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## **ENFORCEMENT OF ENVIRONMENTAL LAWS AT GOVERNMENT-OWNED FACILITIES: SOME THEORETICAL AND PRACTICAL CONSIDERATIONS**

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### **SUMMARY**

Enforcement of environmental laws at government-owned facilities is discussed primarily from the perspective of state enforcement at national government facilities. The paper focuses on the impact of the Federal Facilities Compliance Act of 1992 (FFCA). Three general principles are proposed and analyzed in relation to realities encountered in California's enforcement experience. Some tentative conclusions drawn from the first year of the FFCA are proposed.

### **1 INTRODUCTION**

In one sense, enforcement of environmental laws at government-owned (2) facilities is not significantly different from environmental enforcement of the private sector. Federal law now requires there be little difference. By waiving the government's sovereign immunity from fines and monetary penalties, the Federal Facilities Compliance Act of 1992 (FFCA) (3) stripped the government of the most important advantage it alone enjoyed in the regulated community. Before enactment of the FFCA, state and local enforcement agencies could seek injunctive relief against the national government, but their efforts lacked teeth. Monetary penalties (in the form of contempt) were only available in the event the government refused or failed to obey a court order. By enacting the FFCA, Congress declared that the federal government, insofar as management of hazardous and solid waste is concerned, is now subject to the same fines and monetary penalties that everyone else faces.

Yet, enforcement of environmental laws at government facilities is unique. It is different because the government *is* different. Even bringing the federal government fully within the enforcement arena, subject to monetary penalties, required a special law (the FFCA); and even this law, because it was compromise legislation, created limited exemptions to immediate enforcement that relate to federal management of munitions waste, mixed radioactive waste, and waste generated on ships. The unique nature of regulating the sovereign's activities by a lesser sovereign (e.g., a state) leads us to approach enforcement with a different mind-set than we do with private-sector enforcement. With the FFCA, we are now in uncharted waters, armed for the first time with effective sanctions to enforce the requirements of the nation's most sweeping pollution-control law.

In this paper, I outline three general principles concerning enforcement at government-owned facilities. These principles are followed by a discussion of real-world attributes which necessarily mesh with and temper those principles. Finally, some tentative conclusions for discussion are presented. This paper draws on the author's experience and focuses primarily on state government hazardous waste law enforcement against the United States. Particular attention is directed to the FFCA, since it is under this law that significant enforcement actions will be taken. It is hoped that the principles and realities discussed might have application elsewhere (4).

### **2 THE FEDERAL FACILITIES COMPLIANCE ACT**

One cannot discuss a federal enforcement policy without a rudimentary understanding of the history of the FFCA.

The FFCA was enacted in direct response to unsuccessful attempts by states to subject the federal government to monetary penalties for environmental mismanagement. Various states argued that existing law waived the government's immunity from penalties. With respect to hazardous waste, they argued that sweeping language in RCRA holding the government subject to all substantive and procedural requirements of federal, state, and local laws meant that Congress intended penalties be assessed when federal agencies violated the law. In particular, they pointed to the language in section 6001 of RCRA (42 U.S.C. § 6961) that the federal government

"shall be subject to and comply with all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) . . . in the same manner, and to the same extent, as any person is subject to such requirements. . ."

Results of the various states' efforts were mixed, but generally negative. The Ninth Circuit Court of Appeals said no to Washington, in *United States v. Washington* 872 F.2d 874 (Ninth Cir. 1989), thereby effectively stalling attempts by California (also a Ninth Circuit state) as well. The Tenth Circuit thwarted New Mexico's attempts in *Mitzelfelt v. Department of Air Force* 903 F.2d 1293 (10th Cir. 1990). The State of Ohio, seeking to alleviate conditions at the Department of Energy's uranium processing plant in Fernald, succeeded partially in the Seventh Circuit, which held that Congress had waived federal sovereign immunity in RCRA's citizen-suit section, but not in its federal-facilities provisions (5). Ohio's limited victory was short lived. In *Ohio v. United States Department of Energy* 503 U.S. \_\_\_, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992), the Supreme Court determined, through a close analysis of the language in RCRA and the Clean Water Act, that Congress did not explicitly waive the government's immunity from penalties. Accordingly, they were unavailable to the states and local governments.

