

Penalty Enforcement Against Federal Facilities for Underground Storage Tank Violations  
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**“The new Golden Rule: He who has the gold makes the rules.”<sup>1</sup>**

## **I. Introduction.**

The December 22, 1998 deadline requiring owners of underground storage tanks (USTs) installed before 1985 to comply with the upgrade requirements in Subchapter IX of the Solid Waste Disposal Act (SWDA) recently passed.<sup>2</sup> As a result, UST enforcement actions should dramatically increase this year. Prior to the deadline, only new USTs installed beginning in 1985 faced Subchapter IX corrosion protection and spill/overflow prevention requirements. The large number of federal facilities tanks involved makes potential federal penalties a significant issue. According to information submitted by the federal agencies to the U.S. Environmental Protection Agency (EPA) last Fall, federal facilities contain over 13,000 active USTs.<sup>3</sup> State attempts at penalty enforcement actions for UST new tank violations by federal facilities have been rare, but the pace of UST enforcement may begin to increase in light of the December deadline's passing.

In seeking penalties against federal agencies, states face the sovereign immunity hurdle of the “clear and unequivocal” test, most recently affirmed in the environmental context in *DOE v. Ohio*<sup>4</sup>. The UST sovereign immunity issue concerns punitive

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<sup>1</sup> Numerous exhaustive Internet searches found this quote attributable to no one.

<sup>2</sup> The deadline is contained in 40 C.F.R. § 280.21. The SWDA's cite is 42 U.S.C. §§ 6901 - 6992k (1976, as amended in 1978, 1980, 1984, 1988, 1992, and 1996), also known as the Resource Conservation and Recovery Act (RCRA). For the sake of simplicity, all references will use the 42 U.S. Code cites and Subchapter Roman numeral designations versus the SWDA cites and Subtitle designations.

<sup>3</sup> Per responses submitted to EPA Office of Enforcement Compliance Assurance's Federal Facilities Enforcement Office (FFEO) in Fall 1998 from the various federal agencies as compiled by attorney Melanie Barger Garvey of EPA FFEO and depicted in a December 1998 FFEO UST status report.

<sup>4</sup> *DOE v. Ohio*, 503 U.S. 607, 615, 112 S.Ct. 1627, 1633 (1992). This had been a long standing doctrine well before *DOE v. Ohio*, see e.g.s, *U.S. v. Mitchell*, 445 U.S. 535, 538-39, 100 S.Ct. 1349, 1351-1352 (1980) and *Eastern Transportation Co. v. U.S.*, 272 U.S. 675, 686, 47 S.Ct. 289, 291 (1927).

penalties, penalties for wholly past conduct, which can be obtained in an administrative or judicial proceeding.

No one disputes that SWDA Subchapter IX's federal facilities section allows states to regulate federal USTs or to obtain coercive penalties against federal facilities for violation of a court's injunction. Punitive penalties are much preferred by regulators since punitive penalties do not require an injunction as a precursor to a penalty action. Also, regulators can use the much more expeditious administrative forum. In addition, with punitive penalties, violators cannot postpone compliance by beginning to comply only after an injunction is issued.

While federal sovereign immunity for punitive penalties was clearly waived for solid and hazardous waste under RCRA with the 1992 SWDA Amendment, called the Federal Facilities Compliance Act (hereinafter FFCA),<sup>5</sup> the FFCA does not appear to apply to Subchapter IX of RCRA. Moreover, Subchapter IX's own waiver language<sup>6</sup> utterly fails the "clear and unequivocal" test.

A SWDA citizen suit could potentially provide an alternate enforcement mechanism for states to use, but it has similar "clear and unequivocal" problems. The SWDA citizen suit provision<sup>7</sup> merely refers to the civil penalties section in Subchapter III (the hazardous waste Subchapter),<sup>8</sup> ignoring the civil penalties section in Subchapter IX<sup>9</sup>. Thus states

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<sup>5</sup> Pub. L. No. 102-386 (Oct. 6, 1992), which amended 42 U.S.C. § 6961's federal facilities language and § 6903(15)'s definition of "person."

<sup>6</sup> 42 U.S.C. § 6991f.

<sup>7</sup> 42 U.S.C. § 6972 "Citizen suits."

<sup>8</sup> 42 U.S.C. § 6928 "Federal enforcement."

<sup>9</sup> 42 U.S.C. § 6991e "Federal enforcement."

could not even use the citizen suit provision to obtain punitive penalties against federal agencies for UST violations.

On another front, the U.S. EPA has been asserting authority for punitive penalties for UST violations against federal facilities since 1997.<sup>10</sup> EPA asserts that sovereign immunity does not apply for interagency federal penalty actions and justifies this initiative based upon the SWDA meeting the less rigorous “clear statement” test, instead of the more stringent “clear and unequivocal” standard that the states must meet.<sup>11</sup> The key differences between the two standards are that “clear statement” scrutiny is less stringent and analyzing legislative history is permissible under the “clear statement” test.<sup>12</sup> EPA argues that SWDA section 6961(b), [t]he Administrator may commence an enforcement action against any department, agency... of the Federal Government pursuant to the enforcement authorities contained in this chapter,” allows them to use the Subchapter IX enforcement provisions at section 6991e to impose punitive penalties on federal agencies.<sup>13</sup>

Every federal agency has acquiesced to EPA’s initiative, except the Department of

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<sup>10</sup> According to a letter from DoD General Counsel to Director EPA FFEO (March 18, 1998) at 1; and validated in a telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>11</sup> Letter from Director EPA FFEO to Army, Navy, and Air Force Secretaries for Environment, Safety, and Occupational Health (August 26, 1997); and issue memorandum from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations (April 10, 1998).

<sup>12</sup> See e.g.s, *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council and NLRB*, 485 U.S. 568, 577 and 583, 108 S.Ct. 1392, 1399 and 1402 (1988) and Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies, hereinafter Fair Housing Act opinion, 18 Op. Off. Legal Counsel 29 at 6-7 (1994).

<sup>13</sup> Letter from Director EPA FFEO to Army, Navy, and Air Force Secretaries for Environment, Safety, and Occupational Health (August 26, 1997); and issue memorandum from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations (April 10, 1998).

Defense (DoD).<sup>14</sup> On April 16, 1999, DoD requested a legal opinion from the Department of Justice's Office of Legal Counsel (DOJ OLC) over this legal dispute.<sup>15</sup> DoD invoked a 1979 executive order of President Carter, EO 12,146, "Management of Federal Legal Resources" that sets forth a mechanism for resolving interagency legal disputes.<sup>16</sup> If DOJ were to opine in favor of DoD, EPA would be precluded from using punitive UST fines against all federal agencies. However, if DOJ's 1997 Clean Air Act (CAA) opinion<sup>17</sup> is a valid indicator of the Office of Legal Counsel's inclinations, EPA is apt to prevail.

This may not occur because the SWDA section 6991f federal facilities text is weaker than the CAA section 118(a) federal facilities text.<sup>18</sup> Moreover, the SWDA is devoid of legislative history on Congressional intent for federal facility punitive (UST) penalties, whereas legislative history was heavily relied on in the CAA opinion.<sup>19</sup> Although a close call, this thesis predicts that DOJ will rule that EPA does not have authority for punitive penalties against federal agencies for UST violations.

Despite the inability of states and the uncertainty of EPA using punitive penalties against federal facilities for UST violations, Congress has little incentive to address this

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<sup>14</sup> According to a telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>15</sup> According to an interview with Colonel Dan Benton of DoD's Office of General Counsel at the Pentagon (April 20, 1999). He estimates that DOJ will take from six to twenty-four months to issue an opinion.

<sup>16</sup> Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979).

<sup>17</sup> Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (hereinafter CAA Opinion)(July 16, 1997) which has not yet received a citation designation.

<sup>18</sup> 42 U.S.C. § 7418(a).

<sup>19</sup> CAA Opinion at 3 (where DOJ relied on legislative history).

issue.<sup>20</sup> EPA may be able to fill the state penalty enforcement gap and in any case, the states and EPA have several indirect methods to force compliance.<sup>21</sup> Moreover, there is no past history of significant federal facility UST violations, as was the case with the Department of Energy's (DOE's) lackadaisical hazardous waste management that spurred the FFCA.<sup>22</sup> Instead of addressing federal facilities' compliance, Congress should focus any new efforts on the exponentially more significant UST problem posed by large-scale lack of compliance by small government and small business.

## **II. Background on UST legislation and UST penalty enforcement.**

### **A. UST history.**

An UST is a tank and any underground piping connected to the tank that has at least 10 percent of its combined volume underground.<sup>23</sup> EPA estimates that there are currently about 892,000 regulatable USTs nationwide.<sup>24</sup> Underground storage tanks are used mainly to store gasoline, diesel, fuels, *etc.*<sup>25</sup> About half are owned by petroleum marketers.<sup>26</sup> These tanks used to be mostly constructed of bare steel, which is inclined to corrode and leak over time, thereby contaminating soil and ground water. One industry

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<sup>20</sup> See discussion in this thesis at pages 21-24 *supra*.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> EPA Factsheet, Overview of the Federal UST Program (1996) at the EPA Office of UST website, <<http://www.epa.gov/swerust1/overview.htm>>.

<sup>24</sup> Amy Porter, *Storage Tanks: Seven Industry Groups Form Coalition to Boost Compliance with New Standards*, BNA Daily Environment Report (December 23, 1999), available on Westlaw as 246 DEN A-1, 1998.

<sup>25</sup> Wesley Brown, *Regulatory Hammer Set to Fall*, Tulsa World (December 6, 1998) at 3, available on Westlaw as 1998 WL 11162195.

<sup>26</sup> *Id.*

study projected that 20% of unprotected USTs will end up leaking.<sup>27</sup> EPA estimates that 60% of leaks affect ground water.<sup>28</sup> One gallon of gasoline can contaminate five million gallons of drinking water.<sup>29</sup> The potential hazard from leaks is significant because over half of the nation's drinking water comes from ground water.<sup>30</sup>

In 1984, Congress addressed the threat of leaking USTs by adding Subchapter IX to the SWDA. Subchapter IX banned the installation of bare steel tanks beginning in 1985, and required existing tanks to be upgraded, replaced, or closed pursuant to EPA regulations, which were to be promulgated within 48 months.<sup>31</sup> EPA promulgated these regulations in 1988 and set a generous ten year deadline (December 22, 1998) for this upgrade.<sup>32</sup> As well as corrosion protection for tanks and piping, USTs were required to have spill/overfill protection.<sup>33</sup> Furthermore, states may have more stringent requirements than those in Subchapter IX and the implementing federal regulations.<sup>34</sup>

All UST owners were required (within 18 months after November 8, 1984) to notify

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<sup>27</sup> *Storage Tanks: Remaining Underground Cleanup Effort Will Cost About \$36 Billion, Report Says*, BNA Daily Environment Report (March 15, 1995) at 1 (citing a 1995 report by Environmental Information Ltd.), available on Westlaw as DEN 50 d11, 1995.

<sup>28</sup> *Storage Tanks: More Than \$1 Million in Penalties Assessed, 3,192 Violations Found in Enforcement Effort*, BNA Daily Environment Report (July 21, 1997), available on Westlaw as 139 DEN A-9, 1997.

<sup>29</sup> Amy Porter, *Storage Tanks: Seven Industry Groups Form Coalition to Boost Compliance with New Standards*, BNA Daily Environment Report (December 23, 1999), available on Westlaw as 246 DEN A-1, 1998.

<sup>30</sup> EPA Factsheet, *Overview of the Federal UST Program (1996)* at the EPA Office of UST website, <<http://www.epa.gov/swerust1/overview.htm>>.

<sup>31</sup> 42 U.S.C. § 6991b.

<sup>32</sup> 40 C.F.R. § 280.21.

<sup>33</sup> 42 U.S.C. § 6991b and 40 C.F.R. §§ 280.21 and 280.40-45.

<sup>34</sup> 42 U.S.C. § 6991g.

regulators of the existence and specifics of each tank.<sup>35</sup> A 1986 amendment to Subchapter IX required financial responsibility certification and created a UST clean-up fund.<sup>36</sup>

The average cost of implementing Subchapter IX upgrades for a typical three tank service station in a metropolitan area is about \$8,290 for rust, spill, and overflow protection and \$22,680 to reline the tanks or replace lines.<sup>37</sup> If the tanks are replaced, instead of relined, the cost is closer to \$45,000.<sup>38</sup> A 1995 estimate forecast that the (then) remaining 900,000 tanks needing upgrade or closure would cost approximately \$12.5 billion to meet Subchapter IX's UST requirements.<sup>39</sup> Many owners have simply removed and decommissioned their tanks and not replaced them.<sup>40</sup> The total number of tanks nationwide has decreased from an estimated 2.1 million in the late 1980s to the current estimate of 892,000.<sup>41</sup>

#### **B. UST penalty enforcement.**

Potential UST penalties are substantial, making the state or federal penalty enforcement issue significant. The maximum civil penalty for UST violations is \$10,000

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<sup>35</sup> 42 U.S.C. § 6991a(a) and 40 C.F.R. § 280.22.

<sup>36</sup> 42 U.S.C. § 6991b(d).

<sup>37</sup> Wesley Brown, *Regulatory Hammer Set to Fall*, Tulsa World (December 6, 1998) at 5, available on Westlaw as 1998 WL 11162195.

<sup>38</sup> *Id.*

<sup>39</sup> *Storage Tanks: Remaining Underground Cleanup Effort Will Cost About \$36 Billion, Report Says*, BNA Daily Environment Report (March 15, 1995) at 2 (citing a 1995 report by Environmental Information Ltd.), available on Westlaw as DEN 50 d11, 1995.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

per tank per day of non-compliance.<sup>42</sup> Failing to meet a compliance order may also yield an additional \$25,000 per day of non-compliance.<sup>43</sup> Both penalty amounts will be automatically adjusted upwards for inflation, such that currently the amounts would be \$11,000 and \$27,500 respectively.<sup>44</sup> While states with approved programs are the primary enforcers of Subchapter IX, the EPA, through its Regional offices, may also take enforcement actions.<sup>45</sup>

A field citation program is in place at the federal level and in many states, thereby expediting the penalty mechanism. Starting in 1988, EPA and several states began developing a field citation program for minor violations.<sup>46</sup> The field citation program was not accomplished through a rulemaking, but instead under SWDA section 6991e(a) compliance order authority.<sup>47</sup> The field citation actually constitutes a settlement in that the violator has the option of rejecting the field citation, whereupon the citation is withdrawn and the normal administrative penalty process follows.<sup>48</sup> However, this

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<sup>42</sup> 42 U.S.C. § 6991e(d); and U.S. EPA Penalty Guidance for Violations of UST Regulations, OSWER Directive 9610.12 at 3 (November 14, 1990), which can be found on the Internet at <<http://www.epa.gov/swerust1/directiv/od961012.htm>>.

<sup>43</sup> 42 U.S.C. § 6991e(a)(3).

<sup>44</sup> The amounts are adjusted upwards for inflation per the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, and EPA's Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. § 19.4.

<sup>45</sup> 42 U.S.C. § 6991c provides the authority for EPA delegated state programs and states that the delegated state, "...shall have primary enforcement responsibility..."

<sup>46</sup> Major Kevin Luster, *The Field Citation Program Under the Clean Air Act: Can EPA Apply It to Federal Facilities*, 22 Wm. & Mary Env'tl. L. & Poly. Rev. 71, 80 (Fall 1997)(discussing the evolution of the UST field citation program).

<sup>47</sup> OSWER, EPA, DIR NO. 9610.16: Guidance for Federal Field Citation Enforcement 1 (March 20, 1991). SWDA Subchapter IX does not specifically authorize, and is in fact silent on, a field citation program. The EPA asserts that a UST field citation program is based on their inherent authority to effect settlements.

<sup>48</sup> OSWER, EPA, DIR NO. 9610.16: Guidance for Federal Field Citation Enforcement 2-3 (October 6, 1993) at Section II.3, which can be found on the Internet at <<http://www.epa.gov/swerust1/directiv/>>

results in much higher potential penalties.<sup>49</sup> The EPA field citation guidance lists common violations and enumerates penalties with a range of \$50 - \$300.<sup>50</sup> Field citations are supposed to be used solely for first time violators.<sup>51</sup>

Per President Bush's 1992 FFCA signing statement and agency guidance, SWDA punitive penalties from administrative enforcement actions should be paid from the violating agency's operations and maintenance (O&M) funds (normally the violating installation's O&M account).<sup>52</sup> For that reason, this issue is "near and dear" to the hearts of federal agency decision makers. Although the DOJ administered permanent judgment fund<sup>53</sup> could technically be used if DOJ would certify that the settlement stemmed from imminent judicial litigation against the state,<sup>54</sup> this is not done due to President Bush's 1992 FFCA signing statement and implementing agency guidance.<sup>55</sup>

As a point of clarification, leaking underground storage tanks (referred to as LUSTs), are distinguishable from pure violations of Subchapter IX in that leaks should constitute a

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od961016.htm>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

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

<sup>52</sup> See President Bush's October 6, 1992 FFCA signing statement, *reprinted in* 1992 U.S.C.C.A.A.N. 1337-1, available on Westlaw as 1992 WL 386206 (Leg. Hist.); and *e.g.s* of agency guidance, a memorandum from the DoD Deputy Asst. Secretary of Defense for the Environment (December 17, 1992) and a memorandum from DASD(E) on implementation of the FFCA (June 15, 1993)(both advising use of O&M accounts to pay RCRA fines); and 10 U.S.C. § 2703 (1994)(prohibiting the use of Defense Environmental Restoration Account, DERA, funds to pay penalties).

