings on Resource Conservation and Recovery Act Reform Legislation

Although Congress is currently focusing on Superfund reauthorization, the Clinton administration is considering the potential for legislative reform of the Resource Conservation and Recovery Act (RCRA).⁷ In both June and August 1997, the

1. 990 F.2d 1565 (10th Cir.), *cert. denied*, 114 S. Ct. 922 (1993).

2. *Id.*

3. For example, the Army had submitted the RCRA Part B permit application shortly before commencing the CERCLA cleanup, but subsequently decided that the permit was no longer required.

4. 47 F.3d 325 (9th Cir.), *cert. denied*, 116 S. Ct. 51 (1995).

5. *Id.*

6. *Id.* at 328.

7. 42 U.S.C.A. §§ 6901-92 (West 1995).

Council for Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) convened meetings in Washington, D.C. to discuss with stakeholders the subject of amending the RCRA to modify the regulation of remediation waste. Participants in the meetings included industry, state environmental agencies, national environmental groups, and local community groups. The CEQ and the EPA also invited congressional staff members and federal agency representatives to the meetings as observers.

The Clinton administration identified remediation waste management as an area for reform of the RCRA in the 1995 RCRA Rifleshot Initiative. Last year's legislative proposals resulted in a great deal of debate on reform of the RCRA, but no consensus was reached. The June and August meetings emphasized that the administration remains committed to pursuing legislative change in this area.

The first stakeholder meeting in June was structured around seven specific controversial issues. These issues were posed as questions to elicit a discussion of solutions on which reform policies could be based. There was not, however, agreement on whether legislative reform was the preferred method of implementing changes to the remediation process. Although some stakeholders believed that legislation was the most efficient means of addressing cleanup problems, environmental and community groups feared that changes to the statute could erode the protection currently provided by the RCRA. These groups felt that the current statute provides the framework to develop regulations that are equipped to address the particular cleanup requirements of a site.

At the June meeting, the stakeholders also considered issues such as: how to structure oversight of alternative standards for RCRA remediation waste management and disposal; how to ensure community involvement in remediation waste management reform; what the minimum requirements should be for alternative remediation waste management and disposal standards; what types of remediation waste would be eligible for alternative management or disposal standards; how reform legislation should ensure adequate accountability and oversight for state remediation waste management programs; and how to ensure, through legislation, adequate enforcement of alternative remediation waste management and disposal standards.

The August meeting included a detailed discussion of public participation issues. The discussion addressed whether minimum public participation opportunities should be guaranteed at every waste remediation site and whether a variance from an

established minimum should be granted in certain circumstances. The meeting also included a discussion of state authorization issues. The stakeholders considered what type of authorization model might be appropriate for authorization of an alternative remediation waste standard and to what extent it should be predicated on existing state authorization. No follow-on meetings on RCRA reform have been announced by the CEQ or the EPA. Major Anderson-Lloyd.

Application of Joint and Several Liability for Natural Resource Damages Under the CERCLA and Determining Who Can Recover for Natural Resource Damages

Although joint and several liability is not expressly mandated by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁸ CERCLA liability is joint and several where two or more defendants have contributed to a single indivisible harm. The majority of courts adopt the rule that damages should be apportioned only if the defendant can demonstrate that the harm is divisible.⁹ The defendant's limited degree of participation is "not pertinent to the question of joint and several liability, which focuses principally on the divisibility among responsible parties of the harm to the environment."¹⁰

Imposing the burden of proving divisibility of the harm on the defendant has resulted in defendants rarely escaping joint and several liability due to the difficulty of reasonably ascertaining the proportional causes of environmental harm.¹¹ Therefore, a defendant may be responsible for paying an unequal share of the harm. Although the potential inequitable nature of joint and several liability has not gone unnoticed, the courts generally reason "that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty."¹²

The CERCLA provides for the restoration or replacement of natural resources that have been injured, lost, or destroyed by the release of hazardous substances. The CERCLA defines "natural resources" broadly, to include "land, fish, wildlife, biota, air, water, groundwater, [and] drinking water supplies" that belong to, are managed by, or are held in trust by the federal government, a state or local government, a foreign government, or an Indian tribe.¹³ Section 107(a)(4)(C) of the CERCLA states that generators of hazardous wastes "shall be liable for . . . damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such

8. *Id.* §§ 9601-75.