However, pro-penalty proponents were active in Congress while they were losing in the courts. The National Association of Attorneys General (NAAG) made the FFCA a legislative priority. Proponents of the legislation argued that penalties were the only way to prod the government into compliance. They argued that then-existing penalty provisions available to the states (e.g., section 118 of the Clean Air Act, 42 U.S.C. §§ 7401-7626) had not been abused, and that federal agencies would respond in an environmentally positive manner when agencies faced fines as the alternative to compliance.

Opponents argued that taxpayers should not be forced to compound the errors of their government by paying penalties. They contended that the legislation would give opportunistic states, through enforcement actions, the power to reset priorities. Under this scenario, they argued that the likely result would be that limited available funds would be channeled to those places where states pressed their litigation, instead of to where the monies were needed most. They further argued that in some areas, immediate compliance with the law was impossible, and passage of legislation would simply be an invitation to states to line their pockets at the expense of the federal treasury. Instead, they proposed compromise legislation which would have set up a system to "prioritize" work at facilities which were not in compliance.

After an unsuccessful attempt in the 101st Congress, where legislation passed the House but stalled in the Senate, NAAG's pro-penalty efforts succeeded in the 102nd. Barely seven months after the Supreme Court spoke in *United States v. Ohio* (*supra*), Congress passed and President Bush signed the FFCA. Although the FFCA unambiguously waived the federal government's immunity from penalties (6), it temporarily exempted munitions, mixed nuclear, and public-vessel wastes.

The question now is how the states should take advantage of this long-sought enforcement tool.

### 3 SOME BASIC PRINCIPLES

Three principles can be proposed as underlying an approach to local enforcement of environmental laws at government-owned facilities.

First, the federal government is capable of, and does commit, as large and as serious a universe of violations as are committed by anyone else. In the United States, the size of the federal facilities, the dangerous nature of the materials with which they have dealt, and a historical mind-set that compliance is meant for others have all created a backlog of cleanup responsibilities which will take over 30 years and billions of dollars to remedy. Even with a new mind-set and direction, there is no reason to believe that the government is suddenly incapable of committing serious environmental violations.

Second, the government should be treated in a manner similar to private industry or other parties. As noted in the Introduction, the law requires it. Not only is the federal government, by and large, subject to the same laws as anyone else under the Clean Water Act, the FFCA, and other laws, but other provisions of law *protect* the federal government from being singled out by a state. RCRA states that the federal government is subject to state and local requirements "in the same manner, and to the same extent, as any person is subject to such requirements," and nothing more. Since any waiver of sovereign immunity must be explicit and unequivocal, never implied (7), the government's sovereign immunity waiver in this case "in the same manner and to the same extent, as any person is subject" cannot ever subject the United States to more stringent requirements than those faced by any other entity. Finally, although there is some question concerning whether the amount of taxpayer dollars extracted *from* the federal government by other enforcement agencies should be as high as penalties collected from the private sector, there is nothing to indicate that Congress intended any other result (8).

The third principle (arguably subject to more debate since, from the perspective of national regulation, not all legislatures have spoken on the subject) is that state and local governments should be treated in the same way that the federal government is— and that is just like everyone else. States and local governments are "persons" under RCRA (42 U.S.C. § 6903(15), and in California, they are similarly defined (Cal. Health & Saf. Code § 25118).

### 4 REAL WORLD EXPERIENCE AFFECTING ENFORCEMENT ACTIONS

The principles delineated above mesh with and are modified by the real world experience. In California, our experience leads to observations concerning five subjects.