<sup>53</sup> The judgment fund is authorized by 31 U.S.C. § 724A, and compromise settlements by the Attorney General or his designees are authorized to be treated as judgments by 28 U.S.C. § 2414.

<sup>54</sup> See Comptroller General opinion, B-194508, In the Matter of Civil Penalties Imposed on Federal Agencies for Violations of Local Air Quality Standards - Source of Funds for Payment, 58 Comp Gen. 667 (July 19, 1979)(an administrative penalty could only be certified for payment from the judgment fund where DOJ could certify it was a compromise of imminent litigation).

<sup>55</sup> See FN 52 *infra* for the cite for President Bush's signing statement and *e.g.s.* of agency guidance.

release of solid or hazardous waste which should be covered by SWDA Subchapter IV (solid waste) or Subchapter III (hazardous waste). The key issue would be whether the leaked material is deemed "discarded" and therefore constitutes "waste."<sup>56</sup> See e.g., *Zands v. Nelson*, where gasoline leaking from underground storage tanks was found regulatable as a "solid waste."<sup>57</sup> The rationale is that once gasoline leaks into the soil, it is no longer a useful material and becomes abandoned or discarded.<sup>58</sup> Since federal sovereign immunity was clearly waived (by the FFCA of 1992) for Subchapters III and IV, the potential penalty gap only extends to pure Subchapter IX violations, not those that could be characterized as Subchapter III or IV violations, such as LUSTs.

### **III. States' ability to obtain penalties against federal facilities for violations of SWDA Subchapter IX underground storage tank (UST) provisions.**

#### **A. The "clear and unequivocal" standard for waivers of sovereign immunity.**

In *DOE v. Ohio*,<sup>59</sup> Justice Souter, writing for the majority in a 6-3 decision, found that federal sovereign immunity for punitive penalties was not "clearly and unequivocally" waived in the Clean Water Act (CWA) and the SWDA. The case involved Ohio's claims that it could impose punitive civil penalties on DOE using either delegated EPA regulatory enforcement power or using a citizen suit.<sup>60</sup> DOE had numerous hazardous

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<sup>56</sup> Per the SWDA definitions of "solid waste" at 42 U.S.C. § 6903(27), 40 C.F.R. § 261.2 (1995).

<sup>57</sup> 779 F. Supp. 1254 (S.D. CA. 1991).

<sup>58</sup> *Id.* at 1261-1262, and see also, *Dominick's Finer Foods, Inc. v. Amoco Oil Co.*, No 93-C-4210, 1993 WL 524808 (N.D. IL. Dec. 15, 1993), and *The Craig Lyle Limited Partnership v. Land O'Lakes, Inc.*, 877 F. Supp. 476 (D. MN. 1995).

<sup>59</sup> *DOE v. Ohio*, at 615, 1633.

<sup>60</sup> *Id.* at 632, 1642, "... two different claims: the first brought under the CWA itself, through its citizen suit provision ... and the second under the Ohio water pollution laws that arise under the CWA's distinctive mechanism allowing States to administer CWA enforcement ..." and at 636, 1644 (discussing the two

waste CWA and SWDA violations at its uranium processing facility at Fernald, Ohio.<sup>61</sup> The portion of Justice Souter's opinion dealing with the state's delegated regulatory enforcement power and its failure due to a lack of an express reference in the SWDA federal facilities section's waiver to "punitive sanctions" was concurred with unanimously.<sup>62</sup>

A noteworthy constraint to the sovereign immunity analysis is that legislative history can provide no help to an ambiguous statute. In *DOE v. Ohio* and many other cases, the Supreme Court has stated in no uncertain terms that any legislative analysis has no bearing in determining whether sovereign immunity is waived.<sup>63</sup> Hence, the following analysis (and the caselaw on sovereign immunity) is devoid of reference to legislative history.

Justice Souter opened his analysis with the concept that, "...any waiver of the Government's sovereign immunity must be unequivocal" and "...must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires."<sup>64</sup> The SWDA Subchapter VI ("Federal Responsibilities") federal facilities provision at section 6961 (at that time) provided 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

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claims under RCRA). These cites are to Justice White's dissenting opinion, which explains how there are two separate claims under each statute in a much more understandable fashion than the complicated discussion in the majority opinion.

<sup>61</sup> *Id.* at 611, 1631.

<sup>62</sup> *Id.* at 609, 1630.

<sup>63</sup> See e.g.s, *U. S. v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S.Ct. 1011, 1016 (1992)("it cannot be supplied by a committee report") and *Lane v. Pena*, 518 U.S. 187, 189, 192, 116 S.Ct. 2092, 2097 (1996)("[a] statute's legislative history cannot supply a waiver ...").

<sup>64</sup> *DOE v. Ohio*, at 607, 1629.

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... 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.”<sup>65</sup>

Justice Souter strictly construed Subchapter VI’s federal facilities section and reasoned that “all requirements” could be interpreted as including substantive standards and the means for implementing those standards, but as excluding punitive measures.<sup>66</sup> He focused on the lack of a reference to penalizing past violations or to punitive penalties and on the presence of wording which relied instead on coercive penalties (“from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief”).<sup>67</sup> Coercive penalties are issued for failing to comply with an injunction. Hence, a state using EPA delegated regulatory enforcement authority<sup>68</sup> would first have to go to court to obtain an injunction, and could then only penalize the violator if the violation continued. The underlying rationale was that punitive penalties would deplete the public fisc and were unnecessary because injunctions along with coercive penalties would be sufficient.<sup>69</sup>

Although the dissent concurred in the part of Justice Souter’s opinion dealing with EPA delegated regulatory enforcement power, they disagreed with the citizen suit result.<sup>70</sup> The dissenters would have found that SWDA’s citizen suit provision (which

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<sup>65</sup> *Id.* at 627, 1639.

<sup>66</sup> *Id.* at 627-628, 1639-1640.

<sup>67</sup> *Id.* at 628, 1640.

<sup>68</sup> Delegated per 42 U.S.C. § 6926(b).

<sup>69</sup> *DOE v. Ohio*, at 628, 1640.

<sup>70</sup> *Id.* at 636, 1644.

states are eligible to use) provided alternative authority (apart from the EPA delegated regulatory authority) for states to obtain punitive penalties.<sup>71</sup> The SWDA Subchapter VII (“Miscellaneous Provisions”) citizen suit provision read (and still does read) as follows:

Section 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--

(1)(A) against any person (including (a) the United States, ... who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter...

The district court shall have jurisdiction ... to apply any appropriate civil penalties under [Subchapter III] section 6928(a) and (g) of this title ...

Justice Souter and the majority found that SWDA and CWA citizen suit provisions allowed the federal government to be sued, but not to be subject to punitive penalties.<sup>72</sup> In terms of the SWDA, he arrived at that point by finding a plausible interpretation that the wording in Subchapter VII’s citizen suit provision which expressly included the United States as a “person” applied to the U.S. being sued, but not to “any appropriate civil penalties under [Subchapter III] section 6928(a) and (g) of this title.”<sup>73</sup> Instead of applying the specific wording, “including (a) the United States” to “any person” in the Subchapter VII citizen suit section, he applied Subchapter I’s definitions section “person,” which merely defines “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”<sup>74</sup>

The dissent, as have many subsequent commentators, criticized this artful setting aside

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 607-608, 1629-1630.

<sup>73</sup> *Id.* at 618-619, 1635.

of the citizen suit's specific inclusion of the U.S. within "any person" as, "... using ingenuity to create ambiguity' that simply does not exist in the statute."<sup>75</sup> Nevertheless, *DOE v. Ohio* is still "good law" and its "clear and unequivocal" test remains the current standard for analyzing waivers of sovereign immunity for punitive penalties.<sup>76</sup> Thus, if a court can discern a plausible alternative interpretation of a statute such that punitive penalties are not provided for, the waiver will fail the "clear and unequivocal" test.<sup>77</sup> Several months after *DOE v. Ohio* was decided, Congress changed the result in terms of the SWDA by passing the FFCA (amending the SWDA federal facilities waiver at section 6961 and adding the U.S. to the definition of person in Subchapter I).<sup>78</sup>

#### **B. States' and federal agencies' positions on UST sovereign immunity.**

Interviews with several DoD environmental attorneys revealed that states have so far made few attempts to impose penalties on federal agencies for UST violations and that the state agencies which have attempted to assert UST penalty authority retreat once the DoD entity points out the defects in the waiver of sovereign immunity.<sup>79</sup> An example of this occurred on March 4, 1993 when the Commanding General of the Army's Aberdeen

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<sup>74</sup> *Id.* at 617-618, 1634-1635.

<sup>75</sup> *Id.* at 633, 1642.

<sup>76</sup> *E.g. Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 2096 (1996) ("... waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text"); and *U.S. v. Williams*, 514 U.S. 527, --, 115 S.Ct. 1611, 1616 (1995) ("construe ambiguities in favor of immunity").

<sup>77</sup> *U. S. v. Nordic Village, Inc.*, 503 U.S. 30, 112 S.Ct. 1011 (1992).

<sup>78</sup> Pub. L. No. 102-386, 106 Stat. 1505 (Oct. 6, 1992), which amended 42 U.S.C. § 6961's federal facilities language and § 6903(15)'s definition of "person."

<sup>79</sup> Interview with attorney Dale Murad of the Air Force Environmental Litigation Division at Arlington, Virginia (April 14, 1999) and interview with Colonel Dan Benton of DoD's Office of General Counsel at the Pentagon (April 20, 1999). Also, an April 30, 1999 search of Westlaw yielded no cases.

Proving Ground received a draft consent order for the installation's UST program.<sup>80</sup>

When the General objected to a stipulated penalties clause in the consent order (based on no waiver of federal sovereign immunity for USTs), the Maryland Department of the Environment withdrew the clause.<sup>81</sup> DoD environmental attorneys were not aware of a single case in which a state environmental entity attempted to use a court to resolve the UST penalty issue.<sup>82</sup>

**C. Is the "clear and unequivocal" waiver standard met for UST punitive penalties?**

**1. The waiver contained in Subchapter IX clearly does not meet the standard.**

As a starting point, the UST Subchapter contains its own definitions section.<sup>83</sup> The United States is included within the definition of "person."<sup>84</sup> Therefore, "person" is not an issue for using the specific UST enforcement provisions within Subchapter IX.<sup>85</sup> States with EPA delegated UST programs can enforce under section 6991e "Federal enforcement" as section 6991c(d)(2) allows EPA to delegate its regulatory enforcement authority to states:

[i]f the Administrator determines that a State's program complies with the

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<sup>80</sup> For a description of the sequence of events, see Captain William A. Wilcox, Jr., *The Changing Face of Sovereign Immunity in Environmental Enforcement Actions*, Army Lawyer (August 1993), available on Westlaw at 1993-AUG-Army Law. 3.

<sup>81</sup> *Id.*

<sup>82</sup> Interview with attorney Dale Murad of the Air Force Environmental Litigation Division at Arlington, Virginia (April 14, 1999) and interview with Colonel Dan Benton of DoD's Office of General Counsel at the Pentagon (April 20, 1999).

<sup>83</sup> 42 U.S.C. § 6991.

<sup>84</sup> 42 U.S.C. § 6991(6). The U.S. has been included in this definition ever since the original 1984 enactment of Subchapter IX.

<sup>85</sup> Subchapter IX's specific enforcement provision providing for penalties is at 42 U.S.C. § 6991e "Federal Enforcement."

provisions of this section and provides for adequate enforcement of compliance with the requirements and standards adopted pursuant to this section, he shall approve the State program in lieu of the Federal program and the State program shall have primary enforcement responsibility with respect to requirements of its program.”<sup>86</sup>

Yet, states’ use of delegated regulatory enforcement power is limited by the specific federal facilities section (6991f) in Subchapter IX, which reads as follows:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. 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.<sup>87</sup>

This paragraph fails the “clear and unequivocal” test because it makes no mention of “punitive penalties.” Moreover, the last sentence’s specific reference to “injunctive relief” would be understood as limiting the waiver of sovereign immunity to injunctive relief alone, as happened in *DOE v. Ohio*.<sup>88</sup> Hence under a *DOE v. Ohio* analysis, states clearly could not impose punitive penalties on federal facilities using this delegated regulatory enforcement authority. They would, at most, be permitted to use coercive penalties due to the “sanction ... with respect to the enforcement of any such injunctive relief” language.

## **2. Does the “clear and unequivocal” FFCA of 1992 waiver in Subchapter VI (“Federal Responsibilities”) apply to Subchapter IX?**

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<sup>86</sup> 42 U.S.C. § 6991c(d)(2).

<sup>87</sup> 42 U.S.C. § 6991f.

<sup>88</sup> See *DOE v. Ohio*, at 628, 1640 (where Justice Souter similarly read § 6961’s exact same wording to limit the waiver to only coercive penalties).

The FFCA waiver reads as follows:

**Section 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)...<sup>89</sup>

**(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...<sup>90</sup>

The FFCA waiver at section 6961 does not “clearly and unequivocally” apply to Subchapter IX of SWDA. Subsection (a), which contains the express waiver, only references “respecting control and abatement of solid waste or hazardous waste disposal and management.” There is no reference to USTs or “this chapter.” Subsection (b) does

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<sup>89</sup> 42 U.S.C. § 6961(a).

<sup>90</sup> 42 U.S.C. § 6961(b).

refer to “this chapter,” but only refers to “the Administrator,” and would only therefore apply to the EPA. Also, Subsection (c) reinforces that only Subsection (a) applies to the states by providing, “(c) Limitation on State use of funds collected from Federal Government ... from penalties and fines imposed for violation of any substantive or procedural requirement referred to in subsection (a) of this section ...”<sup>91</sup> Hence, under an analysis as rigorous as Justice Souter’s in *DOE v. Ohio*, the FFCWA waiver does not effect a “clear and unequivocal” waiver of sovereign immunity for USTs.

**3. Could the SWDA citizen suit provision in Subchapter VII apply for a state to impose UST punitive penalties?**

Along with adding the express waiver language for solid and hazardous waste violations at section 6961, Congress also put in, “and shall include each department, agency, and instrumentality of the United States” to the definition of “person” in the general Subchapter I SWDA definitions section.<sup>92</sup> This added language should change the *DOE v. Ohio* holding on SWDA citizen suits for hazardous waste violations. As discussed above, Justice Souter applied the general definition section to the citizen suit penalty provisions to find a plausible interpretation which defeated a clear and unequivocal waiver of sovereign immunity for punitive penalties.<sup>93</sup> Now that the general definitions language he relied on has been specifically changed to include the U.S., the citizen suit provision should allow states to impose punitive civil penalties. The citizen suit provision could be applied to UST violations because it applies to any violation of

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<sup>91</sup> 42 U.S.C. § 6961(c).

<sup>92</sup> 42 U.S.C. § 6903(15)(as amended in 1992).

<sup>93</sup> *DOE v. Ohio*, at 618-619, 1635.

“this chapter.”<sup>94</sup>

Nevertheless, the citizen suit provision only incorporates “any appropriate civil penalties under section 6928(a) and (g) of this title.”<sup>95</sup> Section 6928 “Federal enforcement” only applies to, “... violation of any requirement of this subchapter [Subchapter III, dealing with hazardous waste].” Hence, section 6928 does not “clearly and unequivocally” apply to UST violations. For that reason, the Subchapter VII citizen suit provision’s lack of reference to the UST “Federal enforcement” provision at section 6991e would render 6991e civil penalties unavailable for a citizen suit.

Even if the states could overcome the problem covered in the preceding paragraph, a citizen suit has several limitations which would render it largely ineffectual. For one thing, the citizen suit provision does not provide for administrative penalties, the preferred method of effecting penalties due to streamlined processing time and expense. Also, any civil penalties would go into the U.S. treasury,<sup>96</sup> so a prevailing state would, at most, be able to recoup its attorney’s fees under the Equal Access to Justice Act.<sup>97</sup>

Moreover, the application of legislative intent and the Article III case or controversy standing requirement in recent cases such as *Gwaltney* and *Steel*<sup>98</sup> would preclude a

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<sup>94</sup> 42 U.S.C. § 6972(a)(1)(A).

<sup>95</sup> 42 U.S.C. § 6972(a).

<sup>96</sup> 42 U.S.C. § 6928(g), “[c]ivil penalty... shall be liable to the United States for a civil penalty...” While citizen suit civil penalties would go to the federal treasury, if a state were able to instead use its EPA delegated enforcement authority to obtain punitive penalties, those penalties could go to the state. *See* 42 U.S.C. § 6961(c), “all funds collected by a State from penalties and fines imposed for violation of any 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.”

<sup>97</sup> 28 U.S.C. § 2412.

<sup>98</sup> *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) and *Steel Company v. Citizens for a Better*

citizen suit for wholly past violations. This would render a citizen suit a useless tool if the federal agency were able to correct the UST violation (after the 60 day notice of intent to sue was served<sup>99</sup>) before the citizen suit was filed.<sup>100</sup> Combined with the rationale that the “in violation” language showed Congress’ intent to provide only for prospective relief is the Article III case or controversy requirement. If the violation were wholly past (and no injunction is therefore necessary), the remaining remedy of a penalty to be paid to the U.S. treasury would not benefit the citizen plaintiff (*i.e.* no redressibility).<sup>101</sup>

Hence, a federal UST violator would have at least 60 days to remedy the violation, and could even resort to tank closure to avoid being “in violation” (though this might likely have to be a permanent closure otherwise the citizen suit plaintiff may have a good argument that the violation was “likely to recur”). Therefore, a state using SWDA’s citizen suit to impose penalties on a federal violator would be, at best, an inefficient expense of enforcement resources and, at worst, futile. The fact that there is not a single reported case of a state even attempting to use a SWDA citizen suit against a federal agency for a UST violation demonstrates the lack of appeal of this avenue and the

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*Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998).

