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DOE ENVIRONMENTAL ISSUES BULLETIN

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ENVIRONMENTAL CRIMINAL LIABILITY CONCERNS FOR FEDERAL OFFICIALS

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Department of Energy (DOE) officials have recently stated that they have concerns about individual criminal environmental liability under the Federal Facility Compliance Act (FFCA). These concerns were raised at FFCA mixed waste task force meetings with the National Governors' Association, during testimony of DOE officials before Congress,

and at the Environmental Council of the States meeting with the White House held in June. In addition to concerns under the FFCA, liability could arise under other statutes.

Federal Employee Liability

DOE officials are specifically troubled by the prospect of personal criminal liability for failing to meet Resource Conservation and Recovery Act (RCRA) requirements, liability which could arise even in cases in which DOE requests sufficient funding to meet all the requirements of RCRA but Congress does not appropriate sufficient funds. This concern arises, arguably, because DOE officials would "know" that RCRA would be violated as a result of insufficient funding, thus making DOE officials who are responsible for RCRA compliance criminally liable for the violations.

Federal employee liability for environmental violations may arise under a number of statutes. Liability for failure to meet RCRA requirements can arise by virtue of the waiver of sovereign immunity under the FFCA. Liability may also arise under the Clean Water Act, Clean Air Act, Comprehensive Environmental Response, Compensation, and Liability Act, Emergency Planning and Community Right-to-Know Act, Safe Drinking Water Act, Toxic Substances Control Act, Federal Insecticide, Fungicide, and Rodenticide Act, National

Environmental Policy Act, Federal Tort Claims Act and Administrative Procedure Act.* However the waiver for criminal penalties is less explicit under all of these statutes than the waiver under the FFCA.

FFCA Waiver of Sovereign Immunity

The FFCA contains a waiver of sovereign immunity for RCRA with regard to federal facilities and federal employees.² This waiver may be the most comprehensive because it is the most recent and addresses insufficiencies found by courts in previous waivers. The relevant provisions of the waiver are as follows:

Each department, agency and instrumentality . . . of the Federal Government. . . shall be subject to, and comply with all Federal, State, interstate and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal. . . . The . . . 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. . . . Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, . . .³

The waiver continues with exemptions and other

limitations as follows:

. . . but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year upon the President's making a new determination. . . .⁴

Analyzing the waiver sentence by sentence, the provision gives rise to the following: 1) federal agencies are subject to all RCRA requirements, both state and federal 2) these requirements include provisions authorizing penalties and fines 3) the U.S. government and its employees are subject to injunctive relief 4) government employees are not liable for *civil penalties* for any act within the scope of their employment 5) government employees *are* subject to criminal sanctions 6) federal agencies are not subject to criminal sanctions 7) the president can exempt facilities 8) the facility exemption can only be granted for lack of funding if the president has requested sufficient funding and Congress has failed to provide such funding and 9) the presidential exemption lasts one year.

To simplify further, the waiver apparently says that agencies are subject to civil penalties, both agencies and employees are subject to injunctive relief, employees are subject to criminal penalties, and only federal facilities may be exempted from penalties and injunctive relief (although it is possible that such an exemption may prevent criminal liability from arising).

Next Steps

To develop appropriate responses and assure the highest likelihood of successful response to these concerns, states and DOE should work together to identify solutions. First, thorough analyses of the legal issues in the caselaw, law reviews, legislative histories, and elsewhere should be conducted and discussed. Such analyses would provide the basis for determining the existence and extent of criminal liability for federal employees. For example, defenses to state prosecution may exist that provide some degree of immunity for federal employees acting within the scope of their employment.

Second, assuming criminal liability for federal employees does exist and there is agreement that criminal liability is in some cases inappropriate, states and federal agencies should discuss methods for addressing these concerns. Possible non-legislative responses to the criminal liability concerns of federal employees could include development of specific provisions in DOE/state agreements or adoption by states of appropriate enforcement policies or other guidelines. Finally, if non-legislative responses prove inadequate, states and DOE can work together to craft suitable revisions to legislation that will address the specific problem areas they have identified.

Joint discussion of states and DOE will ensure that perspectives and concerns are fully understood and addressed. In addition, a cooperative approach can take advantage of the legal and analytical skills and resources of both state and federal attorneys.

¹See, e.g., JACK A. VAN KLEY, **WHEN THE GOVERNMENT BREAKS THE LAW: A PRACTICAL GUIDE FOR ENFORCING ENVIRONMENTAL LAWS AGAINST FEDERAL FACILITIES**, National Association of Attorneys General Monograph Series 1993.

