



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON DC 20314-1000

REPLY TO
ATTENTION OF

CECC-E

15 August 2007

MEMORANDUM FOR DISTRICT, DIVISION, CENTER and LABORATORY COUNSELS

Subject: Guidance for Counsel on Responding to State Allegations of USACE Violation of Environmental Compliance Law or Regulation and Demand for Payment of Fines and Penalties Associated with Civil Works (CW) Facilities or Operations

1. PURPOSE: This memorandum provides guidance on how USACE counsel should respond to State attempts to impose fines and penalties against USACE associated with CW facility or operational activities, including those of concessionaires, for violations of environmental laws or regulations. It recognizes the role counsel must serve in making the legal determination that a waiver of sovereign immunity exists that permits imposition of fines or penalties for violation of the involved State law or regulation, and in engaging with their environmental compliance coordinator or other appropriate program personnel in developing procedures for legal coordination to assure prompt resolution of regulatory violation issues. It also points out the need for counsel, when appropriate, to pursue defensive actions in available State administrative forums or Federal courts and to seek by referral to CECC-E timely involvement by the Department of Justice's Environmental Defense Section (DOJ) in the matter to assure United States appeal rights concerning adverse State administrative decisions are fully protected. The District, Laboratory and Center Counsel whose facility is the subject of the State violation notice will be responsible for counsel actions required by this guidance.

2. BACKGROUND:

a) Over the past decade, Congress has waived in varying degrees the Government's immunity from fines and penalties under various statutes. Examples of such waivers exist in the Clean Air Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; and the Clean Water Act. These waivers of sovereign immunity when applicable to the circumstances of a particular violation impose a requirement on Government generally and ultimately on USACE specifically to comply with certain substantive and procedural requirements of State laws. Accordingly, counsel must be cognizant of situations in which State laws and regulations, as the result of Congressional waivers of sovereign immunity may be enforceable against USACE activities or facilities. Care must be taken to ensure that State regulators' claims of sovereign immunity waiver are supported by clear language contained within the relevant legislation and by the factual circumstances prompting the alleged violation and subsequent fine or penalty demand.

b) Federal facilities are subject to fines for failure to comply with State law or regulatory requirements only when Congress has clearly and unequivocally waived sovereign immunity. In such cases, agency funding may be used for payment of fines and penalties validly assessed pursuant to statutes where the sovereign immunity of the United States has been waived provided that such fines and penalties are reasonably based, assessed according to the language of the waiver, applied in a non-discriminatory manner, and if sufficient appropriations are available for their payment.

3. REQUIRED COUNSEL ACTIONS: Counsel will coordinate with their environmental compliance coordinator (or comparable designated technical staff) as a preventive law measure to assure that counsel is promptly advised of the receipt of any State Notice of Violation or other regulatory enforcement action. Counsel will take the following actions in the event of receipt of a State notice of violation or similar enforcement notice.

a) District Counsel will electronically forward a copy of all Notices of Violation or similar enforcement notices to their Division Counsel and to CECC-E. This is in addition to action taken by the environmental compliance coordinator (or comparable designated technical staff) to advise USACE Headquarters' program elements of the violation notice. Center and Laboratory Counsel will provide their copy of such notices to CECC-E.

b) Counsel must work with their environmental compliance coordinator (or comparable designated technical staff) responsible for receipt of such violation notices to ensure that validly assessed fines and penalties associated with violation notices where sovereign immunity has been waived are resolved as soon as practicable. In coordination with the environmental compliance coordinator (or comparable designated technical staff), Counsel will evaluate the statutory and regulatory basis on which the Notice of Violation is based, specifically evaluate if a sovereign immunity waiver applies, and provide a legal determination on its applicability to the USACE activities addressed in the violation. Where the alleged violation results from operational activities and a sovereign immunity waiver exists, Counsel must determine whether the waiver includes payment of the type of fine or penalty being assessed, if the fine or penalty being assessed is warranted, and if action should be taken disputing the assessment.

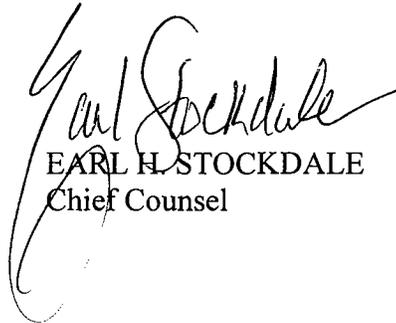
c) Administrative and judicial forums may be available within the State to dispute the State's action. Where an effort to dispute the violation or related fine or penalty assessment is determined to be warranted, District, Laboratory and Center Counsel must determine whether to and how to best defend USACE interests in any State administrative forum; and the appropriateness of consultation with DOJ on whether, in the first instance, to dispute the violation notice in a State administrative forum, or in federal court. These determinations will be made in consultation with Division Counsel and CECC-E. Where defense of USACE interests or appeal of an adverse State administrative decision to a judicial forum is required, Counsel will provide timely electronic notice to Division Counsel, CECC-E and CECC-L. In the case of an appeal to a judicial forum, the notice must provide sufficient time to allow for consultation with DOJ on whether an appeal of any final adverse administrative determination to a state or federal judicial forum is appropriate. Since appeal timeframes may be quite short, Counsel should

assure that coordination with their Division Counsel, CECC-E and CECC-L on the need to seek judicial review is in place before the issuance of the final administrative appeal determination triggering the appeal timeframe.

d) Where referral to DOJ through CECC is deemed advisable or required, District, Laboratory and Center Counsel will be expected to promptly advise the assigned DOJ attorney of the grounds for the notice of violation, rationale for resisting the violation or payment of any applicable fine or penalty, and where applicable, the results of any administrative hearings on the matter. CECC-L, in coordination with CECC-E, will manage DOJ referrals. Counsel must include the following information in the DOJ referral package provided to CECC-L.

- A summary of the action prompting the notice of violation including a chronological synopsis of the bases for the violation and a statement of reasons why defense is required.
- A copy of the State's notice of violation or order and copies of any associated correspondence.
- Copies of applicable State regulatory and statutory requirements.
- Copies of any State administrative determinations including all filings and applicable USACE and State correspondence.
- A copy of Counsel's evaluation on the appropriateness of the fine or penalty being assessed and its determination on whether the State is consistent in its application/enforcement of the regulatory requirement and its assessment of fines and penalties related thereto.

4. POC for this action is Phil Steffen (CECC-E) (202 761-0026).



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