<sup>99</sup> 42 U.S.C. § 6972(b), “[n]o action may be commenced under subsection ... prior to 60 days after the plaintiff has given notice of the violation.”

<sup>100</sup> Under the *Gwaltney* line of cases, the defendant in a citizen suit must be “in violation” at the time the citizen suit is filed. *Gwaltney* at 58. The citizen is required to provide at least 60 days notice to the violator before filing suit to give the violator time to remedy the violation and to give the state or EPA the chance to take the enforcement lead. *Id.* at 59 - 60. The Supreme Court based *Gwaltney* on the “in violation” language in the Clean Water Act (and in dicta referred to the similar language in other environmental statutes, such as SWDA, Clean Air Act, and the Toxic Substance Control Act, as only providing for prospective relief). *Id.* at 57. The Court did note an exception for instances where the violation is likely to recur, such that an injunction would have some benefit. *Gwaltney*, at 66.

<sup>101</sup> *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1020 (1998).

problem with the citizen suit provision not referring to section 6991e civil penalties.

**D. Should Congress amend Subchapter IX to waive sovereign immunity?**

Congress should not amend the SWDA to waive sovereign immunity for UST violations because the federal agencies are far ahead of the rest of the regulated community in complying with Subchapter IX's UST requirements.<sup>102</sup> There is no past history of significant federal UST non-compliance, as was the case with DOE's hazardous waste management compliance.<sup>103</sup>

In December 1998, all of the federal agencies reported UST compliance to the EPA administrator.<sup>104</sup> Of note, large agencies such as DoD and DOE projected 100 percent compliance by the December 22nd, 1998 deadline. Also in December 1998, EPA FFEO sent a letter to the federal agencies advising them that in order to obtain the benefits of EPA's audit policy, the agencies would have to notify the EPA of their intent to self disclose UST violations by January 5, 1999, and make the detailed disclosures by January 22, 1999.<sup>105</sup> Three of the smaller federal agencies submitted a total of approximately sixty tanks as part of this process and none of the larger federal agencies submitted any

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<sup>102</sup> In December 1998, the larger federal agencies reported near 100% UST compliance to the EPA. Per telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999). In contrast, a recent petroleum industry study estimated 40% non-compliance in the overall regulated community with the majority of those owned by school districts, municipalities, and small business. Wesley Brown, *Regulatory Hammer Set to Fall*, Tulsa World (December 6, 1998)(discussing a Petroleum Equipment Institute nationwide survey completed in September 1998), cite as 1998 WL 11162195. Instead of addressing this problem area, EPA has expressly set its enforcement priorities for the first six months of 1999 to focus on "federal facilities, chain retailers, and facilities that pose serious environmental hazards."

<sup>103</sup> For a lengthy discussion of DOE's repeat violations, see the legislative history to the FFCA of 1992, H.R. Rep. No. 102-111 at 4, *reprinted in* 1992 U.S.C.C.A.N. 1287, and available on Westlaw as 1991 WL 111328; and S.R. Rep. No. 102-67 at 4, available on Westlaw as 1991 WL 104464 (Leg. Hist.).

<sup>104</sup> Telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>105</sup> Memoranda from Craig Hooks, Director EPA FFEO, to all federal agencies (December 22, 1999).

violations.<sup>106</sup> This low number of self-disclosures from federal facilities indicates a high degree of compliance.

One caveat to this optimistic view of federal UST compliance is that the agencies may be using "temporary closure" to postpone the December 22nd, 1998 deadline. EPA estimated that tank owners would close 200,000 of the 892,000 tanks on December 22nd in order to comply with the UST deadline.<sup>107</sup> To qualify for temporary closure, release detection is not required as long as the tank is empty.<sup>108</sup> USTs may be placed in temporary closure status for up to 12 months.<sup>109</sup> At the end of the 12 month period, the UST owner must permanently close the tank, following the abandoned underground storage tank (AUST) requirements, unless the implementing agency grants an extension.<sup>110</sup> Permanently closed tanks must be emptied and all of the sludges inside cleaned out.<sup>111</sup> Then the tanks must be removed from the ground or filled in with an inert solid material.<sup>112</sup> Because temporary closure may be masking a compliance problem, this issue should be revisited in December of 1999.

Congress did have an opportunity to amend the UST federal facilities section in 1996

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<sup>106</sup> Telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>107</sup> Amy Porter, *Storage Tanks: Seven Industry Groups Form Coalition to Boost Compliance with New Standards*, BNA Daily Environment Report (December 23, 1999), available on Westlaw as 246 DEN A-1, 1998.

<sup>108</sup> Per 40 C.F.R. § 280.70.

<sup>109</sup> *Id.*

<sup>110</sup> Per 40 C.F.R. § 280.71-74.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

when it passed a minor amendment to SWDA land disposal provisions.<sup>113</sup> It did not. Representative Oxley (R-OH) sponsored the Land Disposal Flexibility Act, and was the one who also proposed strengthening the section 6991f federal facilities language so that it would mirror the FFCA federal facilities language at section 6961(a).<sup>114</sup> However, the proposed FFCA-style federal facilities language was not made part of the ultimate legislation.<sup>115</sup>

In addition to the high degree of federal facilities' UST compliance, there are several other reasons why Congress does not need to act. First, states can request EPA to initiate a penalty enforcement action against a federal facility found in violation of Subchapter IX (unless DOJ finds in its forthcoming opinion that EPA does not have authority).<sup>116</sup> Also, states have their own alternate mechanisms to force federal facilities to comply with SWDA's Subchapter IX. States can issue compliance orders and follow them up with court injunctions if the violations are not promptly remedied. Once the injunction is violated, the state could seek coercive penalties. Moreover, states can indirectly, yet expeditiously, force compliance by prohibiting all fuel suppliers from delivering to non-compliant tanks. In fact, last Fall, 20 states were planning on enacting such blanket

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<sup>113</sup> The main thrust of the Land Disposal Flexibility Act, Pub. L. No. 104-119, 110 Stat. 830 (Mar 26, 1996) was to provide grants for smaller communities to upgrade their dumping facilities and to add more flexibility for the standards for such dumps. See H.R. Rep. No. 104-454, *reprinted in* 1996 U.S.C.C.A.A.N. 593. The bill was designated HR 2036. According to a May 4, 1999 telephone interview with one of Rep. Oxley's legislative staffers, Tim Johnson, the version containing the bolstered federal facilities change did not make it out of the House Commerce Committee. That early version is not available on Westlaw or Thomas, but was found on the Internet at an environmental law website maintained by attorney Steve Taber at <<http://www.webcom.com/staber/legis/h2036>>. It is also available on LEXIS using a LEXSEE search as "104 PL 119, full text version, HR 2036 July 14, 1995 version 1."

<sup>114</sup> *Id.*

<sup>115</sup> See 142 Cong. Rec. H1965-03 (daily ed. March 7, 1996), available on Westlaw as 1996 WL 99588 (for the final version of the bill that Rep. Oxley presented on March 7, 1996).

<sup>116</sup> See discussion of DOJ's upcoming opinion on U.S. EPA versus federal agency UST penalty

legislation.<sup>117</sup> Also, states could issue individual orders to suppliers to cease deliveries to non-compliant tanks.

#### **IV. EPA's ability to obtain penalties against federal facilities for violations of SWDA Subchapter IX UST provisions.**

##### **A. Background on federal facility UST penalty enforcement.**

##### **1. EPA federal facility UST penalty enforcement actions.**

EPA headquarters began encouraging UST federal facility penalty enforcement with a February 1997 letter to the Regions.<sup>118</sup> This initiative then appears to have been spurred, in part, by the July 16, 1997 decision from the Department of Justice (DOJ) Office of Legal Counsel (OLC) on Clean Air Act (CAA) penalty authority.<sup>119</sup>

As in the preceding state v. federal enforcement discussion, the issue is over punitive penalties. No one disputes that SWDA Subchapter IX's federal facilities section provides for regulating federal facilities USTs or penalties against federal facilities for violation of an injunction. However, only states could use coercive sanctions against federal facilities because the EPA is precluded from any court action against another federal agency by the unitary executive and nonjusticiability theories.<sup>120</sup> For that reason, the sole issue is

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enforcement at section IV.J at pages 73-76 *supra*.

<sup>117</sup> Jennifer Silverman, *Storage Tanks: EPA Enforcement Following Deadline for USTs will Focus on Larger Facilities*, BNA Environment Report (December 14, 1998), available on Westlaw as 239 DEN AA-1, 1998.

<sup>118</sup> According to a letter from DoD General Counsel to Director EPA FFEO (March 18, 1998); and validated in a telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>119</sup> See Captain Richards, *Debate Over the EPA UST Penalty Authority Continues*, Army Lawyer (November 1998) USALSA Rep., Environmental Law Division Note, available on Westlaw as 1998-NOV Army Law 59.

<sup>120</sup> See Ability of the Environmental Protection Agency to Sue Another Government Agency, 9 Op. Off. Legal Counsel 99 (December 4, 1985)(DOJ opinion that any type of judicial proceeding between two federal agencies would be nonjusticiable due to Article II constraints that only the President is allowed to

whether EPA could obtain punitive penalties against federal facilities administratively.

Currently, there are four UST penalty enforcement administrative proceedings ongoing between EPA and DoD, two in Region 3, Walter Reed Army Hospital and Oceana Naval Air Station, and two in Region 6, Tinker and Barksdale AFBs.<sup>121</sup> A fifth enforcement proceeding (against the Naval Research Laboratory in Washington D.C.) was recently dismissed by an EPA ALJ on the merits.<sup>122</sup> The two in Region 6 were before an EPA administrative law judge (ALJ), with the Air Force arguing that the enforcement actions should be dismissed because the legal dispute between the two federal agencies over UST penalties should only be resolved before DOJ per EO 12,146.<sup>123</sup> The same arguments were made to the ALJ presiding over both the Oceana and Walter Reed cases.<sup>124</sup> That ALJ, Chief Judge Susan Biro, allowed oral argument in the Oceana case on April 13, 1999 and stated that she expected to rule in approximately one month.<sup>125</sup> However, in the wake of DoD's April 16, 1999 request for an opinion to DOJ's Office of Legal Counsel, motions to stay were made in mid-May and granted in both the Oceana and Walter Reed cases.<sup>126</sup> The motions were reportedly made by DoD at

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resolve disputes between federal agencies and Article III case or controversy requirements that would not be met where both parties are essentially the same entity).

<sup>121</sup> Telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>122</sup> According to an interview with attorney Dale Murad of the Air Force Environmental Litigation Division in Arlington, Virginia (May 4, 1999).

<sup>123</sup> According to an interview with attorney Dale Murad of the Air Force Environmental Litigation Division in Arlington, Virginia (April 14, 1999). The cite for the EO is Exec. Order No. 12,146, 44 F.R. 42,657 (1979).

<sup>124</sup> According to an interview with attorney Dale Murad of the Air Force Environmental Litigation Division in Arlington, Virginia (April 21, 1999).

<sup>125</sup> *Id.*

<sup>126</sup> According to an interview with attorney Dale Murad of the Air Force Environmental Litigation Division in Arlington, Virginia (May 25, 1999).

the request of DOJ OLC and were unopposed by EPA.<sup>127</sup>

Nevertheless, before a stay request was made in the Tinker AFB case, the ALJ (Barbara Gunning) issued a ruling on May 24, 1999 that dramatically undercuts EPA's position, finding that there is "no clear statement" of Congressional intent for punitive UST penalties against federal facilities.<sup>128</sup> In a 38 page opinion, the ALJ first decided (contrary to the Air Force's arguments) that she should decide the issue.<sup>129</sup> She then found that no "clear statement" was present due to the inadequate penalties language at SWDA section 6991f and the dearth of legislative intent regarding UST federal facilities penalties behind the 1984 UST enactment and the FFCA of 1992.<sup>130</sup>

**2. All federal agencies have acquiesced to EPA UST penalties, except for DoD.**

All federal agencies except for DoD have been paying SWDA UST penalties.<sup>131</sup> Some of the other federal agencies, such as the Bureau of Prisons, have paid under protest.<sup>132</sup> In fact, two DoD components, the Navy and Army, have even paid several UST penalties, though under protest.<sup>133</sup> Since January 1998, FFEO and DoD have

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> "Order on Respondent's Motions to Dismiss and for Accelerated Decision," Docket No. UST-6-98-002 AO-1 (May 24, 1999). For those with access to the federal FLITE system, this decision is available at the Air Force Environmental Litigation Division's site in the "hot environmental news" area.

<sup>130</sup> *Id.*

<sup>131</sup> According to a telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

exchanged a total of four memorandums disagreeing over the issue.<sup>134</sup> Also, EPA's General Counsel drafted a June 16, 1998 legal opinion on the matter, concluding that EPA has UST penalty authority over federal agencies.<sup>135</sup> DoD General Counsel's April 16, 1999 request for a DOJ opinion will probably result in a new round of position memoranda exchange.<sup>136</sup>

## **B. Interagency legal disputes.**

### **1. Unitary Executive Theory.**

Because Article II of the Constitution vests power to execute the laws exclusively in the President,<sup>137</sup> he alone is allowed to settle disputes between federal agencies under his control. Courts have long held that they may not hear such disputes due to Article II provisions and separation of powers concerns.<sup>138</sup> In addition, courts have dismissed suits between federal agencies since they view such suits as nonjusticiable under Article III under the rationale that no case or controversy exists where the plaintiff and defendant are the same.<sup>139</sup>

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<sup>134</sup> Letter from Director EPA FFEO to Army, Navy, and Air Force Secretaries for Environment, Safety, and Occupational Health (August 26, 1997); letter from DoD General Counsel to Director EPA FFEO (January 20, 1998); letter from DoD General Counsel to Director EPA FFEO (March 18, 1998); and memorandum from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations (April 10th, 1998).

<sup>135</sup> Legal memorandum from EPA Office of General Counsel to EPA Office of Enforcement Compliance Assurance (June 16, 1998).

<sup>136</sup> According to an interview with Colonel Dan Benton of DoD's Office of General Counsel at the Pentagon (April 20, 1999).

<sup>137</sup> U.S. CONST. art. II, §1, cl. 1, [t]he executive power shall be vested in a President of the United States of America"; and §3, [The President] shall take Care that the Laws be faithfully executed..."

<sup>138</sup> See e.g.s, *Morrison v. Olson*, 487 U.S. 654 (1988), *Bowsher v. Synar*, 478 U.S. 714 (1986), *INS v. Chadha*, 462 U.S. 919 (1983), *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Myers v. U.S.*, 272 U.S. 52 (1926).

<sup>139</sup> See a discussion of such cases in Ability of the Environmental Protection Agency to Sue Another Government Agency, 9 Op. Off. Legal Counsel 99 (December 4, 1985); and testimony before a House of

## 2. The Executive branch's framework for interagency dispute resolution.

A 1979 executive order by President Carter, EO 12,146 "Management of Federal Legal Resources," sets forth a mechanism for resolving interagency legal disputes at paragraph 1-4 "Resolution of Interagency Legal Disputes."<sup>140</sup> Subparagraph 1-401 provides:

Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.<sup>141</sup>

Subparagraph 1-402 further provides,

Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory authority vesting of responsibility for a resolution elsewhere.<sup>142</sup>

Within the Department of Justice (DOJ), procedures would channel such a dispute to the Office of Legal Counsel (OLC). Aside from the DOJ mechanism specified in EO 12,146, a dispute could be sent to the Office of Management and Budget (OMB) per a request by the EPA Administrator per a 1978 Executive Order, EO 12,088, "Federal Compliance with Pollution Control Standards," which reads:

1-602. The Administrator [of EPA] shall make every effort to resolve conflicts regarding such violation [of an applicable pollution control

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Representatives Subcommittee by F. Henry Habicht III, Assistant Attorney General for DOJ's Land and Natural Resources Division concerning "Federal Facilities Compliance with Environmental Laws" (April 28, 1987), 100th Congress, serial No. 100-39, reprinted in the November 1988 edition of the EPA's Federal Facilities Compliance Strategy.

<sup>140</sup> Exec. Order No. 12,146, 44 F.R. 42,657 (1979).

<sup>141</sup> *Id.* at subparagraph 1-401.

<sup>142</sup> *Id.* at 1-402.

standard] between Executive agencies ... If the Administrator cannot resolve a conflict, **the Administrator** [emphasis added] shall request the Director of the Office of Management and Budget to resolve the conflict.<sup>143</sup>

A key distinction between EO 12,146 and 12,088 is that the former authorizes the head of either agency in the dispute to request the opinion, whereas the latter only authorizes the EPA Administrator to request the resolution. For that reason, DoD could not invoke EO 12,088 on its own.

Lastly, DoD could have requested an opinion from the General Accounting Office's Comptroller General on the propriety of expending funds (to pay UST penalties). Congress has authorized the Comptroller General to issue decisions to a disbursing or certifying official or the head of an agency on the propriety of expending funds.<sup>144</sup> For the issue of paying UST penalties, the analysis would hinge on the Purpose Statute, which provides that, "[a]ppropriations shall be applied only to objects for which the appropriations were made except as otherwise provided by law."<sup>145</sup> The Comptroller General would analyze whether the SWDA provides authority for federal agencies to pay UST punitive penalties from EPA enforcement actions.