9. *See, e.g.,* United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-11 (S.D. Ohio 1983).

10. *Monsanto*, 858 F.2d at 171.

11. *See, e.g., Id.* at 172-73; *Chem-Dyne*, 572 F. Supp. at 811.

12. *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989).

injury, destruction, or loss resulting from such a release.”¹⁴ It extends liability for natural resource damages to the same classes of parties that are liable for cleanup.¹⁵ However, section 107(f)(1) of the CERCLA expressly limits those who can assert a claim under Section 107(a)(4)(C). “[L]iability shall be to the United States Government and to any State” and “the President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages.”¹⁶

Joint and several liability applies to both natural resource damages and response actions.¹⁷ One area of contention, however, is whether a municipality can bring an action pursuant to section 107 of the CERCLA for natural resource damages. As noted above, section 107(f)(1) expressly limits to the President or an authorized representative of a state the power to assert a claim for natural resource damages. In *Boonton v. Drew Chemical Corp.*,¹⁸ the court held that governmental subdivisions, such as municipalities, are encompassed within the meaning of “state” or, alternatively, that a municipality is an “authorized representative of a state” and is entitled to bring an action for natural resource damages. The court reasoned that it was proper to expand the definition of “state” to effectuate the remedial purpose of the CERCLA.¹⁹ Also, the court pointed out that since the definition of “natural resources” under the CERCLA includes property belonging to local governments, it would be anomalous to deny relief to a local government when its natural resources are expressly listed within the protected coverage of section 107(a)(4)(C).²⁰ The rationale and holding of the *Boonton* court were endorsed by the court in *New York v. Exxon Corp.*,²¹ where the court held that the City of New York could bring an action for natural resource damages under section 107(a)(4)(C) of the CERCLA.

Other courts, however, have refused to adopt this view. In *Philadelphia v. Stepan Chemical Co.*,²² the court disagreed with the holdings in *Boonton* and *Exxon*. Relying primarily on the plain meaning of the statute, the court held that political subdivisions are not included in the definition of “state.” The court found no support in the statutory language or in the legislative history for the holdings in *Boonton* and *Exxon*.

The court in *Bedford v. Raytheon Co.*,²³ agreed with the *Stepan* court, noting that, since the decisions of the *Exxon* and *Boonton* courts, Congress has amended the CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 (SARA). The SARA permits states to appoint natural resources trustees to bring lawsuits seeking natural resource damages. The *Bedford* court stated:

Prior to [the] SARA, a policy-driven, expansive interpretation of the word “State,” designed to include local governments, was the only way a municipality could bring a natural resource damages action under [the] CERCLA. In [the] SARA, Congress provided an express means for states to bring natural resource damage actions by permitting the states to designate natural resource trustees.²⁴

In *Rockaway v. Klockner & Klockner*,²⁵ Judge Ackerman, the same judge who wrote the *Boonton* decision, was persuaded by the arguments in the *Stepan* and *Bedford* decisions and concluded that “the approach of the [*Stepan* court] is the better one. I am, therefore, constrained to retreat from my earlier decision in *Boonton*.”²⁶

13. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 101(16), 42 U.S.C. A. § 9601(16) (West 1997).

14. 42 U.S.C.A. § 9607(a)(4)(C) (West 1997).

15. See CERCLA § 107(a).

16. 42 U.S.C.A. § 9607(f)(1).

17. Charles de Saillan, *Superfund Reauthorization: A More Modest Proposal*, 27 E.L.R. 10,201 (1997) (“As with liability for cleanup, liability for natural resource damages is strict, joint, and several.”).

18. 621 F. Supp. 663 (D.N.J. 1985).

19. *Id.* at 666.

20. *Id.*

21. 633 F. Supp. 609 (S.D.N.Y. 1986).

22. 713 F. Supp. 1484 (E.D. Pa. 1989).

23. 755 F. Supp. 469 (D. Mass. 1991).

24. *Id.* at 472.

25. 811 F. Supp. 1039 (D.N.J. 1993).