²Pub.L. 102-386, enacting 42 U.S.C. sections 6908, 6939c, 6939d, 6939e, and 6965, amending section 6903, 6924, 6927, and 6961, and enacting as provisions in notes under sections 6939c and 6961.

³42 U.S.C. § 6961.

⁴*Id.*

⁵For the Clean Air Act waiver, see 42 U.S.C. § 7418, amendment by Pub. L. 101-549, effective Nov. 15, 1990 (Clean Air Act Amendments of 1990). For the Safe Drinking Water Act waiver, see 42 U.S.C. § 300j-6. For the Clean Water Act, see 33 U.S.C. § 1323.

DOE ALIGNMENT IMPLEMENTATION REVEALED

Reductions in personnel and budget will affect almost every aspect of the Department of Energy, Secretary Hazel O'Leary told employees on Aug. 3 when she provided details on employee reductions and office closings announced May 3. O'Leary hailed the blueprint as the next step in this administration's commitment to a government that costs less and works better. She also emphasized that involuntary separations are likely. The Strategic Alignment Initiative will result in savings of \$1.7 billion - part of DOE's \$14.1 billion commitment toward the president's balanced-budget plan - and employee reductions of 3,788 over five years. Emphasizing the need to change the way the department does business, O'Leary unveiled a "process engineering honor roll," recognizing 36 DOE organizations which have embraced change management, achieved significant budget savings, and streamlined processes. DOE has undergone intensive strategic planning since May 3 to arrive at an implementation plan that will achieve the desired savings while streamlining processes and improving services to DOE's customers.

Overhead reductions

More than half of the \$1.7 billion Strategic Alignment savings (\$992 million over five years) stem from reductions in overhead costs such as travel (\$175M), information management integration (\$245M), closing and consolidating office space (\$21M), streamlining NEPA processes (\$26M), asset sales (\$75M) and reducing DOE's **reliance on support service contractors** (\$450M). Outside of the alignment initiative, significant overhead savings are expected although not yet quantified from implementing the accepted Galvin (DOE

laboratories) and Yergin (basic and applied sciences) recommendations.

Overhead cost savings will be accomplished primarily by:

- Reengineering DOE processes and practices such as travel and training,
- Decreasing the number of Headquarters sites from 16 to 4,
- Integrating and streamlining DOE's information management activities and establishing a chief information officer,
- Selling Cold War-era related assets such as precious and non-precious metals,
- Contract reform,
- Simplifying and streamlining DOE oversight, and
- Moving to external regulation and industry standards where prudent and appropriate.

Field offices closed, Consolidated

Twelve DOE Field Offices will be closed or consolidated within the next five fiscal years. The general counsel's Dallas and Houston offices will be closed by September 1995 and March 1996, respectively. Fossil Energy's Laramie and Metairie offices will be closed by September 1995, while the Naval Petroleum offices in Casper and Bakersfield will close by September 1997 (contingent upon enactment of legislation and sale of the Reserves).

By March 1996, the Energy Efficiency Regional Support Offices in San Francisco, New York, Dallas and Kansas City will be closed and the Denver and Golden, Colo., offices will be combined. The Paris office will be closed by March 1996. Finally, the Morgantown and Pittsburgh technology centers will be operated as one center by March 1996.

Organizations aligned, restructured

DOE elements will operate more efficiently and effectively through the clustering of program offices by business line, clarification of roles and responsibilities, assignment of lead offices, and office

and activity consolidations.

Clustering of the energy resources business-line programs (Fossil Energy, Energy Efficiency) with Nuclear Energy, Energy Research, Energy Information and Policy serving as advisors, and the national security business-line programs (Defense Programs, Nonproliferation and National Security, Fissile Materials Disposition and Nuclear Energy) will take place in FY 96.

The cluster approach will facilitate integration of programmatic planning and policy, corporate decision-making, and prioritizing of initiatives and budgets matrixing of staff resource savings and customer service. A new department-wide Research and Development Council, which draws from current senior managers, will integrate basic and applied science programs, improve interagency coordination, identify gaps and duplication of effort, and participate in budget development.

Early in FY 96, O'Leary will issue a handbook identifying the specific roles and responsibilities of Headquarters and Field elements. In general, Headquarters is responsible for program, policy and budget direction, while the Field is responsible and accountable for implementation. By October 1995, environment, safety and health policy and independent oversight will be performed solely by the Office of Environment, Safety and Health. Safeguards and security policy will be performed exclusively by the Office of Security Affairs. The Office of Nonproliferation and National Security will serve as the single point of contact and coordination for all emergency-management activities. (See DOE *Staffing Allocation Targets on back cover*).