There are numerous examples where the Comptroller General has ruled on the propriety of a federal agency expending funds, including opinions on interagency disputes over the propriety of payments.<sup>146</sup> A dispute with similar players to the UST

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<sup>143</sup> Exec. Order No. 12,088, 43 F.R. 47,707 (1978).

<sup>144</sup> 31 U.S.C. § 3529.

<sup>145</sup> 31 U.S.C. § 1301(a).

<sup>146</sup> See e.g.s, Matter of: The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act, B-253179, (November 29, 1993), 73 Comp. Gen. 46, available on Westlaw as 1993 WL 505822 (C.G.)(propriety of DOJ using the Judgment Fund to pay litigative awards for government's share of CERCLA response costs and natural resource damages); Matter of: Federal Facility Contribution to Capital Costs of Sewage Treatment Projects, B-195507 (October 4, 1979), 59 Comp. Gen. 1, available on Westlaw as 1979 WL 15048 (C.G.)(dispute between EPA and

issue arose between the EPA and Department of the Navy over federal facilities' contributions to capital costs of sewage projects.<sup>147</sup> The Comptroller General ruled against the EPA, finding that the EPA had "no authority to exclude from eligibility for a construction grant a percentage of the total costs of an otherwise acceptable project to upgrade wastewater treatment facility equal to the percentage of service the facility would be required to provide a major federal facility."<sup>148</sup> The Comptroller General had tangentially visited this issue in 1978 finding that the Department of the Air Force did not have the fiscal authority to spend operations and maintenance funds as grant funds for publicly owned sewage treatment facility upgrades.<sup>149</sup>

The Comptroller General also has ruled on cases involving waivers of sovereign immunity for payments to state agencies. For example, the Comptroller found that because federal sovereign immunity had not been waived, "appropriated funds could not be used to pay a penalty imposed by the Boston City Fire Department for answering false alarms resulting from a malfunction of a fire alarm in a Veterans Administration Medical Center."<sup>150</sup> Even more to the point, the Comptroller General ruled in 1978 that there was a waiver of sovereign immunity for administrative civil penalties under the Clean Air Act and that spending National Oceanic and Atmospheric Agency "O & M" funds to pay the

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Navy over CWA sewage facility grant calculation); and Matter of: Department of Air Force-Sewage Utility Contracts, B-189395 (April 27, 1978), available on Westlaw as 1978 WL 9944 (C.G.) (propriety of Air Force spending funds for sewage facility grants).

<sup>147</sup> Matter of: Federal Facility Contribution to Capital Costs of Sewage Treatment Projects, B-195507 (October 4, 1979), 59 Comp. Gen. 1, available on Westlaw as 1979 WL 15048 (C.G.).

<sup>148</sup> *Id.* at 1.

<sup>149</sup> Matter of: Department of Air Force-Sewage Utility Contracts, B-189395 (April 27, 1978), available on Westlaw as 1978 WL 9944 (C.G.).

<sup>150</sup> Matter of: Veterans Administration-False Alarm Charges, B-219532 (November 4, 1985), 65 Comp. Gen. 61, available on Westlaw as 1985 WL 50850 (C.G.).

penalty was permissible applying fiscal law principles.<sup>151</sup> This and the preceding examples amply illustrate that the Comptroller General could issue a decision on the propriety of expending DoD funds to pay EPA UST penalties.

Yet, a Comptroller General decision would not preclude DOJ from subsequently issuing a contrary opinion. For example, in a 1994 DOJ OLC opinion concerning a dispute between the Veteran's Administration and the Department of Labor on the applicability of the Davis-Bacon Act to the Veteran's Administration lease of medical facilities, DOJ did not defer to the Department of Labor's determination.<sup>152</sup> DOJ noted that while 5 U.S.C. App section 1261 gave the Department of Labor the initial responsibility to determine Davis-Bacon Act coverage, that statutory authority did not supersede "the Attorney General's authority, under Executive Order 12,146, to resolve legal disputes between executive branch agencies," 28 U.S.C. section 511, to provide legal advice to the President, and 28 U.S.C. section 512, to provide legal opinions to heads of executive departments.<sup>153</sup> Furthermore, DOJ has specifically opined that "opinions of the Comptroller General are not binding on the executive branch."<sup>154</sup> Their rationale is rooted in separation of powers, "[t]he Comptroller General is an officer of the legislative branch, see *Bowsher v. Synar*, 478 U.S. 714, 727 -32 (1986), and historically,

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<sup>151</sup> Matter of: National Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards, unpublished B-191747 (June 6, 1978), available on Westlaw as 1978 WL 9814 (C.G.). See also In the Matter of Civil Penalties Imposed on Federal Agencies for Violations of Local Air Quality Standards, 56 Comp Gen. 667 (1979).

<sup>152</sup> Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities, 18 Op. Off. Legal Counsel No. 30 (1994).

<sup>153</sup> *Id.* at 17-18.

<sup>154</sup> Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65, 76 (1992), and Indemnification of Treasury Department Officers and Employees, 15 Op. Off. Legal Counsel 57, 64 (1991).

the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the opinions of the Attorney General and the Office of Legal Counsel."<sup>155</sup> Yet, DOJ has also stated that, "where possible, the executive branch will accord deference to the Comptroller General's opinions."<sup>156</sup> In sum, a Comptroller General decision finding that funds could not be expended to pay certain penalties would provide temporary authority for an agency to avoid paying those penalties.<sup>157</sup>

**C. "Clear statement" standard for EPA's ability to obtain penalties against federal agencies.**

**1. Legal background behind the "clear statement" standard.**

A firm rule of statutory construction is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Courts will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress ... the *Catholic Bishop* rule."<sup>158</sup> The Supreme Court has noted that, "[t]his approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution."<sup>159</sup>

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<sup>155</sup> Indemnification of Treasury Department Officers and Employees, 15 Op. Off. Legal Counsel 57, 64 (1991).

<sup>156</sup> Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65, 76 (1992).

<sup>157</sup> Yet, this authority could be retroactively reversed by an opposite DOJ OLC opinion. Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65, 76 (1992), and Indemnification of Treasury Department Officers and Employees, 15 Op. Off. Legal Counsel 57, 64 (1991).

<sup>158</sup> *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council and NLRB*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397 (1988).

<sup>159</sup> *Id.* at 568, 1397.

Analyzing legislative intent is a key difference between the “clear and unequivocal” standard for waivers of sovereign immunity and the *Catholic Bishop* rule. Whereas legislative intent analysis is improper under the “clear and unequivocal” standard, it is appropriate for *Catholic Bishop* rule analysis.<sup>160</sup> For example, in *DeBartolo*, the Court found no “clear indication in the relevant legislative history that Congress intended section 8(b)(4)(ii)(B) [of the National Labor Relations Act] to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer.”<sup>161</sup> Based upon the ambiguity in the language and the lack of legislative intent, the Court declined to interpret “[i]t shall be an unfair labor practice for a labor organization or its agents ... to threaten, coerce, or restrain any person engaged in commerce” as including peaceful handbilling.<sup>162</sup> Had the Court not applied the “clear statement” rule of statutory construction, it would have had to decide the constitutional issue of whether prohibiting peaceful handbilling violated First Amendment free speech protections.<sup>163</sup>

The Department of Justice has acknowledged this rule of statutory construction in previous decisions analyzing whether particular statutes afforded one agency the power to issue punitive penalties against other federal agencies, “[l]ike the Supreme Court, we are ‘loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.’”<sup>164</sup> DOJ found that

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<sup>160</sup> See e.g., *DeBartolo*, 485 U.S. 568, 577 and 583, 108 S.Ct. 1392, 1399 and 1402.

<sup>161</sup> *Id.* at 583, 1402.

<sup>162</sup> *Id.* at 579, 1400.

<sup>163</sup> *Id.* at 575, 1398.

the “constitutional thicket” in cases of Congress authorizing one agency to penalize another arises from “substantial separation of powers concerns.”<sup>165</sup>

## **2. Past Department of Justice (DOJ) Office of Legal Counsel (OLC) decisions on penalties and/or judicial review under other statutes.**

### **a. 1997 Clean Air Act (CAA) opinion.<sup>166</sup>**

This opinion is highly relevant in that it involves EPA penalty authority over other federal agencies under an environmental statute. It demonstrates a heavy reliance by DOJ on legislative history to bolster a somewhat ambiguous statute. The opinion stemmed from comments DoD made objecting to a proposed EPA rule instituting a CAA field citation program because the rule purported to apply to federal agencies.<sup>167</sup> The CAA provisions authorizing civil litigation (for EPA to enforce payment or for the violator to appeal administrative fines) created separation of powers concerns such that the “clear statement” standard was triggered.<sup>168</sup> DOJ’s Office of Legal Counsel found that Congress intended for EPA to be able to assess administrative penalties against other federal agencies for violations of the Act and that the proposed system did not violate

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<sup>164</sup> See e.g., Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies, hereinafter Fair Housing Act opinion, 18 Op. Off. Legal Counsel 29 at 6-7 (1994), quoting *Public Citizen v. DOJ*, 491 U.S. 440, 466, 109 S.Ct. 2558, 2573 (1989)(which cites *DeBartolo* and the *Catholic Bishop* rule for the “clear statement” rule of statutory construction).

<sup>165</sup> *Id.* at 1. See also, I. The Constitutional Separation of Powers Between the President and Congress, (May 7, 1996, cite as 1996 WL 876050 (OLC)(a separate and lengthy DOJ opinion on the general issue of executive/legislative separation of powers), slipcopy at 33-34 for DOJ’s view of statutory interpretation principles.

<sup>166</sup> Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act, (hereinafter CAA opinion)(July 16, 1997) which has not yet received a citation designation.

<sup>167</sup> LTC Jaynes, *EPA’s Authority to Assess Fines Against Federal Facilities under the Clean Air Act (CAA)*, DAJA-EL (August 13, 1998)

<sup>168</sup> CAA opinion at 1.

separation of powers principles.<sup>169</sup>

DoD argued without success that because the CAA enforcement section (which has no definitions section) did not list the U.S. as a person, although the general definition section did, the “clear statement” standard was not met.<sup>170</sup> DOJ found that the 1977 CAA Amendments’ change to section 302(e)’s definition of “person” to include “any agency, department, or instrumentality of the United States and any officer, agent or employee thereof” “provides a very strong basis” in the statutory text for EPA penalty authority against other agencies.<sup>171</sup> Moreover, DOJ relied on the legislative history of the 1977 CAA Amendments.<sup>172</sup> DOJ noted a House committee report accompanying the House bill, which expressly stated that the purpose of the expansion of “person” was intended to make it clear that section 113 enforcement included federal agencies.<sup>173</sup>

Although DOJ agreed with DoD that the potential for judicial appeals necessitated applying the “clear statement” standard, DOJ found that the mere potential was not sufficient to render the CAA penalty system unconstitutional.<sup>174</sup> DOJ avoided an actual separation of powers problem over judicial appeals by federal agencies by focusing on the discretionary aspect of section 113(d)(4),

[a]ny person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued

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<sup>169</sup> *Id.* at 1.

<sup>170</sup> *Id.* at 2.

<sup>171</sup> *Id.* at 3.

<sup>172</sup> *Id.* at 3. DOJ also found that the 1990 Amendment’s (which provided for the field citation program) legislative history was silent on federal agency applicability and that the 1970 Amendments did not contemplate penalty authority because the U.S. was then not defined as a “person.”

<sup>173</sup> *Id.* at 3, referring to H.R. Conf. Rep. No. 95-294 at 200 (1977, reprinted in 1977 U.S.C.C.A.A.N. 1077).

<sup>174</sup> CAA opinion at 4-5.

under paragraph (1) of this subsection **may** [emphasis added] seek review of such assessment in the United States District Court ...<sup>175</sup>

In the same manner, DOJ avoided the separation of powers problem presented by the potential for EPA to resort to the courts to force payment of administrative fines by distinguishing the seemingly mandatory wording in CAA section 113(d)(5),

[i]f any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order ... the Administrator **shall request** [emphasis added] the Attorney General to bring a civil action in the appropriate district court to enforce the order or to recover the amount ordered or assess ...<sup>176</sup>

DOJ found that the Attorney General had discretion to pursue such a suit, because of the words “**request** [emphasis added] the Attorney General.”<sup>177</sup> DOJ reasoned that although the EPA is required to make the request, the Attorney General has the discretion to not honor that request.<sup>178</sup> DOJ relied on their 1989 NRC opinion (discussed *supra* at IV.C.2.d at pages 42-43) for the proposition that the Attorney General’s discretion to not honor a request from an agency to initiate litigation could be used to avoid actual unconstitutionality.<sup>179</sup> However, the CAA’s text and legislative history do not contain express wording giving the Attorney General discretion to chose to not pursue a penalty enforcement case, as was the case with the Atomic Energy Act.<sup>180</sup> This lack of any specific legal authority for the Attorney General’s discretion to pursue a CAA case and

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<sup>175</sup> 42 U.S.C. § 7413(d)(4) for the statutory CAA cite and *Id.* at 4-5 for DOJ’s discussion of this issue.

<sup>176</sup> 42 U.S.C. § 7413(d)(5) for the statutory CAA cite and CAA opinion at 4-5 for DOJ’s discussion of this issue.

<sup>177</sup> CAA opinion at 5.

<sup>178</sup> *Id.*

<sup>179</sup> Constitutionality of Nuclear Regulatory Commission’s Imposition of Civil Penalties on the Air Force, hereinafter NRC opinion, 13 Op. Off. Legal Counsel 131, 134 (1989).

the resulting inconsistency with the Fair Housing Act opinion (discussed at 2.b *supra*) is a weakness in DOJ's CAA opinion.<sup>181</sup>

In the end, DOJ resolved the potential problem of Congressional interference with the President's exclusive Article II authority to settle disputes between federal agencies by opining that nothing in the CAA precluded the President from exercising his prerogative over all executive agencies.<sup>182</sup> DOJ found that the President had discretion to order federal agencies to forego CAA enforcement suits or appeals between EPA and other federal agencies and to specify executive branch internal dispute resolution mechanisms.<sup>183</sup> Also, DOJ noted that the other agencies would have an opportunity to confer with the EPA administrator or could request a decision from the Attorney General.<sup>184</sup>

**b. 1994 Fair Housing Act Opinion.**<sup>185</sup>

This opinion resembles the SWDA UST issue in that it involved the ability of one federal agency to impose fines on another where a statute was ambiguous and legislative intent was obscure. DOJ provided this opinion under EO 12,146 to resolve a dispute

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<sup>180</sup> CAA opinion at 5.

<sup>181</sup> The statute describing the powers of the Attorney General does reserve the power to conduct litigation exclusively within the Department of Justice, but it does not expressly provide for discretion to decline requests to take certain classes of appeals or violations of law. 28 U.S.C. § 516-519. Moreover, in the Fair Housing Act opinion, DOJ was faced with similar mandatory suit wording and found no Attorney General discretion to decline to pursue such a suit. *See* Fair Housing Act opinion, 18 Op. Off. Legal Counsel 29 at 6 (1994).

<sup>182</sup> CAA opinion at 5.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 6.

<sup>185</sup> Fair Housing Act opinion, 18 Op. Off. Legal Counsel 29 (1994).

between the Department of Agriculture (USDA) and Department of Housing (HUD).<sup>186</sup> The Fair Housing Act provided for administrative and judicial enforcement actions against “respondents” who violated anti-discrimination provisions in the Act.<sup>187</sup> DOJ applied the “express statement” standard to find that because the Fair Housing Act did not specifically define “respondent” as including federal agencies, it would not be interpreted to do so.<sup>188</sup> DOJ cited *Franklin* and *Public Citizen* for the proposition that separation of powers concerns demanded “express statement” analysis of the statute.<sup>189</sup>

DOJ opined that, “[t]he executive branch, which is constitutionally charged with enforcing the Act, may enjoy somewhat greater latitude to construe a statute to avoid constitutional difficulties than does a court.”<sup>190</sup> Thus, it seems DOJ believes it has more leeway applying the “express statement” standard than would the judiciary. However, DOJ still rejected HUD arguments to construe the statute as only allowing administrative enforcement, which would have thereby avoided the Article III nonjusticiability issue (from judicial enforcement) and would have reduced the separation of powers issue.<sup>191</sup> DOJ rejected this approach since part of the separation of powers problem would remain in that Congress would be mandating a dispute resolution within the executive branch,

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<sup>186</sup> *Id.* at 1.

<sup>187</sup> *Id.* examining the Fair Housing Act, 42 U.S.C. § 3601 et seq.

<sup>188</sup> Fair Housing Act opinion at 5. The terms “clear statement” and “express statement” are interchangeable.

<sup>189</sup> *Id.* at 5-7, citing *Public Citizen v. DOJ*, 491 U.S. 440, 466, 109 S.Ct. 2558, 2573 (1989) (“[the Court is] loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils”) and *Franklin v. Massachusetts*, 505 U.S. 788, 800, 112 S.Ct. 2767, 2775 (1992) (“[t]he President is not explicitly excluded from the APA’s purview, but he is not explicitly included, either.”).

