First, the Bad News

The Supreme Court has rejected a long-running challenge to one of the most-feared enforcement tools for compelling cleanups at federal Superfund sites: Section 106 Unilateral Administrative Orders (UAOs). The Court refused to review a ruling from the D.C. Circuit Court of Appeals that upheld USEPA's use of UAOs in the face of claims by General Electric that UAOs were unconstitutional. See General Electric Co. v. United States, No. 10-871 (June 6, 2011), cert. denied.

Under CERCLA, USEPA has three primary means of ensuring federal Superfund sites are cleaned up: undertake the work directly and then seek to recover costs from potentially responsible parties (PRPs); file suit to compel the PRPs to undertake the cleanup; or administratively issue a UAO under Section 106 of CERCLA compelling the PRPs to undertake the cleanup. UAO recipients who believe that they are not responsible for the contamination have two equally unpalatable choices - perform the work and then seek reimbursement from the Superfund after work is completed or refuse to comply with the order. In the latter case, if the USEPA is successful in enforcing the UAO, the PRP is liable for $37,500 per day ($13.7 million per year!) in penalties, reimbursement to the United States for any costs that the United States might have incurred, plus up to three times those costs as damages.

According to GE’s lawsuit, USEPA has issued approximately 1,700 UAOs to 5,400 PRPs since CERCLA was enacted in 1980. A study by the Environmental Law Institute found that 5% of UAO recipients failed to comply with the orders. Anyone who has had to negotiate Superfund site cleanups with USEPA knows what a draconian enforcement mechanism UAOs are and how USEPA leverages the threat of UAOs to negotiate “consensual” cleanup agreements (typically in the form of judicially enforceable consent decrees).

GE's challenge arose from USEPA's efforts to force GE to cleanup PCB contamination in the Hudson River. In response to USEPA threats to issue an UAO, GE filed suit in 2000 challenging the constitutionality of that enforcement mechanism. In 2005 and 2009, the federal district court issued rulings rejecting GE's claims. On appeal to the D.C. Circuit Court of Appeals, GE argued that the UAOs violate the Fifth Amendment guarantee of due process, because they are issued without the right to a hearing. In addition, GE argued that the issuance of an UAO can have materially adverse financial effects on a PRP (e.g., lower stock prices, increased borrowing costs) that constitute a deprivation of property without due process.

In June, 2010, the Circuit Court issued an opinion rejecting these arguments. The court concluded that UAO recipients can obtain a hearing by refusing to comply and then challenging the order when USEPA files suit in federal court to compel compliance. Because the PRP is not required to pay anything until the order is successfully enforced, there is no deprivation of property before the opportunity for a hearing. The court also concluded that adverse financial consequences arising from an UAO are not the result of USEPA action but market reactions which do not implicates the protections afforded under the Fifth Amendment.

GE then filed a writ of certiorari with the U.S. Supreme Court. The Court rejected that appeal earlier this week, effectively ending 11 years of litigation without any improvement to the Superfund enforcement landscape. PRPs negotiating with USEPA over Superfund cleanups must still factor in the risk of an UAO as part of their negotiation strategy.
Then, Some Good News

On the other hand, the Ninth Circuit Court of Appeals recently ruled that USEPA alone has the authority to recover penalties for alleged violations of UAOs. In a complex case involving a Canadian smelting operation that allegedly contaminated the Columbia River in Washington, the court rejected an attempt by an Indian tribe and private citizens to recover $24 million in penalties based on a violation of an UAO issued to the smelting company. See *Pakootas v. Teck Cominco*, No. 08-35951 (9th Cir. June 1, 2011).

This case involves a number of unique issues, not the least of which is the extent to which CERCLA can be enforced against alleged sources of contamination that exist outside the United States, but that may be causing releases of hazardous substances in the United States. The key facts, however, concern the issuance of an UAO to Teck Cominco, the Canadian smelter. Teck Cominco elected not to comply, and after USEPA took no further action, the plaintiffs filed suit to enforce the UAO. While the suit was pending, USEPA negotiated a separate agreement with Teck Cominco and withdrew the UAO.

The plaintiffs proceeded with their penalty claims, which the federal district court dismissed. On appeal to the Ninth Circuit Court of Appeals, the court concluded that USEPA has the exclusive authority to determine if and when penalties should be recovered for failing to comply with an UAO. The court specifically ruled that the plaintiffs’ claims ran afoul of the pre-enforcement bar in CERCLA Section 113(h), because the plaintiffs were seeking to recover penalties from Teck Cominco before the cleanup was completed.

It is not often the Ninth Circuit rules against the exercise of citizens suits to enforce environmental laws. However, the *Pakootas* case involves a very unusual set of facts and the Ninth Circuit clearly was concerned that allowing the plaintiffs’ penalty claim to proceed might derail the settlement agreement between USEPA and Teck Cominco. This latter point was of particular concern given the unresolved extra-territoriality issue, given that Teck Cominco’s operations were located solely in Canada.

From the PRP perspective, this decision mitigates the risk that citizens or environmental advocacy groups may use the courts to over-ride USEPA’s discretionary enforcement authority under CERCLA Section 106, and separately recover penalties that USEPA has elected to not pursue.

©2019 Greenberg Traurig, LLP. All rights reserved.

Source URL: https://www.natlawreview.com/article/cercla-updates