First, litigation (9) against the United States is different and vigorous. It is different because the federal government's interests in litigation are different. A private enterprise's paramount interest generally consists of protecting its purse and good name. Litigation involving the United States brings in other concerns. Certainly, the federal facility involved has an interest in protecting its budget. However, mysteries and features of the budget process introduce their own wrinkles. For example, an agency may prefer to be represented by the Justice Department (which generally enters a case when it is filed in court, as opposed to an administrative forum) because in those circumstances, litigation costs are not necessarily borne by the installation. Moreover, even though the federal government may agree to do certain things, its representatives consistently argue that they cannot commit to spend money which has not been authorized by Congress. They generally request that the entity bringing the enforcement action acknowledge in any settlement document that the Anti-Deficiency Act, 31 U.S.C. § 1341, may prevent payment of fines and penalties, or indeed, initiation of environmental cleanup work if the money is not appropriated by Congress. The state plaintiff may be able to identify money in a discretionary fund of the agency or installation, just as it may be necessary to confirm the existence of funds in a private defendant's bank account. Failing this, it may be that the best that can be hoped for is a carefully worded promise by the agency to see that the Executive Branch requests the money from Congress. Drafting the appropriate language to see that

the item does not stall on its way to Washington, or in the halls of the Pentagon, the Office of Management and Budget, or elsewhere, requires creativity and skill.

Special considerations in resolving cases go beyond financial interests. The language in any particular settlement document is not only scrutinized by the agency for precedential value as it relates to the particular installation or agency, but the Justice Department in particular reviews a settlement for any precedent it may have in cases involving other federal agencies. In this author's experience, there appears to be within the Justice Department a view that its mission is not necessarily to interpret the law most reasonably, or to discern the will of Congress. Instead, its role is to interpret it in the most restrictive manner possible. That is, if there is any ambiguity in a statute as to what it commands the United States to do or how it applies to the United States, the Justice Department will generally take the most restrictive interpretation or argue that the law does not apply to it. This restrictive view is sometimes, but not always, the position of the agency.

Second, the United States will find as many reasons to excuse its conduct as private parties do. Some will be the same—e.g., the law was ambiguous, the violation was an oversight, no environmental damage occurred, and so forth. Others will focus on the nature of the federal process—e.g., our people are limited to a two-year tour of duty; we're a training base, and the violations were really created by a detachment here from South Carolina, etc. This point is obvious and, perhaps, tautological. The lesson to be drawn from it is that the government admits fault and shifts blame in the same manner that private parties do.

Third, the use of taxpayer dollars for penalties inevitably affects the charging and settling process. Where the money goes also has an impact. Although Congress has rejected the argument that demanding penalties from the government only penalizes the taxpayers, it seems that those of us in the enforcement business nevertheless recognize that there may be a different level of pain associated with identical penalties when one entity being punished operates at a profit, and the other is a government agency. Indeed, since one purpose of assessing penalties is to deprive the violator of profit derived from the violations, it can be argued that penalties will naturally be lower since the government (which is a non-profit entity) will have derived no profit from a violation. In a similar vein, the use of environmental credits in lieu of penalties may be more appropriate against a government agency defendant (10).

Fourth, political considerations against large federal facilities can and may still enter the process. Large federal installations are a major economic force within their communities. California, which benefited disproportionately from the defense buildup of the 1980s now is suffering more than its per capita share of economic pain in base closures. More, as yet unannounced, closures are predicted. Whether a "get-tough" environmental enforcement action against a base which could be on the next hit list would tip the balance in the Pentagon is conjectural. What is likely, however, is that those who enforce the law and seek significant penalties cannot help but wonder whether their action will persuade military management that a particular base in, say, California, should be decommissioned in favor of one remaining in another state. Whether this should be a concern is a policy question that needs to be addressed by those charged with enforcement of the law in any particular jurisdiction.

The political factor in the charging and settling process is, of course, not limited to large federal facilities. Any facility—private or public—can have a significant local or state economic impact. Moreover, private enterprises can, and have, threatened to move out of state in the face of significant enforcement actions. Although charging and settling positions may not have changed in response to direct threats or predictions in individual enforcement actions, the State of California has moderated its position on penalties in response to difficult economic times. Insofar as penalty policies are applied across the board, the military installations have benefited from this moderation. Whether they will—or should—further benefit from the uncertainties of the base closure process can not be predicted at this time.