<sup>190</sup> Fair Housing Act opinion at 9.

stating, “[t]he manner and method of resolving disputes within the executive branch should be determined by the President, not Congress.”<sup>192</sup> DOJ also refused to interpret the Act this way because it viewed such an interpretation as an impermissible “rewrite” of the Act which found no support in the statute’s text or legislative history.<sup>193</sup>

**c. 1992 Enforcement Jurisdiction for the Office of Special Counsel for Immigration Related Unfair Employment Practices Opinion.**<sup>194</sup>

This opinion is potentially significant in that it is the only DOJ opinion which explicitly applies sovereign immunity to interagency federal enforcement. The dispute arose between the DOJ Office of Special Counsel and the Department of the Navy over whether the Special Counsel could investigate and proceed with an enforcement action for the Navy’s alleged employment discrimination against a Russian emigre.<sup>195</sup> In 1990, DOJ OLC had issued a cursory memorandum finding that the Special Counsel had jurisdiction to investigate the case against the Navy.<sup>196</sup> The 1992 opinion revisited the issue and reversed the previous decision because, “our earlier analysis did not adequately address the sovereign immunity implications ... and settled rules of statutory construction that have evolved to preserve sovereign immunity.”<sup>197</sup>

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<sup>191</sup> *Id.* at 9-10.

<sup>192</sup> *Id.* at 10, citing *Eubanks v. Wilkinson*, 937 F.2d 1118 (6 Cir. 1991) (“discussing distinction between construing and rewriting a statute”).

<sup>193</sup> Fair Housing Act opinion at 10.

<sup>194</sup> Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices, hereinafter Special Counsel for Immigration Related Unfair Employment Practices opinion, 6 Op. Off. Legal Counsel 121 (August 17, 1992).

<sup>195</sup> *Id.* at 1.

<sup>196</sup> *Id.* at 2.

<sup>197</sup> *Id.* at 1-2.

The Antidiscrimination Provision of the Immigration Reform and Control Act (IRCA) authorizes the Special Counsel for Immigration Related Unfair Employment Practices and empowers the Special Counsel to investigate and prosecute administrative actions against “any person or entity” who discriminates in hiring, recruitment, or referral of an individual based on that individual’s national origin or citizenship.<sup>198</sup> The Special Counsel or the individual may file a charge before an Administrative Law Judge (ALJ) within the DOJ.<sup>199</sup> The ALJ may order injunctive relief, back pay, and civil penalties.<sup>200</sup> Any aggrieved party may appeal this order to the appropriate court of appeals, and a federal district court may enforce the ALJ’s order.<sup>201</sup>

OLC found that sovereign immunity applied because, “[t]he Antidiscrimination Provision authorizes ALJs to enter an order awarding back pay, which would expend itself on the Treasury, or an order requiring the hiring of individuals, which would restrain the United States from acting or compel it to act” and, “[i]t also provides for judicial enforcement of such orders by the district courts.”<sup>202</sup>

Applying the strict standard for waivers of sovereign immunity, OLC found, “not only is there no evidence that Congress intended to include federal agencies within the phrase ‘person or other entity’ there is considerable evidence that Congress did not intend federal agencies to be included in this term.”<sup>203</sup> OLC reviewed the text of the statute and

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<sup>198</sup> *Id.* at 1, analyzing IRCA, 8 U.S.C. § 1324b.

<sup>199</sup> Special Counsel for Immigration Related Unfair Employment Practices opinion at 2.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 3.

<sup>203</sup> *Id.*

found that the Antidiscrimination Provision lacked a federal facilities section or any type of waiver language.<sup>204</sup> Instead of merely examining the text of the IRCA, OLC looked at legislative history and found the lack of discussion in committee reports on whether the Antidiscrimination Provision was intended to supplement the exclusive Title VII remedy against federal agencies showed that Congress did not intend so.<sup>205</sup> OLC also observed that the legislative history did not contain costs estimates for federal compliance.<sup>206</sup> OLC noted the Supreme Court admonition that sovereign immunity waiver analysis should not look to committee reports, clarifying that its “analysis of the legislative history is thus purely confirmatory.”<sup>207</sup>

OLC distinguished their previous decision’s rationale, which was based on the existence of a provision in the IRCA providing an exception for discrimination authorized by executive order.<sup>208</sup> OLC found that it was previously mistaken in finding that executive orders applied just to government employees (citing an example where they could apply to contractor employees).<sup>209</sup> Moreover, they opined that this provision failed to supply an, “‘unequivocal’ expression of congressional intent to waive sovereign immunity...”<sup>210</sup>

OLC also found that implementing the Antidiscrimination Provision against federal

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<sup>204</sup> *Id.* at 4.

<sup>205</sup> *Id.* at 5.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 9-10 in FN 10.

<sup>208</sup> *Id.* at 4.

<sup>209</sup> *Id.* at 5.

<sup>210</sup> *Id.* at 4-5.

agencies would cause Article II separation of powers and Article III nonjusticiability constitutional problems because it would authorize the special counsel to litigate in federal court against another federal agency.<sup>211</sup> However, OLC ignored the “may seek a review of such order” and “may petition the United States district court” language.<sup>212</sup> In other OLC opinions, where the statute provided discretion for seeking judicial review, OLC found that there was no Article II or III problem because an interagency suit was not required.<sup>213</sup>

**d. 1989 Nuclear Regulatory Commission Imposition of Penalties on the Air Force Opinion.**<sup>214</sup>

This opinion, like the CAA opinion, demonstrates that where a statute’s text is bolstered by legislative history, DOJ will construe a statute to save it from unconstitutionality. Amendments in 1969 to the Atomic Energy Act of 1954 authorized the Atomic Energy Commission to conduct an administrative enforcement action which included a civil penalty.<sup>215</sup> The Act’s definition of “person” specifically included a “Government agency other than the Commission.”<sup>216</sup> However, the Commission did not have the authority to directly collect the penalty and would instead have to refer the matter to the Attorney General for collection through a judicial action.<sup>217</sup> A civil suit

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<sup>211</sup> *Id.* at 5-6.

<sup>212</sup> These statutory provisions are located at 8 U.S.C. § 1324b(i)(1) and (j)(1).

<sup>213</sup> See NRC opinion at 134 discussed in the next paragraph *supra* and CAA opinion at 5 discussed *infra* at paragraph IV.C.2.a at pages 34-37.

<sup>214</sup> NRC opinion, 13 Op. Off. Legal Counsel 131 (1989).

<sup>215</sup> *Id.* at 132.

<sup>216</sup> *Id.* at 133.

between two federal agencies pursued by the Attorney General would, of course, be nonjusticiable under Article III.<sup>218</sup>

In this opinion, DOJ's Office of Legal Counsel construed the Act as not requiring judicial enforcement.<sup>219</sup> DOJ did not hesitate in this respect, as in the Housing Act opinion, because here the text of the statute and the legislative record contained support for this interpretation.<sup>220</sup> The Act had wording making the judicial collection of administrative fines a discretionary matter for the Attorney General, "[t]he Attorney General shall have the exclusive power to compromise, mitigate, or remit such civil penalties as are referred to him for collection," and a Senate Report made clear that the Attorney General was "authorized, but not required, to institute a civil action to collect the penalty."<sup>221</sup>

**e. 1989 Review of Final Order in Alien Employer Sanction Cases**

**Opinion.**<sup>222</sup>

This opinion has limited relevance other than for the proposition that statutes should be interpreted to avoid constitutional problems. The issue involved the Immigration and Naturalization Service's (INS's) ability to appeal decisions by its own Administrative

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<sup>217</sup> *Id.* at 134.

<sup>218</sup> *Id.* at 138-140 (discussing how a suit between two executive agencies would essentially be akin to a suit by a person against himself). *See also* Ability of the Environmental Protection Agency to Sue Another Government Agency, 9 Op. Off. Legal Counsel 99 (December 4, 1985).

<sup>219</sup> *Id.* at 134.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Review of Final Order in Alien Employer Sanction Cases, hereinafter Alien Employer opinion, 13 Op. Off. Legal Counsel 370 (1989).

Law Judges, that were favorable to employers, to federal district court.<sup>223</sup> DOJ interpreted 8 U.S.C. section 1324a's "person or entity" who may seek judicial review as merely encompassing the employer, not the INS.<sup>224</sup> A broader reading of "person or entity" would otherwise have resulted in usurpation of the President's authority to resolve disputes within the executive branch and, "would implicate the general rule that a lawsuit between two members of the executive branch does not give rise to a justiciable 'case or controversy' under Article III."<sup>225</sup> DOJ reached this conclusion because of the numerous phrases in other parts of the statute in which "person or entity" referred to the employer being prosecuted.<sup>226</sup> DOJ did not conduct any legislative analysis, perhaps due to the fact that the text of the statute was sufficiently clear so that legislative analysis was unnecessary.

#### **D. EPA's and the other federal agencies' positions on UST penalties.**

##### **1. EPA's view.**

##### **a. EPA argues that there is a "clear statement" of Congressional intent within the text of the FFCA of 1992.**

EPA begins by noting that DoD is the sole federal agency not paying UST penalties under EPA's 1997 UST field citation initiative.<sup>227</sup> Furthermore EPA observes that the

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.* As an aside, § 1324a (penalizing those who hire illegal aliens) is a wholly separate provision from § 1324b (penalizing those who discriminate against legal immigrants in employment decisions), the provision analyzed in DOJ's 1992 Special Counsel for Immigration Related Unfair Labor Practices opinion.

<sup>225</sup> Alien Employer opinion at 371.

<sup>226</sup> *Id.* at 370.

<sup>227</sup> See letter from Director EPA FFEO to Army, Navy, and Air Force Secretaries for Environment, Safety, and Occupational Health at 1 (August 26, 1997); and letter from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations at 1 (April 10, 1998).

Bureau of Prisons, which is part of DOJ, had paid UST penalties<sup>228</sup> -- though EPA omits that the penalties were paid under protest<sup>229</sup>. EPA then points to four provisions in the SWDA that together give EPA UST penalty authority.<sup>230</sup> EPA first notes<sup>231</sup> the language in section 6961(b) of the SWDA (added by the FFCA of 1992):

(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** [emphasis added]. 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** [emphasis added].<sup>232</sup>

EPA next argues section 6991e is one of the forms of “enforcement authority” referred to in section 6961(b).<sup>233</sup> Section 6991e(a) provides that when:

any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance within a reasonable specified time or the Administrator may commence a civil action in the United States District Court in which the violation occurred for appropriate relief, including a temporary or permanent injunction.<sup>234</sup>

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<sup>228</sup> Letter from Director EPA FFEO to Army, Navy, and Air Force Secretaries for Environment, Safety, and Occupational Health at 1 (August 26, 1997).

<sup>229</sup> As confirmed in a telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>230</sup> See letter from Director EPA FFEO to Army, Navy, and Air Force Secretaries for Environment, Safety, and Occupational Health at 1 (August 26, 1997); memorandum from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations at 1 (April 10th, 1998); and legal memorandum from EPA Office of General Counsel to EPA Office of Enforcement Compliance Assurance at 1 (June 16, 1998).

<sup>231</sup> *Id.*

<sup>232</sup> 42 U.S.C. § 6961b.

<sup>233</sup> See letter from Director EPA FFEO to Army, Navy, and Air Force Secretaries for Environment, Safety, and Occupational Health at 2 (August 26, 1997); memorandum from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations at 2 (April 10, 1998); and legal memorandum from EPA Office of General Counsel to EPA Office of Enforcement Compliance Assurance at 2 (June 16, 1998).

EPA next refers to section 6991e(c), as providing support that a section 6991e(a) compliance order can contain penalties:

(c) Contents of order

Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty...<sup>235</sup>

EPA next refers to SWDA Subchapter IX's definition section's (at section 6991(6)) definition of "person" which includes "the United States Government."<sup>236</sup> Lastly, EPA concludes that these three provisions, viewed in conjunction with Subchapter IX's section 6991f(a) allow EPA to assess penalties on federal agencies for UST violations. Section 6991f(a) provides:

Federal Facilities

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges.<sup>237</sup>

The EPA General Counsel opinion and the two memoranda from EPA FFEO each omit the last sentence of section 6991f(a), which provides, "[n]either 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." This language limiting the process or sanction to injunctive relief is

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<sup>234</sup> 42 U.S.C. § 6991e(a)(1).

<sup>235</sup> 42 U.S.C. § 6991e(c).

<sup>236</sup> Memorandum from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations at 2 (April 10, 1998).

the same the Supreme Court relied on in *DOE v. Ohio* to find no authority for punitive penalties under the virtually identical wording in RCRA section 6961 (before it was amended by the FFCA of 1992).<sup>238</sup>

However, EPA argues that SWDA's waiver of sovereign immunity is inapplicable here because "the judicial aspect of RCRA's enforcement scheme does not apply to administrative actions brought by EPA against other federal agencies."<sup>239</sup> EPA cites a footnote in DOJ's 1994 Fair Housing Act opinion as support for this proposition.<sup>240</sup>

Also, EPA points out that DOJ's 1989 NRC opinion upheld administrative penalties by the NRC against the Air Force even though the Atomic Energy Act contained no section on waiver of sovereign immunity or federal facilities.<sup>241</sup> Yet, since the states have no enforcement authority under the AEA (only the Atomic Energy Commission, which was specifically created by the AEA, enforces it), it would be difficult to fathom Congress inserting a sovereign immunity section into the AEA.<sup>242</sup>

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<sup>237</sup> 42 U.S.C. § 6991f(a).

<sup>238</sup> *DOE v. Ohio*, at 628, 1640.

<sup>239</sup> Legal memorandum from EPA Office of General Counsel to EPA Office of Enforcement Compliance Assurance at 3, FN 3 (June 16, 1998).

<sup>240</sup> *Id.* at 3, FN3, referring to FN4 of the Fair Housing Act Opinion, 18 Op. Off. Legal Counsel 29 at 7, which in part states, "[t]hat issue [sovereign immunity] would only arise if the judicial enforcement aspect of the enforcement scheme were found applicable."

<sup>241</sup> Letter from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations at 3 (April 10, 1998).

<sup>242</sup> Moreover, although not containing a section on waiver of sovereign immunity or federal facilities, the AEA specifically gave the NRC the power to fine "any person" who violated the Act and included any "Government agency" of the United States within the definition of "person." NRC opinion, 13 Op. Off. Legal Counsel 131, 132. Also, a potential impediment to applying the NRC opinion to UST enforcement by EPA is that the NRC was an independent commission, not squarely within the executive branch (as is EPA). Nevertheless, DOJ made the unitary executive analysis in its NRC opinion because the President has some degree of control over the NRC and because the AEA provides for the Attorney General to initiate a collection action at the request of the NRC. NRC opinion, 13 Op. Off. Legal Counsel 131, 135-143.

Furthermore, EPA argues that DoD made the same sovereign immunity argument in submissions to DOJ for the 1997 CAA opinion and DOJ was not persuaded by those arguments.<sup>243</sup> However, neither the NRC or CAA DOJ opinions expressly stated anything about sovereign immunity.

EPA's approach is that since sovereign immunity is irrelevant to the federal agency administrative enforcement issue, the sovereign immunity language in section 6991f should be wholly ignored.<sup>244</sup> Making no effort to address the effect that this 6991f language could have to limit Subchapter IX enforcement over federal facilities to injunctive authority is a weakness in EPA's argument. A plain reading of the "or exempt" wording in this sentence makes this sentence cover more than sovereign immunity. While the DOJ footnote in the HUD opinion does say that sovereign immunity does not apply between federal agencies in administrative proceedings, it does not say that the enforcement language contained in a federal facilities section should be ignored in terms of ascertaining legislative intent over the scope of enforcement mechanisms for federal enforcement against federal agencies.<sup>245</sup>

Moreover, in the CAA opinion, DOJ analyzed the CAA's federal facilities provision, section 118.<sup>246</sup> DOJ did not need much analysis because the CAA's section 118 does not

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<sup>243</sup> Letter from Director EPA FFEO to DoD Deputy General Counsel for Environment and Installations at 5 (April 10, 1998).

<sup>244</sup> Thus, EPA does not even examine § 6991f's, "[n]either 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" in the context of "clear statement" intent.

<sup>245</sup> Also, fiscal law constraints such as the Purpose Statute and Anti-Impoundment Act necessitate meaningful analysis of the Subchapter IX federal facilities section. See discussion at section IV.D.2 at pages 52-53 *supra*.

<sup>246</sup> Although as EPA argues, DOJ's analysis of CAA § 118 was superficial. DOJ merely noted that § 118 was revised in 1970 to "make federal agencies subject to the requirements of the Act." *Id.* at 5 commenting on DOJ's CAA opinion at 6.

contain the same language as SWDA section 6991f, which limits enforcement against federal facilities to injunctive relief and sanctions for violating that injunctive relief. The point being made is that DOJ did not wholly ignore the federal facilities provision in its CAA opinion and, *ergo*, a fair analysis of the UST penalty issue cannot ignore SWDA's Subchapter IX's federal facilities language.

Lastly, EPA attacks DoD's use of several court decisions for the proposition that sovereign immunity is an issue in federal v. federal agency enforcement.<sup>247</sup> EPA points out that in those cases the U.S. was not the real party at interest on both sides.<sup>248</sup> *Ergo*, the courts' application of sovereign immunity was justified because the ability of a non-federal party to litigate against a federal agency was at issue. EPA also points out that a Supreme Court case which DoD attempts to rely on (*Franchise Tax Board* for the notion that sovereign immunity applies to administrative enforcement) is distinguishable because it involved a state agency v. a federal agency dispute and an administrative process that was unlike the EPA's in that it had no administrative appeal options.<sup>249</sup>

**b. EPA further argues that implementation of UST penalty enforcement would not cause a constitutional problem with the President's exclusive powers over executive agencies.**

EPA argues that nothing in the SWDA would require either the EPA or a respondent

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<sup>247</sup> *Id.* at 5-6 specifically criticizing DoD's use of *Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 104 S.Ct. 2549 (1984) and *Department of the Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995). The EPA memorandum does not address two cases DoD's raised in DoD's March 18, 1998 letter to EPA, *U.S. v. Horn et al.*, 29 F.3d 754 (1st Cir. 1994) and *In re Jay Newlin and Carol T. Newlin*, 29 B.R. 781 (E.D. Pa. 1983).