Joint and several liability applies to natural resource damages in the same manner it applies to response actions. A few district courts have extended the definition of "state" to include municipalities so that local governments can bring a natural resource damages action. With the enactment of the SARA, which provides a procedural mechanism for municipalities to bring a natural damages action, the inclusive definition of "state" may no longer be necessary. Mr. Song.²⁷

Regulation of Oil-Water Separators Under the RCRA's Underground Storage Tank Regime

The approach of the 22 December 1998 underground storage tank (UST) upgrade deadline has prompted several questions regarding oil-water separators. One question in particular concerns whether collection tanks for oil that is isolated by the separator are considered USTs or whether these collection tanks are exempt from the UST regulations. The answer to this question depends on the type of oil-water separator involved and the facts of each particular situation.²⁸

Underground storage tanks are regulated by the 1984 amendments²⁹ to the Resource Conservation and Recovery Act (RCRA).³⁰ The implementing regulations for the UST provisions of the RCRA are at 40 C.F.R. part 280.³¹ Under the regulations, a UST is defined as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of

the ground."³² In the preamble to the final rule for USTs, the Environmental Protection Agency (EPA) acknowledged that the statutory directive in the RCRA amendments was to "establish a UST program 'as may be necessary to protect human health and the environment,'"³³ and recognized that the statute provides "some flexibility for the [agency] to concentrate its resources on tanks that pose the greatest potential environmental threat."³⁴ The EPA further explained that this flexibility allowed the agency "to define the universe of regulated facilities in a manner that focuses regulatory resources on the tanks posing substantial risk from storage of regulated substances and, thereby, fosters development of a program that most effectively protects human health and the environment."³⁵

Using this flexibility, the EPA created "regulatory exclusions"³⁶ to exempt four classes of tanks from the UST regulations, one of which was wastewater treatment systems permitted under the Clean Water Act (CWA).³⁷ The EPA included in the universe of waste water treatment systems "any oil-water separators subject to regulation under either section 402 or 307(b) of the Clean Water Act."³⁸ Most oil-water separators fall into this exemption. By virtue of these exclusions, therefore, the UST regulations do not apply if the oil-water separator collection tank is included in a "wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the Clean Water Act."³⁹

In some cases, however, the oil collection tank is located in close proximity⁴⁰ to the oil-water separator but is not covered by either CWA National Pollutant Discharge Elimination System permit requirements or pretreatment standards. The EPA

26. *Id.*

27. Mr. Song was an intern at the Environmental Law Division's Compliance Branch and the Restoration and Natural Resources Branch during the summer of 1997.

28. This article examines this question in terms of the federal UST program.

29. Pub. L. No. 98-616, 98 Stat. 3221 (1984). The amendments added Subtitle I, which is codified at 42 U.S.C. § 6991.

30. 42 U.S.C.A. §§ 6901-91(i) (West 1995).

31. Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks, 40 C.F.R. pt. 280 (1996).

32. *Id.* § 280.12.

33. Preamble to Final Rule for Underground Storage Tanks, Technical Requirements, 53 Fed. Reg. 37,082 (1988) [hereinafter Preamble] (available in LEXIS, Genfed Library, Allreg Files at *42).

34. *Id.*

35. *Id.* at 37,108.

36. The EPA noted that "[u]nlike statutory exclusions, regulatory exclusions may be modified by the Agency in the future should new information show that regulations of an excluded tank type is necessary." *Id.* at 37,107.

37. 33 U.S.C.A. §§ 1251-1387 (West 1995).

38. Preamble, *supra* note 33, at 37,108.

39. *Id.* at 37,194-95. Under the CWA, section 402 imposes National Pollutant Discharge Elimination System permit requirements, and section 307(b) imposes Pretreatment Standards upon discharges of pollutants. See 33 U.S.C.A. §§ 1251-1387.

chose to defer these tanks from the UST regulations. Specifically, the EPA deferred from regulation those tank systems that treat waste water but are not subject to section 402 or 307(b) of the CWA.⁴¹

Although the EPA did not specifically mention the collection tanks described above, these tanks presumably are included in the deferred subset of tanks that includes oil-water separators for several reasons. First, the regulations envisioned USTs being defined in terms of "tank systems."⁴² Second, the EPA created the deferral in conjunction with the exclusion for waste water treatment "tank systems."⁴³ Finally, a "tank system" is defined as an "underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any."⁴⁴ Under these criteria, an oil-water separator with an immediately adjacent collection tank would qualify as a waste water treatment "tank system" composed of an underground storage tank designed to receive and to treat an influent wastewater through physical, chemical, or biological methods and would also include any connected underground piping, underground ancillary equipment, and containment system. In such a situation, the collection tank would be deferred from the UST regulations.⁴⁵ Major DeRoma.