Fifth, enforcement actions are, by their nature, adversarial. The regulating agency has conducted an inspection or other activity and initiated an enforcement action. The target federal agency is a defendant. The state, as the charging entity, is in a position of power, an unusual role

for both parties. For some time, the federal agencies, in a manner similar to private industry, came to enforcement settlement meetings promoting a "partnership" between the regulators (the state) and those regulated (the facility subject to enforcement.) Indeed, as the likelihood of enactment of the FFCA increased, California enforcement personnel heard a great deal more about the state-federal "environmental partnership" than they had before. Now that the FFCA is in force, the federal government has an even greater incentive to create a non-adversarial partnership with state regulators. Nevertheless, RCRA receives its force, by Congressional design, through the threat of penalties. Both the US EPA and the California Department of Toxic Substances Control have begun significant federal facilities enforcement projects, which contemplate inspections, enforcement actions, and the potential for significant penalties.

What does this mean for the future of environmental enforcement at government-owned facilities? Can there be a "partnership"? Certainly, enforcement will be different from before. The federal government will no longer be able to implement compliance at its own speed, pursuant to its own priorities. To the degree that the ability to enforce through penalties has created a more dominant state partner in the state-federal relationship, it augurs for compliance in areas where the states are most concerned, assuming they concentrate their enforcement efforts in those areas. It also means that the state will retain the role of police officer, thereby creating a tension in any partnerships that either side seeks to forge. On the other hand, it promises that whatever partnerships are formed will be done on the basis of more equal strengths possessed by the parties.

## **5 THE CALIFORNIA EXPERIENCE IN THE FIRST YEAR OF THE FEDERAL FACILITIES COMPLIANCE ACT**

The Federal Facilities Compliance Act became law in November 1992. At the time this paper was drafted, approximately a year had gone by. The experience in California is necessarily limited, since an enforcement action often takes more than a year to initiate and conclude. Thus, exposition of this topic must be brief, and the jury is still out in determining whether the FFCA will be implemented smoothly, and with any significant effect.

Notwithstanding the limited time that the FFCA has been in effect, the general impression is that the federal government is being brought into the compliance universe and is being treated like other parties. Although a year is probably time enough for insurmountable problems to surface, it appears that none has. Penalty assessments have covered the range from small field citations to six-figure assessments. Small cases have settled. Where high penalties have been sought, however, negotiations have been less successful, and these cases remain on the docket for further negotiation or trial. This suggests either that the government is a tough defendant, or it may simply be a function of the fact that few, if any, cases calling for more than \$100,000 in penalties settle without extensive negotiations.

We also see that the federal government is reacting to many of the same things that the private sector worried about when it was brought into the California compliance universe. For example, the California Department of Toxic Substances Control has, for several years, insisted that defendants in civil cases agree to a contingent admissions clause. That is, a party is permitted, in settling a case, to deny the allegations of a complaint, but it must agree that for the purposes of enhancing penalties in *subsequent* actions, that the allegations in the action currently being settled will be deemed to have been admitted at a later hearing on subsequent violations. This policy protects the party in the instant settlement, but it also preserves the state's interest in pursuing repeat offenders for enhanced penalties. However, it runs contrary to the manner in which most civil actions are settled in the United States, wherein a defendant denies liability and pays damages to the plaintiff, who, in turn, dismisses the lawsuit. Settlement negotiations concerning the California Department of Toxic Substances Control's "contingent admissions" provision have been a substantial point of contention in many settlement negotiations. Ultimately, however, the private sector has adjusted to including this provision in all cases alleging significant violations, and arguments about it have diminished. We can probably

expect the same painful adjustment process by the federal government in this and perhaps other areas.

## 6 CONCLUSIONS

Several tentative conclusions can be drawn from our experience in enforcing environmental laws at government-owned facilities.

First, economics is important to the federal government, and it responds accordingly. California has seen a change in attitude by the federal government which has facilitated environmental compliance. Base commanders have reacted by allocating penalties to the operating budgets of the units under their command which are responsible for violations. Repeat inspections at facilities where penalties or costs of investigation (11) have been paid previously to the state for violations have, in general, shown fewer violations.

Second, there has been no raid on the federal treasury. Cases have, in this author's experience, been approached from a penalty standpoint in a manner similar to most other cases, with perhaps some deference being paid to the fact that taxpayer money from a not-for-profit entity is being sought. There have been no projections that massive fines will be collected, and no budget items depend on such fines for funding. Given the considerable uncertainties in the enforcement process at federal facilities, it would be foolish to place any budgetary reliance on a set penalty figure.