<sup>248</sup> *Id.* EPA notes that the state of California was the other party in *Franchise Tax Bd. of Cal.* and the employees whom the FLRA represented were the other party in *Dept of the Army v. FLRA*. See also, discussion in this thesis at section IV.E at pages 56-59 *supra*.

<sup>249</sup> *Id.* for EPA criticism on use of *Franchise Tax Bd.*

federal agency to go to court over a UST penalty and nothing interferes with the President's ability to carry out his Article II responsibilities over federal agencies.<sup>250</sup> EPA summarily rejects the Article II issue by pointing to the statutory right of federal agencies (against whom a administrative penalty enforcement action is taken) to confer with the EPA Administrator per SWDA section 6961(b)(2), "[n]o administrative order issued to such a [Federal Agency] shall become final until such [Federal Agency] has had the opportunity to confer with the administrator."<sup>251</sup>

From a telephone interview with Sally Dalzell of EPA FFEO, EPA's position on the UST field citation program's lack of a right to confer is that the respondent agency can obtain a right to confer by rejecting the citation and pursuing the matter in formal administrative proceedings.<sup>252</sup> EPA views accepting a UST field citation as a voluntary choice to forego the right to confer.<sup>253</sup> Also, EPA asserts that agencies have the right to confer over UST penalties from formal administrative proceedings although this is currently not expressly provided for in the existing Part 22 rules of administrative procedure for civil penalties.<sup>254</sup> Lastly, EPA points to its February 1998 proposed change to the Part 22 rules to explicitly provide the right for federal agencies to confer over penalties from UST formal administrative proceedings as soon making the formal

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 3.

<sup>252</sup> Telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>253</sup> Memorandum from EPA to DoD Deputy General Counsel for Environment and Installations at 3 (April 10, 1998).

<sup>254</sup> *Id.* Although not provided for in the Consolidated Rules of Practice (CROP) governing the administrative assessment of civil penalties, the right to confer would be allowed through internal EPA policy.

proceedings right to confer issue moot.<sup>255</sup>

## 2. DoD's view.

### a. DoD argues that there is no "clear statement" of Congressional intent.<sup>256</sup>

DoD primarily relies on Congress's not changing the ineffective penalty language in Subchapter IX when they changed the federal facilities language at section 6961(a) with the FFCA in 1992.<sup>257</sup> DoD argues that this showed Congress's intent to alter the status quo for solid and hazardous waste, but not for USTs (Subchapter IX).<sup>258</sup> DoD also points to EPA's four-and-one-half years of acquiescence (or inaction) to this interpretation up until a February 25, 1997 letter to the EPA Regions that advised the Regions to take penalty actions against federal agencies for UST violations.<sup>259</sup>

DoD criticizes EPA's reliance on SWDA section 6961(b), which allows the Administrator to commence an enforcement action against a federal agency "pursuant to the enforcement authorities contained in this chapter."<sup>260</sup> DoD asserts that subsection 6961(b) provides for enforcement orders, but not for penalties because it does not

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<sup>255</sup> *Id.* The proposal takes out the Part 22.37 specific provision for a right to confer over § 6928 (hazardous waste violations) penalties. Part 22.31 would instead provide the right to confer for all final orders issued under the CROP. The proposal also expands Part 22.01 "Scope of the Rules" to also apply the CROP to UST compliance orders under § 6991e. The citation for the proposed change to the CROP is 63 F.R. 9464 (February 25, 1998).

<sup>256</sup> *See*, memorandums from DoD Deputy General Counsel for Environment and Installations, (January 20, 1998 and March 18, 1998) to Director EPA FFEO, and DoD General Counsel's request to DOJ's Office of Legal Counsel (with attached 26 page position paper)(April 16, 1999).

<sup>257</sup> January 20, 1998 memorandum at 1, March 18, 1998 memorandum at 2, and April 16 request at 1 and position paper at 8.

<sup>258</sup> *Id.*

<sup>259</sup> January 20, 1998 memorandum at 2, March 18, 1998 memorandum at 2, and April 16, 1999 request at 1.

<sup>260</sup> January 20, 1998 memorandum at 2, March 18, 1998 memorandum at 2, and April 16, 1999 position paper at 7.

expressly mention penalties, as does subsection 6961(a).<sup>261</sup> Also, DoD argues that the language in section 6961(a), “requirements referred to in this subsection,” prevents subsection 6961(a) from being read in conjunction with subsection 6961(b).<sup>262</sup> DoD goes on to argue that even if section 6961(b) could be read in conjunction with section 6961(a) and applied to the whole chapter, this general provision could not overcome the (defective) specific UST federal facilities provision at section 6991f.<sup>263</sup>

DoD next argues for a high level of scrutiny (the “clear and unequivocal” standard), based on interference with Congress’ spending powers, on EO 12,088, or on the concept of sovereign immunity.<sup>264</sup> In terms of spending, DoD argues that federal agencies’ paying UST penalties where statutory authority is inadequate would cause an Article I constitutional issue because the executive branch has no power to reallocate appropriations to purposes not intended by Congress or to impound them.<sup>265</sup> DoD opines that this Article I issue requires application of the “high levels of judicial scrutiny in sovereign immunity questions to the interagency situation.”<sup>266</sup> DoD cites numerous GAO Comptroller General opinions on spending issues in which a high level of scrutiny was applied to provisions purported to allow one federal agency to pay fines and penalties to another federal agency.<sup>267</sup> Nonetheless, DOJ has never embraced this heightened

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> January 20, 1998 memorandum at 2, March 18, 1998 memorandum at 2, and April 16, 1999 position paper at 8.

<sup>264</sup> March 18, 1998 memorandum at 3-10, and April 16, 1999 position paper at 17-24.

<sup>265</sup> March 18, 1998 memorandum at 2-6, and April 16, 1999 position paper at 17-19.

<sup>266</sup> March 18, 1998 memorandum at 2.

<sup>267</sup> March 18, 1998 memorandum at 3-5 and April 16, 1999 position paper at 18-19.

scrutiny spending argument in any of its past interagency penalty opinions.<sup>268</sup>

DoD also suggests that EO 12,088, “restricts an expansive reading of appropriations for payment of fines and penalties.”<sup>269</sup> DoD bases this on the section providing that the agency head, “shall ensure that funds authorized and appropriated for the prevention, control, and abatement of environmental pollution are not to be used for any other purpose unless permitted by law and specifically approved by the Office of Management and Budget.”<sup>270</sup>

DoD further argues that “clear and unequivocal” scrutiny applies because the concept of sovereign immunity applies between federal agencies in the context of imposing fines.<sup>271</sup> However, as DoD acknowledges, DOJ OLC’s CAA opinion did not embrace this analysis.<sup>272</sup> In fact, other than the Immigration Related Special Counsel opinion (which is distinguishable, see pages 39-42 and 59 of this thesis), DOJ has never applied sovereign immunity in its past interagency penalty cases. DoD then discusses several cases in which courts applied the concept of sovereign immunity to intergovernmental disputes.<sup>273</sup>

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<sup>268</sup> See e.g.s, CAA opinion (July 16, 1997) which has not yet received a citation designation; Fair Housing Act opinion, 18 U.S. Op. Off. Legal Counsel 29 (1994); Special Counsel for Immigration Related Unfair Employment Practices opinion, 6 U.S. Op. Office of Legal Counsel 121 (August 17, 1992); and NRC opinion, 13 U.S. Op. Off. Legal Counsel 131 (1989).

<sup>269</sup> March 18, 1998 memorandum at 5 and April 16, 1999 position paper at 19.

<sup>270</sup> *Id.*, quoting EO 12,088, subparagraph 1-502.

<sup>271</sup> March 18, 1998 memorandum at 6 and April 16, 1999 position paper at 20.

<sup>272</sup> March 18, 1998 memorandum at 7 and April 16, 1999 position paper at 20.

<sup>273</sup> March 18, 1998 memorandum at 7-9 and April 16, 1999 position paper at 20-24, discussing, *Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 104 S.Ct. 2549 (1984)(for the proposition that there is no distinction between administrative proceedings and judicial proceedings; sovereign immunity applies equally to both); and for the proposition that sovereign immunity applies to interagency federal disputes, *Department of the Army v. FLRA*, 56 F.3d 273 (D.C. Cir 1995); *U.S. v. Horn et al*, 29 F.3d 754 (1st Cir.

In the April 16, 1999 request to OLC, DoD's General Counsel appears somewhat uncomfortable in directly advancing this sovereign immunity argument. DoD's April 16, 1999 request downplays the argument that sovereign immunity applies to interagency (federal) enforcement actions, stating "[a]lthough the issue of whether or not one federal agency can impose punitive fines against another does not technically involve issues of sovereign immunity, there being only one sovereign involved, that fact even applied narrowly does not mean that one can ignore controlling Supreme Court case law as to the meaning of the words used in the statute in question..."<sup>274</sup> DoD only sets forth the sovereign immunity argument in full at page 20 of its 26 page position memorandum.

**b. DoD argues that even if "clear statement" intent were found, implementation of UST penalty enforcement would violate Article II of the Constitution and the statutory right to confer with the Administrator.**

DoD points to a still uncorrected defect in EPA's Part 22 administrative procedures for civil enforcement actions as a procedural defect which, until remedied, would prevent implementing UST penalties.<sup>275</sup> SWDA Section 6961(b)(2) (part of the FFCA of 1992) requires that, "[n]o 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."<sup>276</sup> Under Part 22, a federal agency could request an administrative hearing before a regional hearing officer, appeal that officer's decision to the Environmental Appeals Board, and then appeal the EAB's

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1994); and *In re Jay Newlin and Carol T. Newlin*, 29 B.R. 781 (E.D. Pa. 1983).

<sup>274</sup> April 16, 1999 position paper at 4.

<sup>275</sup> January 20, 1998 memorandum at 2-3 and April 16, 1999 position paper at 15-17.

<sup>276</sup> 42 U.S.C. § 6961(b)(2)(as amended in 1992).

decision to the EPA Administrator.<sup>277</sup> However, Part 22 does not currently apply to UST enforcement. In 1996, when EPA changed Part 22 to comport with this FFCA of 1992 requirement to confer, it only did so for hazardous waste enforcement per SWDA section 6928, and nothing else.<sup>278</sup> DoD argues that EPA's failure to amend Part 22 to encompass enforcement under section 6961(b) is inconsistent with EPA's current assertions that it can enforce SWDA Subchapter IX using section 6961(b).<sup>279</sup> Of course when EPA's proposed February 1998 change to Part 22 becomes final, there will be no issue for formal administrative actions.<sup>280</sup>

In addition to the formal administrative UST process, DoD criticizes EPA's UST field citation process.<sup>281</sup> EPA's field citation policy (discussed *infra* in section II.B at page 8 and in section IV.D.1.b at pages 50-51) requires a violator to waive any appeal of the field citation or risk future enforcement with "substantially larger penalties."<sup>282</sup> DoD views this threat as virtually foreclosing administrative appeal or the right to confer with the Administrator.<sup>283</sup> Indeed, DoD also points out that EPA did not implement its CAA

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<sup>277</sup> 40 C.F.R. § 22.01.

<sup>278</sup> January 20, 1998 memorandum at 2-3 and April 16, 1999 position paper at 15-17. EPA currently explicitly provides Part 22 administrative procedures only for civil penalties under SWDA § 6928 (hazardous waste enforcement by the EPA). *See*, 40 C.F.R. § 22.07 (1996).

<sup>279</sup> January 20, 1998 memorandum at 2-3 and April 16, 1999 position paper at 17.

<sup>280</sup> The citation for the proposed changes to the CROP is 63 FR 9464 (February 25, 1998). Part of the changes would specifically provide for a process for federal agencies to confer with the EPA Administrator over UST formal administrative penalties. *See also*, discussion at section IV.D.1.b of this thesis at pages 49-51 *infra*.

<sup>281</sup> January 20, 1998 memorandum at 2-3 and April 16, 1999 position paper at 15-17.

<sup>282</sup> January 20, 1998 memorandum at 3 and April 16, 1999 position paper at 16.

<sup>283</sup> *Id.*

field citation programs until it issued rules providing for a right to confer.<sup>284</sup> Hence, EPA is being inconsistent over the right to confer in implementing its CAA and UST field citation programs.

DoD asserts that these defects in both the UST administrative and field citation regimes are statutory (violating SWDA section 6961(b)) and constitutional (not providing for the ability to confer between agency heads violates separation of powers by Congress attempting to limit the President's exclusive right over mechanisms to resolve disputes between federal agencies).<sup>285</sup>

#### **E. Whose analysis is legally correct?**

EPA's argument that the "clear and unequivocal" standard should not apply because sovereign immunity is not an issue between two federal agencies appears correct. At a fundamental level, two different sovereigns are not involved in UST penalty enforcement by U.S. EPA against another federal agency.

The cases that DoD argues for the proposition that sovereign immunity applies between two federal agencies do not involve situations where the U.S. was the real party at interest on both sides, or are otherwise distinguishable. If one of the real parties at interest is a non-federal entity, sovereign immunity would correctly apply because the ability of the federal sovereign to be sued by a non-federal entity would be at issue. The flaw in all but one (*In re Newlin*<sup>286</sup>) of the cases that DoD advances is that, upon closer examination, a non-federal party is actually one of the real parties at interest in those cases.

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<sup>284</sup> January 20, 1998 memorandum at 3 and April 16, 1999 position paper at 17.

<sup>285</sup> *Id.*

In *U.S. v. Horn*, some of the real parties at interest were the criminal defendants who stood to obtain the \$46,000 in attorneys fees due to prosecutorial misconduct.<sup>287</sup> While the Department of Justice appealed a federal judge's order which had sanctioned prosecutorial misconduct (by an assistant U.S. Attorney) by requiring the U.S. to pay attorney's fees, the criminal defendants were the real party at interest, not the federal judge. The case was captioned with the criminal defendants' names as the appellees, the appellees' named counsel were the private attorneys of the criminal defendants, and the criminal defendants, not any federal entity, stood to receive the \$46,000 for attorneys fees.<sup>288</sup> Sovereign immunity applied because a real party at interest was a non-federal party. Moreover, nonjusticiability was not addressed anywhere in the opinion (as it would have to be if this were a true federal v. federal case).

*In re Newlin*<sup>289</sup> is a better case for DoD's position, but still fails to qualify as bonafide precedent. This case involved an IRS appeal of a bankruptcy judge's order (awarding attorneys fees to the taxpayer and levying a \$250 fine) against the IRS for violating stay restrictions.<sup>290</sup> The district court analyzed whether sovereign immunity had been waived and upheld the award of attorneys fees, but invalidated the fine (based upon the lack of a "clear and unequivocal" waiver of sovereign immunity for criminal contempt bankruptcy fines against the U.S.).<sup>291</sup> The portion dealing with sovereign immunity for the

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<sup>286</sup> *In re Jay Newlin and Carol T. Newlin*, 29 B.R. 781 (E.D. Pa. 1983).

<sup>287</sup> *U.S. v. Horn et al*, 29 F.3d 754 (1st Cir. 1994).

<sup>288</sup> *Id.* at 754-758.

<sup>289</sup> *In re Jay Newlin and Carol T. Newlin*, 29 B.R. 781 (E.D. Pa. 1983).

<sup>290</sup> *Id.* at 783-786.

<sup>291</sup> *Id.*

taxpayer's attorneys' fees is easily distinguished with the same rationale that applies to *Horn*.<sup>292</sup> The other part involving a \$250 fine for criminal contempt against the IRS to be paid into the U.S. Treasury<sup>293</sup> at first glance appears to present sound precedent for the UST matter. This fine, like a UST penalty by EPA against a federal agency, would be deposited into the U.S. Treasury. Hence for the fine issue, the Newlins are not the real party at interest, and it is accurate to assert that this is a true federal v. federal case. Nevertheless, two factors undercut the precedential value of this opinion for the notion that sovereign immunity applies between two federal agencies. First, the taxpayers' private attorney was the attorney for "the appellees,"<sup>294</sup> not DOJ attorneys on behalf of the bankruptcy judge. Second, and of more significance, the federal district court judge (when invalidating the bankruptcy judge's contempt fine) used wording that sounds much like nonjusticiability:

[s]uch a contempt citation is illogical if not pointless. One branch of the government of the United States, the bankruptcy court, is 'fining' another branch, the IRS. The money from the fine stays within the federal fisc and its *inter se* transfer accomplishes nothing for the public good... [vindicating the authority of the government] is not accomplished by the government's punishing itself...<sup>295</sup>

Invalidating the fine, therefore, could (and should) have been based upon non-justiciability alone, not upon sovereign immunity. In any case, this is only a district court opinion, carrying minimal precedential value to the UST issue.

DOJ's application of sovereign immunity's "unequivocal" standard in the Special

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<sup>292</sup> The rationale is that the Newlins are the real party at interest regarding the attorneys fees because they (not the U.S. Treasury) stood to receive the attorneys fees.

<sup>293</sup> *Id.* at 782 and 785.

<sup>294</sup> *Id.* at 781 listing "Jack K. Miller" for appellees.

<sup>295</sup> *Id.* at 783.