Litigation Division Note

Recent Decision:

Blue Fox, Inc. v. The United States Small Business Administration and the United States Army

Introduction

On 25 August 1997, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) issued a decision in *Blue Fox, Inc. v. The United States Small Business Administration and the United States Army*⁴⁶ which reversed the district court's grant of

summary judgment to the United States Army (Army). The Ninth Circuit held that a subcontractor may bring suit against the government to recover funds owed to the subcontractor by the prime contractor on a government contract for upgrade of telecommunications at an Army depot.⁴⁷ As the circuit court's decision runs counter to long-standing precedent insulating the government from lawsuits by subcontractors under the doctrine of sovereign immunity, the Army recommended that the Department of Justice seek rehearing en banc of the circuit court's decision. The Department of Justice concurred with the Army's recommendation and on 9 October 1997 filed a petition seeking rehearing en banc with the Ninth Circuit.

Background

Plaintiff-Appellant, Blue Fox, Inc. (Blue Fox), was a subcontractor on a project which required the prime contractor, Verdan Technology, Inc. (Verdan), to upgrade the telecommunications capability of the Army Depot in Umatilla, Oregon. The contract between the Small Business Administration⁴⁸ (SBA) and Verdan contemplated two phases of work: (1) construction of a facility to house telephone switching equipment and (2) the installation, testing, and putting on-line of the switching equipment. Verdan subcontracted with Blue Fox to construct the twenty-five foot by twenty foot concrete block building that would house the system; to install all of the electrical, heating, ventilation, and air conditioning systems for the building; and to construct a cable vault that would run underneath the building. The subcontract represented forty-three percent of the overall contract.

The Army treated the contract as a service contract, not a construction contract, and thus did not require Verdan to furnish, nor did Verdan furnish, a payment or performance bond as required in certain instances by the Miller Act.⁴⁹ Blue Fox alleges that it was unaware until it completed performance that

40. In the question that prompted this article, "close proximity" is defined as two or three feet away.

41. Preamble, *supra* note 33, at 37,108. The tank systems, however, are exempt only from Subparts B-E and G and are, therefore, subject to all remaining applicable provisions of the UST regulations. *Id.* at 37,194. Furthermore, exclusion and/or deferral of a UST does not excuse noncompliance with other statutes, such as the CWA or the Clean Air Act, 42 U.S.C.A. §§ 7401-7671(q) (West 1995).

42. Preamble, *supra* note 33, at 37,082.

43. *Id.* at 37,194.

44. *Id.* at 37,125.

45. Thus, in this scenario, the answer regarding UST regulation of the adjacent collection tank under the federal UST program is "probably not." However, the more remote the collection tank is from the separator system, the more probable the answer is "yes."

46. No. 96-35648, 1997 WL 489034 (9th Cir. Aug. 25, 1997).

47. *Id.* at *1.

48. The contract was solicited pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a). Section 8(a) instituted a business development program for those contractors determined to be socially and economically disadvantaged. The statute required certain government contracts to be set aside so that the SBA could award them to eligible firms. The Army set aside this contract to the SBA in September 1993. However, the Army, the SBA, and Verdan thereafter signed a tripartite agreement under which the SBA delegated responsibility for administering the contract back to the Army.

no bond had been furnished. The Army made all payments on the contract directly to Verdan. However, Verdan failed to pay Blue Fox money due, in the amount of \$46,518.14, for work performed. Blue Fox notified the Army, in writing, of Verdan's failure to pay. The Army, after making additional contract payments to Verdan, subsequently terminated Verdan for default in January 1995 for, among other things, failure to adhere to the contract's delivery schedule. The Army modified an existing services contract with another contractor to obtain completion of the project. Blue Fox obtained a default judgment against Verdan and its officers in January 1995 in the Tribal Court of the Yakima Indian Nation, but Blue Fox was unable to collect any money from Verdan.