Third, the federal agency or department must have a budget process that allows for speedy resolution and payment of penalties. After enactment of the FFCA, we in the regulatory community were alarmed at a report that there would be no Defense Department budgeting for penalties because the government would be in total compliance. Apparently, this approach has not been implemented, as it should not be. Some monetary penalties will inevitably be assessed. If no budgeting or other anticipation of their payment occurs, we face the prospect of all cases going to courts so that compliance with the statute will be compelled.

Fourth, environmental compliance should be a significant factor in promotions and evaluations of job performance at the federal level. This is particularly true in the military, where tours of duty rarely exceed three years, and there exists an incentive to leave nettlesome environmental problems to the next facility commander. It is no overstatement that environmental problems are among the most difficult problems facing the Departments of Defense and Energy. Placing people in command who are capable of solving these problems—and are evaluated on their success—is in the national interest.

All of the foregoing lead to the final conclusion: notwithstanding the assertion that government (including state and local government) should be treated in a manner similar to any other party in enforcement of environmental laws, this analysis and our experience suggest that dissimilar treatment is inevitable. The dissimilar treatment, however, has contributed to successful implementation of the FFCA. The states are aggressively using the law to seek compliance without attempting to line their treasuries at the expense of the federal taxpayer. The federal agencies have responded with increased efforts at compliance that account for their new penalty liabilities. Ultimately, we will know that we have succeeded when the level of compliance is such that few penalties are collected because there is no need to seek them.

## ENDNOTES

1. The comments contained in this paper are the opinions of the author alone and do not necessarily represent those of the Attorney General of California or any executive or administrative agency of the State of California.

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2. "Government" naturally encompasses local, regional, national, and even international administrations. This paper focuses on the national government of the United States. It is hoped that useful generalizations from this focus can be made to other governments at all levels in a wide range of countries.
  3. Public Law 102-386, amending the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) 90 Stat. 2796, as amended, 42 U.S.C. § 6901 et seq. The sovereign immunity waiver, discussed herein, appears at 42 U.S.C. § 6961.
  4. In an attempt to promote discussion, the hypotheses and conclusions which are discussed are sweeping. They are, therefore, proposed with an invitation that they be criticized and modified by the reader.
  5. Ohio also sued under the Clean Water Act, where the Court of Appeals also held that penalties and fines were available against the federal government. As with the RCRA provisions, the Supreme Court also reversed that determination.
  6. The full text of section 6961 is included as an appendix to this paper.
  7. See, e.g., *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L. Ed.2d 607 (1980); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983).
  8. The only special consideration to be given for penalties assessed against the federal government is contained in § 102(a)(3) of the FFCA, which provides that they be used for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.
  9. Not all enforcement, of course, involves litigation. However, this paper is necessarily written with this perspective paramount since the author's major experience is in litigation.
  10. Through environmental credits, an entity subject to an enforcement action pays for an environmentally beneficial project. Generally, the project has some nexus to the violation charged, and the benefit extends beyond the facility to the community at large. Some or all of the expense of the project is credited against the assessed penalty.
  11. Before enactment of the FFCA, the federal government reimbursed the state for investigative costs in some enforcement actions.

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**APPENDIX**

(As amended Pub.L. 102-386, Title I, § 102(a),(b), Oct. 6, 1992, 106 Stat. 1505, 1506.)

§ 6961. Application of Federal, State, and local law to Federal facilities

(a) In general

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall

be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

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(b) Administrative enforcement actions

(1) The Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities contained in this chapter. The Administrator shall initiate an administrative enforcement action against such a department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person. Any voluntary resolution or settlement of such an action shall be set forth in a consent order.

(2) No administrative order issued to such a department, agency, or instrumentality shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator.

(c) Limitation on State use of funds collected from Federal Government

Unless a State law in effect on October 6, 1992, or a State constitution requires the funds to be used in a different manner, all funds collected by a State from the Federal Government from penalties and fines imposed for violation of any substantive or procedural requirement referred to in subsection (a) of this section shall be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.