Counsel for Immigration Related Unfair Employment Practices opinion is also distinguishable as precedent for the UST enforcement issue.<sup>296</sup> Footnote 3 of the 1992 opinion states:

[w]e assume for purposes of this opinion that sovereign immunity would not bar administrative proceedings in which one executive agency would press charges against another executive agency and final decisional authority would be vested in the executive... We do not believe, however, that this assumption bears on the specific question presented here, because disputes under IRCA are subject to judicial enforcement procedures and thus are not resolved entirely within the executive branch.<sup>297</sup>

Disputes under UST enforcement would not be subject to judicial enforcement, thus sovereign immunity *per se* would not apply as it did in the Special Counsel opinion. Nothing in the four sections EPA asserts for UST enforcement power, sections 6961(b), 6991(6), 6991e, or 6991f, mandates EPA to request judicial enforcement or allows either party to appeal to a court.

While EPA's argument that the "clear and unequivocal" standard does not apply to interagency federal enforcement is persuasive, DoD's "clear statement" analysis is correct because the statutory text is ambiguous on the subject of federal facilities UST penalties and even if one were to refer to legislative history, there is none to clarify this

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<sup>296</sup> See an in-depth discussion of this DOJ opinion, 6 Op. Off. Legal Counsel 121 (August 17, 1992), in this thesis at section IV.C.2.c at pages 39-42 *infra*.

<sup>297</sup> Special Counsel for Immigration Related Unfair Employment Practices opinion, 6 U.S. Op. Office of Legal Counsel 121 at 7 (August 17, 1992). A more accurate rationale (overlooked by DOJ) for applying sovereign immunity in the Special Counsel opinion should have been that the Antidiscrimination Provision could allow an ALJ to award back pay, require the employer to hire the individual, and award attorney's fees to the individual employee. See 8 U.S.C. § 1324b(g)(2)(B)(iii)(providing for back pay and hiring) and § 1324b(h)(providing for attorney's fees). Thus, the individual employee would be the real party at interest, not the Special Counsel. *Ergo* sovereign immunity had to be applied because the ability of a non-federal party to suit and recover money from the federal sovereign is at issue. In the UST enforcement context, the EPA would be the real party at interest because only civil penalties to the General Treasury are at issue. Therefore, the application of sovereign immunity in the Special Counsel opinion is easily distinguishable from the UST situation.

ambiguity. EPA's view of "clear statement," construing the SWDA to avoid constitutional problems (separation of powers and nonjusticiability) with UST penalty enforcement against federal agencies, goes too far. In cases where the Supreme Court has used "clear statement" to interpret a statute to avoid reaching a constitutional issue, it only did so where other parts of the text of the statute clarified the ambiguous portion or where there was express legislative history to clarify the ambiguous portion.<sup>298</sup> Neither is present in regards to UST penalty enforcement.

Disregarding limiting language in a federal facilities section does not seem appropriate. The sentence in section 6991f, "[n]either 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" must be analyzed in the context of "clear statement" intent. A plain reading of the "or exempt" wording in this sentence makes this sentence cover more than sovereign immunity. If this sentence could be ignored, EPA would not need to rely on section 6961 for UST punitive penalty authority. Under this EPA argument, EPA should have been exercising penalty authority for USTs ever since 1984 when Subchapter IX was first added. Furthermore, EPA would have been able to take punitive penalties against federal agencies for solid and hazardous waste violations under the SWDA even before the FFCA of 1992.

The UST federal facilities provision at section 6991f is also significant for what it does not contain. It contains no reference to administrative authority, orders or penalties,

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<sup>298</sup> See e.g., *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council and NLRB*, 485 U.S. 568, 108 S.Ct. 1392 (1988) (to avoid reaching a First Amendment issue, a statute making it an unfair labor practice to "threaten, coerce, or restrain any person" to cease doing business with another was interpreted as not covering peaceful handbilling).

or punitive penalties unlike the federal facilities language at SWDA subsection 6961(a) that refers to “civil and administrative penalties regardless of whether such penalties or fines are punitive or coercive in nature,”<sup>299</sup> SWDA subsection 6992e(a) (the “Demonstration Medical Waste Tracking Program) that refers to “all administrative orders, civil, criminal and administrative penalties,”<sup>300</sup> CAA section 118(a) that refers to “administrative authority,”<sup>301</sup> and Safe Drinking Water Act section 300j-6(a) that refers 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.”<sup>302</sup>

EPA’s argument that the specific language in the UST federal facilities provision (section 6991f) should be totally ignored in favor of EPA’s general enforcement provision (section 6961) also ignores basic principles of statutory interpretation. Surely the specific provision which governs UST enforcement against federal facilities has some weight in ascertaining what enforcement measures Congress intended to be used against those federal facilities? Section 46.06 of the “bible” on statutory construction or interpretation, *Sutherland Statutory Construction*, provides,

[E]ach word given effect. ‘It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.’ A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error...<sup>303</sup>

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<sup>299</sup> SWDA, 42 U.S.C. § 6961(a).

<sup>300</sup> SWDA, 42 U.S.C. § 6992(a).

<sup>301</sup> CAA, 42 U.S.C. § 7418(a).

<sup>302</sup> Safe Drinking Water Act, 42 U.S.C. § 300j-6(a).

<sup>303</sup> Norman J. Singer, *Sutherland Statutory Construction*, Vol. 2A § 46.06 (5th Ed. 1992).

This section of *Sutherland Statutory Construction* is routinely cited for the proposition that, “[w]here a conflict exists the more specific provision controls over the more general one.”<sup>304</sup> The Supreme Court and DOJ have routinely applied this rule, calling it, “a familiar principle of statutory construction.”<sup>305</sup> Applying this principle, not only should the specific UST federal facilities section at 6991f have some weight, it should control over the general enforcement provisions covering EPA enforcement powers against all violators.

Moreover, if the “clear statement” standard is to retain any legitimacy, the specific wording at section 6991f governing federal facilities UST enforcement must be given effect. EPA’s argument that the text added by the FFCA of 1992 shows a “clear statement” of Congressional intent to allow UST penalty enforcement ignores the glaring inconsistency left by the clearly imperfect penalty language in Subchapter IX’s section 6991f. Section 6991f’s penalty language contains essentially the same federal facilities language that section 6961 contained prior to the FFCA of 1992. In amending SWDA in 1992, Congress changed the federal facilities language in section 6961 for solid and hazardous waste enforcement penalties and changed the general definition section’s “person” at section 6903(15) to include the United States. Congress’s leaving the section 6991f language intact undercuts a “clear statement” of intent argument.

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<sup>304</sup> Pre-judgment Interest Under the Back Pay Act for Refunds of Federal Insurance Contributions Act Overpayments, Off. Legal Counsel slip copy, available on Westlaw as 1994 WL 931953 (May 31, 1994)(for quote) and, *see e.g.s* of application of this principle, *Id*; Outer Continental Shelf--Drilling Rigs--Alien Workers, 3 U.S. Op. Off. Legal Counsel 362, 364 (1979); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 215 115 S.Ct. 1447, 1451 (1995); *Philbrook v. Godgett*, 421 U.S. 707, 713-714 (1975); and *Weyerhaeuser S.S. Co. v. U.S.*, 372 U.S. 597, 600-601 (1963).

<sup>305</sup> Arms Control and Disarmament Act, 2 Op. Off. Legal Counsel 54, 55 (1978)(for quote on “familiar principle”).

This lack of textual clarity cannot be rectified by legislative intent. The legislative history of the FFCA of 1992 is totally silent on the issue of USTs, Subchapter IX, and the penalty provisions at section 6991f.<sup>306</sup> A realistic appraisal of Congress's intent in the FFCA of 1992 is that Congress probably overlooked USTs and Subchapter IX when it rewrote the federal facilities language at section 6961.

DoD's argument, that Congress's not addressing Subchapter IX's ineffective punitive penalty language shows a conscious intent to withhold penalty authority, probably gives Congress too much credit. Likewise, EPA's view that section 6961(b)'s general enforcement language shows a "clear intent" is even more so the product of legal advocacy. It is fairly obvious that Congress totally overlooked this issue either way.

The legislative record provides no support for EPA's arguments on intent. The congressional record underlying the FFCA of 1992 does not contain a single reference to USTs, Subchapter IX, or the separate waiver provision contained in Subchapter IX at section 6991f.<sup>307</sup> Also, the legislative history behind the 1984 Amendments which added Subchapter IX to the Solid Waste Disposal Act contain no support for EPA's position.<sup>308</sup>

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<sup>306</sup> See H.R. Conf. Rep. No. 102-886 (Sept. 22, 1992); H. R. Rep. No. 102-111, 1st Sess. 1991 (June 13, 1991), reprinted in 1992 U.S.C.C.A.A.N. 1287, available on Westlaw as 1991 WL 111328 (Leg. Hist) accompanying H.R. 2194; and earlier Senate Report on S. 596, S.R. Rep. No. 102-67, 1st Sess. 1991, (May 30, 1991) available on Westlaw as 1991 WL 104464 (Leg. Hist). The House, Senate, and Conference reports repeatedly speak only of "solid and hazardous waste." The House and Senate reports' "background and need for the legislation" sections discuss repeat "hazardous waste" violations, particularly by DOE at Rocky Flats and Fernald, but never mention violations involving mere storage of fuel whatsoever. See H.R. Rep. No. 102-111 at 2 and S.R. Rep. No. 102-67 at 2. Of course, unused material contained in a UST, which is still fit for its intended purpose, is not "waste" until it is discarded. See e.g.s, cases at FN 58 *infra*.

<sup>307</sup> *Id.*

<sup>308</sup> H.R. Rep. No. 98-198 I, II, and III, 98th Congress, 1st Sess. 1983, reprinted in 1984 U.S.C.C.A.A.N. 5636, available on Westlaw as 1983 WL 25418 (Leg Hist) (June 17, 1983); and H.R. Conf. Rep. No. 98-1133, 98th Cong., 2nd Sess. 1984, reprinted in 1984 U.S.C.C.A.A.N. 5649, available on Westlaw as 1984 WL 37531 (Leg. Hist.) (Oct. 3, 1984). House Conference Report 98-1133 merely recites an even sparser draft version of § 6991f's wording. See H.R. Conf. Rep. No. 98-1133 at 43. The legislative history contains no commentary that would shed additional light on the UST federal facilities provision at § 6991f.

Further evidence that supports DoD's position, though DoD appears to not have raised it, is the fact that the 1988 Amendment to SWDA which created Subchapter X, "Demonstration Medical Waste Tracking Program," contains its own enforcement and federal facilities sections similar to Subchapter IX.<sup>309</sup>

Finally, and of further significance<sup>310</sup> in terms of legislative intent, a 1995-1996 bill in the 104th Congress contained proposed language which attempted to amend Subchapter IX to bolster the federal facilities language for UST penalty enforcement against federal agencies.<sup>311</sup> The main thrust of the Land Disposal Flexibility Act was to provide grants for smaller communities to upgrade their dumping facilities and to afford more flexibility for the standards for such dumps.<sup>312</sup> While most of the proposed Act passed as noted

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<sup>309</sup> 42 U.S.C. §§ 6992d "Enforcement" and 6992e "Federal Facilities." In contrast to the inadequate Subchapter IX language at 6991f, Subchapter X's federal facilities language at § 6992e contains virtually identical language to the FFCA of 1992 language at § 6961(a). This shows that Congress knew how to correctly phrase a federal facilities enforcement waiver and did so when it added a new subchapter to the SWDA in 1988. Considering that, Congress's inaction in 1992 on the impotent language in Subchapter IX at 6991f is highlighted even more so.

<sup>310</sup> This is significant as shown by reliance on it by the EPA ALJ in the UST administrative case at Tinker AFB. The ALJ found that the Land Disposal Flexibility Act's attempt to strengthen the federal facilities UST provision provided evidence of legislative intent. See "Order on Respondent's Motions to Dismiss and for Accelerated Decision," Docket No. UST-6-98-002 AO-1, at 30-32 (May 24, 1999). For those with access to the federal FLITE system, this decision is available at the Air Force Environmental Litigation Division's site in the "hot environmental news" area.

<sup>311</sup> The Land Disposal Flexibility Act, PL-104-119, 110 Stat. 830 (Mar 26, 1996). Representative Oxley (R-OH) sponsored the Act, and was the one who proposed strengthening the § 6991f federal facilities language so that it would mirror the FFCA federal facilities language at § 6961. The bill was designated H.R. 2036. The version containing the bolstered federal facilities change did not make it out of the House Commerce Committee. That early version is not available on Westlaw or Thomas, but was found on the Internet at an environmental law website maintained by attorney Steve Taber at <<http://www.webcom.com/staber/legis/h2036>>. It is also available on LEXIS using a LEXSEE search as "104 PL 119, full text version, HR 2036 July 14, 1995 version 1." See, 142 Cong. Rec. H1965-03 (daily ed. March 7, 1996), available on Westlaw as 1996 WL 99588 (for the final version of the bill that Rep. Oxley presented on March 7, 1996).

<sup>312</sup> The main thrust of the Land Disposal Flexibility Act, PL-104-119, 110 Stat. 830 (Mar 26, 1996) added language to §§ 6949a and 6947. See H.R. Rep. No. 104-454, *reprinted in* 1996 U.S.C.C.A.A.N. 593.

earlier,<sup>313</sup> the proposed change to the UST federal facilities provision did not survive House Commerce Committee scrutiny.<sup>314</sup> There are numerous cases where the courts have found that a failed attempt to pass legislation is evidence of legislative intent.<sup>315</sup> The Supreme Court has noted that, “[a]lthough postenactment developments cannot be accorded ‘the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of’” [the Act in question].<sup>316</sup> Making an even stronger pronouncement on failed attempts to amend a statute, the Court has stated, “Congress’ intent was expressed in deeds as well as words.”<sup>317</sup> In this case, the fact that much of the house and all of the senate did not see this proposed language reduces its value in ascertaining legislative intent. On the other hand, it does show that there is some awareness in Congress that the UST federal facilities provision is inadequate.

My conclusion is that the specific provision at section 6991f cannot be ignored when analyzing whether Congress conveyed a “clear statement” of intent to subject federal

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<sup>313</sup> See, FN’s 113 and 312 *infra*.

<sup>314</sup> A May 4, 1999 telephone interview with Tim Johnson, one of Congressman Oxley’s legislative staffers in his Washington D.C. office, confirmed that the federal facilities wording did not make it out of the House Commerce Committee. Approximately 50 Congressmen (the Committee members) were given the draft of the bill which contained the § 6991f wording. The § 6991f wording was proposed because Congressman Oxley believed the existing § 6991f language was inadequate to waive sovereign immunity in light of *DOE v Ohio* and hoped to gain Democrat political support for the main Land Disposal Flexibility Act provisions by bolstering the inadequate § 6991f waiver. There were a number of draft versions of this bill and this one was one of the earlier drafts (LEXIS reflects six versions, with only the first version containing the proposed language).

<sup>315</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 1762 (1974); *Cannon v. University of Chicago*, 441 U.S. at 687, n.7, 99 S.Ct., at 1952, n.7 (1979); *U.S. v. Rutherford*, 442 U.S. 544, 554, n. 10, 99 S.Ct. 2470, 2476, n.10 (1979); *Hutto v. Finney*, 437 U.S. 678, 694, 98 S.Ct. 2565, 2575 (1979); *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912 (1982).

<sup>316</sup> *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912 (1982), quoting *Cannon v. University of Chicago*, 441 U.S. at 687, n.7, 99 S.Ct., at 1952, n.7.

<sup>317</sup> *Hutto v. Finney*, 437 U.S. 678, 694, 98 S.Ct. 2565, 2575 (1979).

agencies to UST punitive penalties. As the Supreme Court recently noted, “[t]o avoid a constitutional question by holding that Congress enacted, and the President approved, a blank sheet of paper would indeed constitute ‘disingenuous evasion.’”<sup>318</sup>

The May 24, 1999 Tinker AFB EPA ALJ decision reached virtually all of the same conclusions above.<sup>319</sup> The ALJ did not agree with DoD’s argument for the “clear and unequivocal” standard (based on sovereign immunity or fiscal law), yet found in favor of DoD based upon a lack of “clear statement” intent for punitive penalties.<sup>320</sup> The ALJ cited *Sutherland Statutory Construction* for not being able to ignore the inadequate federal facilities language at section 6991f and found the same lack of legislative history for punitive UST penalties in either Subchapter IX or the FFCA of 92.<sup>321</sup> Also, the ALJ noted the Land Disposal Flexibility Act’s failed attempt to bolster the ineffective federal facilities language at 6991f.<sup>322</sup>

**F. Assuming arguendo that “clear statement” intent is met, whose argument is correct whether there are actual constitutional hurdles that would prevent implementing EPA UST penalty enforcement against other federal agencies?**

The SWDA itself does not deprive the President of the power to resolve disputes between federal agencies. It does not require a suit between federal agencies or attempt to prescribe a certain dispute resolution mechanism. Due to the discretionary wording in

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<sup>318</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 215 115 S.Ct. 1447, 1451 (1995).

<sup>319</sup> “Order on Respondent’s Motions to Dismiss and for Accelerated Decision,” Docket No. UST-6-98-002 AO-1 (May 24, 1999). For those with access to the federal FLITE system, this decision is available at the Air Force Environmental Litigation Division’s site in the “hot environmental news” area.

<sup>320</sup> *Id.* at 14, 19 and 36.

<sup>321</sup> *Id.* at 27 and 36.