Blue Fox brought suit against the Army in the United States District Court for the District of Oregon, alleging, *inter alia*, that the Army violated the Miller Act by failing to ensure that a bond was in place to protect Blue Fox.⁵⁰ Blue Fox sought an equitable lien upon the money retained by the Army under the original contract or appropriated for use on the contract to complete the work. On 24 May 1996, the district court entered judgment for the Army and against Blue Fox on cross-motions for summary judgment.⁵¹ The district court held that it had no jurisdiction to determine Blue Fox's claim against the Army because the "waiver of sovereign immunity provided by the [Administrative Procedure Act] does not apply to the claim of Blue Fox."⁵²

Analysis

The fundamental question addressed by the district and circuit courts was whether the district court had jurisdiction to consider Blue Fox's claim against the Army. The Army argued

that, absent a waiver, the doctrine of sovereign immunity protects the United States and its agencies from such lawsuits.⁵³ The Administrative Procedure Act (APA)⁵⁴ provides that a suit may be brought against the federal government where the plaintiff seeks some type of relief other than money damages. Thus, the courts' analyses, under the APA, turned to whether Blue Fox sought relief other than money damages. Blue Fox argued that the relief it sought was an equitable lien against the United States, not money damages.

The district court initially looked to *Bowen v. Massachusetts*⁵⁵ and the analysis employed by the United States Supreme Court when determining if a suit seeks money damages and is thus barred. In *Bowen*, the Court held that if the damages sought were compensation for a suffered loss, the suit sought money damages.⁵⁶ Conversely, if the suit was simply a claim for "the very thing to which the plaintiff was entitled,"⁵⁷ the suit sought specific relief, not money damages, and sovereign immunity was waived under the APA. Accordingly, the district court's analysis focused on whether Blue Fox was *entitled* to the unpaid contract funds under the Miller Act.⁵⁸

Upon review of the Miller Act's requirements, the district court determined that Blue Fox was *not* entitled to reimbursement from the Army for Verdan's failure to pay the subcontractor. The court found that the act "neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract."⁵⁹ Since the court interpreted the act as imposing no statutory or contractual obligation on the Army to pay the subcontractor, it held that Blue Fox could not seek specific relief under the act and that Blue Fox's claim was for money damages.⁶⁰ Accord-

49. 40 U.S.C. § 270a(a)(2) (1994). The act, in pertinent part, requires that on all contracts in excess of \$25,000 that involve the construction, alteration, or repair of any building or public work, the contractor must furnish certain bonds. One of the required bonds is a payment bond with a surety or sureties that will protect those individuals supplying labor and material for the work provided under the contract.

50. Blue Fox asserted jurisdiction under 28 U.S.C. § 1331, the Administrative Procedure Act (APA).

51. *Blue Fox, Inc. v. United States Small Bus. Admin. and U.S. Dep't of the Army*, No. 95-612, 1996 U.S. Dist. LEXIS 8264 (D. Or. May 24, 1996).

52. *Id.* at *13. The court found that the Miller Act did not apply to the contract in question, as it was primarily a service contract, and that even if the Act had applied, it created no statutory obligation for the Army to pay Blue Fox.

53. *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *United States v. Testan*, 424 U.S. 392, 400 (1976); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 244 (1940).

54. 5 U.S.C. § 702 (1994). The act states, in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id. (emphasis added).

55. 487 U.S. 879 (1988).

56. *Id.* at 895.