<sup>322</sup> *Id.* at 30-32.

section 6991e(a), "may commence a civil action," there is really no issue over whether EPA is required to take judicial action (as existed in DOJ's NRC opinion<sup>323</sup>).

Yet, EPA's current rules do pose potential statutory and constitutional problems in that the SWDA section 6961(b)(2) mandate that no order shall be made final until the agency has had an opportunity to confer with the administrator are not provided for in EPA regulations. The Part 22 rules do not currently explicitly provide a right to confer for enforcement actions under SWDA section 6991(e). Still, in practice EPA is providing a right to confer over UST formal administrative enforcement against federal agencies.<sup>324</sup> Moreover, as soon as the proposed February 1998 change to the EPA's Consolidated Rules of Practice (CROP) becomes final,<sup>325</sup> assuming they still confer a conference right, this will be a dead issue for UST enforcement proceedings. Of note, the May 24, 1999 Tinker AFB EPA ALJ decision reached the same conclusion regarding the right to confer over formal administrative penalties (that there is no problem due to EPA's upcoming change to the CROP).<sup>326</sup>

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<sup>323</sup> NRC opinion, 13 Op. Off. Legal Counsel 131, 134, discussed in this thesis at IV.C.2.d at pages 42-43 *infra*.

<sup>324</sup> Per telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999). *See also* EPA Region 6's response brief which was filed in the UST administrative action against Tinker AFB, titled "Complainant's Response in Opposition to Respondent's Motion to Dismiss and in Opposition to Respondent's Motion for Summary Judgment," Docket No. UST-6-98-002-A01 at 5 (July 23, 1998)(stating that the military will have the right to appeal to EAB and the right to confer with the administrator).

<sup>325</sup> The proposed change to the CROP would provide for a process for federal agencies to confer with the EPA Administrator over UST formal administrative penalties. *See also*, discussion at FN's 254 and 255 and the accompanying text.

<sup>326</sup> She reached that conclusion by relying on the upcoming change to the CROP and the fact that the right to confer was not yet a ripe issue because the penalty was not yet final. "Order on Respondent's Motions to Dismiss and for Accelerated Decision," Docket No. UST-6-98-002 AO-1, at 37 (May 24, 1999). For those with access to the federal FLITE system, this decision is available at the Air Force Environmental Litigation Division's site in the "hot environmental news" area. The field citation opportunity to confer issue was not before the Tinker ALJ, hence she made no comments on it.

The UST field citation issue is more problematic. EPA provides no right to confer over field citations (either by formal rule or internal guidance). Moreover, EPA's OSWER Directive prohibits any ability to elevate the dispute to the EAB, the administrator, or to outside executive branch dispute resolution mechanisms. As DoD notes,

... the OSWER Directive explains: '[t]he field citation compliance order is not an adjudicatory proceeding under 40 CFR Part 22. The violator has no right to a hearing under part 22 ... If a violator refuses to accept the terms of the field citation... follow-up enforcement should be initiated by EPA. Such follow-up enforcement should be more stringent than the field citation settlement terms...' <sup>327</sup>

The coercive nature of the UST field citation policy violates both the statutory requirement for a right to confer and the constitutional requirements for the executive to be able to resolve disputes between agencies. EPA should remedy this problem by issuing internal guidance or a rulemaking providing federal agencies the right to confer. In an interview with EPA FFEO's lead attorney, she stated that one of EPA's prime reasons for not wanting to afford a right to confer for UST field citations is a fear of burdening the Administrator with trivial UST fine cases (since the average field citation is only in the hundreds of dollars).<sup>328</sup> However, this "floodgates" rationale would work both ways. It is highly unlikely that DoD would burden its "brass" with a flood of conferences with the EPA administrator over small fine cases. Instead, as in the CAA field citation context, the right to confer (between the EPA Administrator and her military counterparts such as the Secretary of a Military Department) would only be invoked for the rare case in which a precedent was at issue.

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<sup>327</sup> DoD's April 16, 1999 position paper at 16, quoting OSWER Directive 9610.16, Section II.3.

<sup>328</sup> Telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

### G. Could other constitutional arguments be raised?

Last year the Supreme Court found the Line Item Veto Act unconstitutional because the President's use of the veto violated Article V, Clause VII presentment.<sup>329</sup> Using the veto to prevent an appropriation from being spent was distinguished from the President's inherent power to decide not to spend an appropriation.<sup>330</sup> The Court distinguished this by focusing on the Line Item Veto Act's conferring "the unilateral power to change the text of duly enacted statutes." An easy analogy to the federal agency UST penalty issue would be that Congress cannot in similar fashion empower the EPA to redistribute other agencies' appropriations into the General Treasury account or to impound appropriations. However, EPA levying ad hoc penalties on federal agencies probably does not rise to the level of rewriting entire provisions of statutes.

In any case, this or any other constitutional issue that DOJ's Office of Legal Counsel has not addressed in the four cases on interagency penalties really are only academic issues, because DOJ has not been willing to make expansive constitutional analyses.

Also, courts would not be able make such expansive analyses on a case involving two federal agencies because no court would be able to hear a dispute between two federal agencies because of Article II separation of powers constraints and Article III nonjusticiability.<sup>331</sup> The only exceptions to the rule of judicial forbearance (from addressing interagency disputes) have been cases in which one of the agencies was not the real party at interest. An example of this is *U.S. v. ICC*, a suit by the FCC against the

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<sup>329</sup> *Clinton v. City of N.Y.*, 524 U.S. 417, 118 S.Ct. 2091 (1998).

<sup>330</sup> *Id.* at 2091.

<sup>331</sup> See FN's 138 and 139 *infra* for the DOJ opinion on nonjusticiability of interagency suits and for court cases on nonjusticiability of such suits.

Interstate Commerce Commission over illegally high railroad rates.<sup>332</sup> The Supreme Court found that the U.S. was actually suing the railroads, not the ICC.<sup>333</sup> Hence, the suit was justiciable.

In DOJ OLC's 1985 opinion on justiciability of lawsuits between the EPA and other governmental agencies, DOJ analyzed three types of justiciable suits -- suits brought by or against independent federal regulatory agencies, like the ICC cases; suits in which the Comptroller of Currency intervened for a defendant in an antitrust suit by DOJ; and suits between the government and an individual government officer.<sup>334</sup> DOJ could not find, nor envision any type of justiciable suit between the EPA and another federal agency.<sup>335</sup> Thus, an interagency penalty dispute would only be heard in federal administrative law venues (DOJ OLC, OPM, Comptroller General, etc.), not in any court. DOJ OLC has already visited the interagency penalties issue numerous times and has never made expansive constitutional analyses. Hence, for the UST penalty dispute, any fresh constitutional theories (such as separation of powers problems due to improper supplementation of appropriations or impoundment) are apt to be purely academic.

#### **H. The dynamics of using the OLC dispute resolution method.**

EPA may have been hesitant to ask for an OLC decision because all federal agencies except DoD have acquiesced to paying UST penalties. Hence, an adverse OLC decision would reverse the nearly uniform favorable status quo. DoD had also appeared hesitant

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<sup>332</sup> *US v. ICC*, 337 U.S. 426, 432 (1949) as discussed in *Ability of the Environmental Protection Agency to Sue Another Government Agency*, 9 Op. Off. Legal Counsel 99 (December 4, 1985).

<sup>333</sup> *Id.*

<sup>334</sup> 9 Op. Off. Legal Counsel at 100.

<sup>335</sup> *Id.* at 99.

to ask for an OLC decision.<sup>336</sup> The status quo (not paying penalty assessments) for DoD is also somewhat favorable.

DoD should keep a low profile in asserting the UST penalty issue to prevent rousing Congress to amend Subchapter IX's ineffective waiver of sovereign immunity. Otherwise, a victory at the OLC stage could be a fleeting victory resulting in states being able to issue punitive penalties.

The paying in protest option may have appeared attractive in that paying up front usually entails a much smaller fine and keeps the regulators happy. For a recalcitrant agency, nonpayment results in EPA switching to formal administrative actions and increases fines dramatically (\$600 field citation increased to \$70,734 in the case of Barksdale Air Force Base<sup>337</sup>). Nevertheless, there are three drawbacks to paying in protest. If DOJ decides the issue in favor of DoD, fines paid in protest would be returned to the U.S. Treasury, not to the agency that paid the fines.<sup>338</sup> Also, paying a penalty that has no basis in law would be a violation of fiscal law (contrary to the purpose clause of the Anti-Deficiency Act<sup>339</sup>). Lastly, EPA may be more likely to take penalty enforcement actions if there is no resistance by federal agencies.

#### **I. Is EPA penalty enforcement needed to obtain DoD compliance?**

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<sup>336</sup> DoD has been contesting the issue for two years now (since EPA's February 1997 memo to the Regions initiating UST penalty enforcement and the first series of UST penalty cases in the summer of 1997). In the January and March 1998 memoranda from DoD to EPA, DoD had mentioned requesting an opinion from DOJ, but didn't make the request until April 16, 1999.

<sup>337</sup> Per an internal memorandum by Dale Murad of the Air Force Environmental Litigation Division, EPA-Imposed Underground Storage Tank (UST) Fines (April 14, 1998).

<sup>338</sup> Per 31 U.S.C. § 1356(c), all miscellaneous receipts, such as uncommitted funds that are past their appropriations time period (which most returned O&M funds would be since they only have a one year spending window) are returned to the General Treasury account.

<sup>339</sup> 31 U.S.C. § 1301(a).

DoD recently responded to an EPA OECA/FFEO request on status of UST compliance by answering that it would be 100% in compliance by the December 22, 1998 deadline.<sup>340</sup> As a reply to a December 1998 EPA invitation to make self-disclosures per the EPA Audit Policy, DoD made no self-disclosures by the announced January 22, 1999 deadline.<sup>341</sup> Therefore, if DoD's status report and lack of self-disclosures are taken at face value, DoD is 100% in compliance with UST requirements. DoD has 6,286 USTs in operation according to numbers submitted to EPA FFEO in September 1998.<sup>342</sup> The fact that EPA has only initiated five formal administrative penalty enforcement actions and a handful of field citations against DoD since the February 1997 federal facilities penalty initiative began also indicates a high degree of compliance.

In addition, the very minor nature of the five EPA penalty enforcement actions against DoD demonstrate that DoD is not a significant UST violator. The Navy case at Oceana Naval Air Station is weak and may be dismissed by EPA on the merits (of whether a violation occurred).<sup>343</sup> The EPA administrative complaint against the Naval Research Laboratory was dismissed on the merits by an ALJ in April 1999.<sup>344</sup> The Army case at

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<sup>340</sup> Per Oct 1998 response memoranda from the DoD components to EPA FFEO.

<sup>341</sup> Per interview with attorney Dale Murad of the Air Force Environmental Litigation Division in Arlington, Virginia (April 14, 1999) and telephone interview with attorney Sally Dalzell of the EPA FFEO (April 26, 1999).

<sup>342</sup> Per a September 30, 1998 status report by DoD to EPA FFEO.

<sup>343</sup> Per an interview with attorney Dale Murad of the Air Force Environmental Litigation Division in Arlington, Virginia (April 14, 1999). At a hearing on April 13, 1999, the ALJ presiding over the case explored at length whether the EPA was reading the UST regulations too narrowly (regarding whether a pipe the EPA asserted was in violation was a filler tube requiring secondary containment or a mere gauging tube not requiring such containment). This case has been stayed pending DOJ's opinion on the UST penalty dispute between EPA and DoD.

Walter Reed Hospital involved closure violations, which have since been remedied.<sup>345</sup>

The two Air Force cases began as field citations, which EPA only uses for minor violations, and were only elevated because the Air Force refused to pay.<sup>346</sup> Moreover, none of the five cases involves a threat of imminent harm.<sup>347</sup>

Considering the minimal number and nature of DoD UST violations and strong efforts at UST compliance, there appears to be little practical need to justify EPA's quest for punitive penalties for UST violations by DoD facilities.

#### **J. Which way will DOJ decide using the framework in the OLC decisions?**

Although a "close call," my opinion is that DOJ will find in favor of DoD. As stated in its Fair Housing Act opinion, DOJ OLC believes it "may enjoy somewhat greater latitude to construe a statute to avoid constitutional difficulties than does a court."<sup>348</sup> On the other hand, the Fair Housing Act opinion, in which DOJ refused to "rewrite" the statute, shows that there are limits to that latitude. In the CAA opinion, DOJ pushed the limits of the "clear statement" standard with heavy reliance on legislative history from the 1977 CAA Amendments.<sup>349</sup> Regarding UST punitive penalties, there is no such similar support in the legislative history of either the 1984 SWDA Amendment which

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<sup>344</sup> Per a telephone interview with attorney Sally Dalzell of EPA FFEO (April 26, 1999).

<sup>345</sup> Per a telephone interview with (attorney) Major Bob Cotell of the Army's Environmental Law Division (May 13, 1999).

<sup>346</sup> Per an internal memorandum by Air Force Environmental Litigation Division attorney Dale Murad, EPA-Imposed Underground Storage Tank (UST) Fines (April 14, 1998). For those with access to the federal FLITE system, this decision is available at the Air Force Environmental Litigation Division's site in the "hot environmental news" area.

<sup>347</sup> *Id.*

<sup>348</sup> 18 Op. Off. Legal Counsel 29 at 9 (1994).

<sup>349</sup> CAA opinion at 3. *See also*, discussion in this thesis at page 35.

added Subchapter IX or the 1992 SWDA Amendment (the FFCA of 1992). Also, the Demonstration Medical Waste Tracking Program of 1988, the FFCA of 1992, and the Safe Drinking Water Amendments of 1996 show that Congress now knows how to correctly draft federal facilities provisions to provide for punitive penalties. Moreover, the 1996 Land Disposal Flexibility Act's failed attempt to broaden the UST federal facilities language is the proverbial "straw that broke the camel's back." Not only is there no legislative history to support punitive penalties, with the Demonstration Medical Waste Tracking Program of 1988, the FFCA of 1992, the Safe Drinking Water Amendments of 1996, and the Land Disposal Flexibility Act of 1996, there are tangible, albeit of minimal weight, pieces of postenactment legislative history that negate punitive penalties for UST violations.

At the same time, the textual language in the federal facilities section at SWDA section 6991f is much more limiting of federal facilities enforcement than is the federal facilities section at CAA section 118.<sup>350</sup>

The text of this CAA provision is sufficiently clear that one court (applying *DOE v. Ohio*) even found that it passes the "clear and unequivocal" waiver standard for waving sovereign immunity for statement penalty enforcement.<sup>351</sup> The CAA section 118

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<sup>350</sup> The text of the CAA federal facilities section reads:

... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural ... (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officer, agents, or employees under any law or rule of law." 42 U.S.C. § 7418(a).

<sup>351</sup> See *U.S. v. Tennessee Air Pollution Control Board*, 967 F. Supp. 975 (M. Dist. Tenn. 1997)(holding that the CAA's federal facilities and citizen suit sections waive federal sovereign immunity for state imposed punitive civil penalties), but see *contra*, *Sacramento Metropolitan Air Quality Management District v. U.S.*,

provision is a much stronger statement of Congressional intent to authorize penalties for federal facilities than the feeble provision in the SWDA UST federal facilities section, which provides:

shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. 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.<sup>352</sup>

While DOJ would very likely agree with EPA that the “clear and unequivocal” sovereign immunity standard does not apply, DOJ would not be able to wholly ignore the intent of the federal facilities language at section 6991f. DOJ’s Office of Legal Counsel has not made this far of a departure from the “clear statement” standard, absent legislative history to rely on. As DOJ noted in its HUD opinion, statutory interpretation cannot impermissibly rewrite a statute.<sup>353</sup> Also, DOJ has followed *Sutherland Statutory Construction* section 46.06 to give effect to all provisions in a statute and to give precedence to specific terms over general terms.<sup>354</sup>

The recent EPA ALJ decision in the Tinker AFB case (finding as this thesis does, that there is no “clear statement” of Congressional intent for UST punitive penalties against federal agencies) also poses a large hurdle for DOJ if it had been inclined to attempt to tread into uncharted waters with a politically motivated decision. The decision lends

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CIV S-98-437 (E.D. Cal. Nov 13, 1998) and *U.S. v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995).

<sup>352</sup> 42 U.S.C. § 6991(e).

<sup>353</sup> 18 Op. Off. Legal Counsel 29 at 10 (1994).

<sup>354</sup> See OLC opinions at FN 305 *infra*.

much greater credibility to DoD's arguments, and creates precedent which DOJ would have to overcome.<sup>355</sup>

Finally, if DOJ were to find "clear statement" intent, they would likely have no problem over the agency's opportunity to confer with the EPA Administrator. DOJ would find no problem with the formal administrative process because EPA has a proposed rule expressly providing for a right to confer and is currently asserting that they will provide it. In terms of the field citation program, DOJ would likely overlook any problem over the right to confer with the Administrator as long as EPA promised to issue an internal policy providing for the right to confer for field citations.<sup>356</sup>

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<sup>355</sup> A copy of the ALJ's decision has been forwarded by DoD to the attention of DOJ. Also, EPA and DoD have agreed to a stay of the time to appeal the ALJ's decision to the EAB pending resolution of the issue by DOJ OLC. Hence, there will be no EAB appeal before DOJ OLC issues its opinion on the UST interagency penalty issue. Interview with Colonel Dan Benton of DoD's Office of General Counsel at the Pentagon (June 26, 1999).

<sup>356</sup> As DOJ did in the CAA Opinion at 4 ("federal agencies will have the opportunity to consult with the EPA Administrator before any assessment is final").