57. *Id.*

58. *Blue Fox, Inc. v. United States Small Bus. Admin. and U.S. Dep't of the Army*, 1996 U.S. Dist. LEXIS 8264, at *10 (D. Or. May 24, 1996).

ingly, the court held that Blue Fox's claim was not cognizable under the APA.⁶¹

The Ninth Circuit reversed this holding, with the majority finding that Blue Fox's claim was *not* barred by the doctrine of sovereign immunity, reiterating that the immunity had been waived as to suits "seeking relief other than money damages" under the APA. The majority cited to *Bowen* as well, and to the Court's quote from Judge Bork's opinion in *Maryland Department of Human Resources v. Department of Health and Human Services*,⁶² in which he drew the distinction between "money damages" and "specific remedies." Judge Bork characterized money damages as compensatory damages, and specific remedies or performance as "an attempt to give the plaintiff the very thing to which he was entitled."⁶³ The majority, citing *Aetna Casualty and Surety Co. v. United States*,⁶⁴ disagreed with the district court's holding that Blue Fox had to be statutorily entitled to the specific relief requested. Instead, the majority held that Blue Fox sought an equitable lien, which was an equitable remedy, not an action for damages, and thus was included within the APA's waiver of sovereign immunity.⁶⁵

The dissent in the circuit court's decision rejected this conclusion, stating that "no matter how you slice Blue Fox's claim, it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond."⁶⁶ The dissent viewed Blue Fox's claim as accomplishing "by indirection a result that [it] . . . could not reach under the Miller Act."⁶⁷ The dissent dismissed the majority's holding that the district court was wrong in requiring that a statutory remedy exist for the APA to apply, indicating that the real question was whether the government has a duty—in this case, under the Miller Act—which can be specifically enforced. As the dissent found no such duty, it

found that no waiver of sovereign immunity or independent cause of action exists.⁶⁸

As the dissent noted, the majority decision runs contrary to what has been "the law for decades," that "subcontractors cannot enforce a lien on government property unless the government has waived sovereign immunity."⁶⁹ The dissent accurately indicated that no court has ever held that a subcontractor may sue the government for payment of money that prime contractors failed to make to subcontractors, absent an agreement by the government to allow such suits.⁷⁰ The dissent found that no such agreement existed in the instant case and, accordingly, that the suit was barred.⁷¹

Conclusion

The implications of this decision for the government, and the practitioner involved with government contracting, are numerous. It is likely to open the floodgates to increased litigation by subcontractors seeking to enforce liens against the government for payments not made by prime contractors. Additionally, such a break in long-standing precedent will make it more difficult for federal agencies to dispose of such lawsuits promptly at the threshold. Moreover, if the decision stands, it will adversely affect the procurement process for all federal agencies, not just the Army.

Those who are involved with the drafting and administration of government contracts must be careful to properly characterize these contracts.⁷² Should the Miller Act apply, the government must require the necessary bond, thereby giving subcontractors an avenue by which they may seek to recover

59. *Id.* at *12 (citing *Fanderlik-Locke Co. v. United States ex rel. M.B. Morgan*, 285 F.2d 939 (10th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1288 (7th Cir. 1984)).

60. *Id.*

61. *Id.*

62. 763 F.2d 1441, 1446 (D.C. Cir. 1985).

63. *Id.*

64. 71 F.3d 475 (2d Cir. 1995).

65. *Blue Fox, Inc. v. United States Small Bus. Admin. and U.S. Army*, No. 96-35648, 1997 WL 489034 (9th Cir. Aug. 25, 1997).

66. *Id.* at *6.

67. *Id.* at *7.

68. *Id.*

69. *Id.* at *6.

70. *Id.* It has long been recognized that subcontractors have no enforceable rights against the United States for such compensation. *See United States v. Munsey Trust Co.*, 332 U.S. 234, 241 (1947); *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650-51 (9th Cir. 1992); *J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990); *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1289-90 (7th Cir. 1984); *United Elec. Corp. v. United States*, 647 F.2d 1082, 1087 (Ct. Cl. 1981).

71. Additionally, no privity of contract exists between Blue Fox and the Army; the privity exists between the Army and the prime contractor, Verdan.

unpaid money, by suing on the bond in the name of the United States.⁷³ Major Risch.

72. Although the district court held that the Miller Act did not apply because the Army had properly decided that the contract was primarily a service contract, the dissent in the circuit court's decision, based on the Army's concession before the district and circuit courts that the contract *was* subject to the Miller Act, indicated that there was "no question that the Army should not have approved the Verdant contract without ensuring that there was an adequate surety bond" *Blue Fox*, 1997 WL 489034, at *7.

73. *See* 40 U.S.C. § 270b(b) (1994).