NEWS BRIEFS

Unless otherwise indicated, please call DOE News Media contact Amber Jones at 202-586-5819 or Lauren Buehler at NAAG at 202-434-8062 for further information on News Briefs.

- *CRS Provides Updated Brief on Nuclear Weapons Complex Environmental Issues.* On May 2, 1995, an updated Congressional Research Service (CRS) Issue Brief was released titled *Nuclear Weapons Production Complex: Environmental Compliance and Waste Management* (Order Code IB90074). This Issue Brief provides analysis of growing cost and inefficiency concerns, an overall description of cleanup issues, and discussion of the relationship among legal requirements and state and EPA authorities over sites.
- *WIPP Two Steps Closer to Accepting TRU Waste.* DOE took two steps towards meeting the June 1998 goal of receiving transuranic (TRU) waste at the Waste Isolation Pilot Plant (WIPP) in New Mexico. These two steps are 1) submitting on May 31 a draft petition for a "no-migration" determination for mixed waste to EPA (essentially demonstrating no migration of hazardous material from the facility) and 2) submitting on May 26 a Resource Conservation and Recovery Act Part B permit to the New Mexico Environment Department.
- *Secretary O'Leary Approves Management Plan for DOE and Navy SNF.* On June 1, 1995, Secretary of Energy Hazel O'Leary selected DOE sites in Idaho, South Carolina, and Washington for interim management of DOE and Navy SNF. For more information, contact Jayne Brady of DOE at (202) 586-5806.
- *Injunction Lifted on Spent Nuclear Fuel Shipments to South Carolina.* On June 23, DOE received word from the Fourth Circuit Court of Appeals that the injunction against shipment of 151 spent nuclear fuel rods to South Carolina has been lifted. For more information, contact Jayne Brady of DOE at (202) 586-5802.
- *House Speaker Gingrich Appoints Task Force on Nuclear Cleanup and Tritium Production.* On June 28, 1995, House Speaker Newt Gingrich (R-GA) appointed a special Task Force of Republican House members to review cleanup efforts at DOE and alternates for production of tritium. The Task Force is chartered with the goal of developing a comprehensive framework for speeding cleanup and reducing costs, with proposed legislation due by August recess. The Task Force is chaired by Doc Hastings (R-WA), and includes Todd Tiahrt (R-KS), Lindsey Graham (R-SC), Zach Wamp (R-TN), Steve Schiff (R-NM), Charlie Norwood (R-GA), Mike Crapo (R-ID), Dan Schaeffer (R-CO), Joe Skeen (R-NM), George Nethercutt (R-WA), Frank Riggs (R-CA), Jim Bunn (R-OR), David McIntosh (R-IN), Mark Sanford (R-SC), John Ensign (R-NV), and John Boener (R-OH).
- *Proposed Budget Cuts for DOE Expected to Affect 50 Sites.* On July 10, DOE officials released an analysis of the effects of \$800 million in spending cuts on DOE's environmental management program, as proposed by the House Appropriations Committee in H.R. 1905. Thomas Grumbly, Assistant Secretary of Energy for Environmental Management, expressed concern about the cuts in a letter to Senator Pete Domenici (R-NM) on the same day. The cuts are expected to impede cleanups at 50 sites nationwide.

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\$1.7 billion of DOE's Strategic Alignment savings will result from workforce reductions of 3,788 positions (27%) by the end of FY 2000. Most of these reductions (67%) will occur during the first two years. Headquarters staffing levels will be reduced by 2,339 positions (33%) while Field levels will be reduced by 1,449 (21%). Numbers are based on the FY 95 target exclusive of employment at the Power Marketing Administrations and the FERC. Tools such as buyouts, attrition, outplacement and managed hiring will help DOE reach these staffing targets and mitigate the potential for involuntary separations.

Staffing Allocation Targets

	FY95 Alloc	FY96 EOY	FY 00 EOY	PERCENTAGE REDUCTION
IHQ Target	7,010	6,194	4,671	33%
Operations/Field Office				
Albuquerque	1,606	1,505	1,306	19%
Chicago	596	559	504	15%
Idaho	462	431	387	16%
Nevada	410	372	293	29%
Oakland	441	413	342	22%
Oak Ridge	772	698	560	27%
Ohio	250	235	234	6%
Richland	581	532	476	18%
Rocky Flats	302	292	282	7%
Savannah River	623	566	467	25%
Centers of Excellence - Savings			- 57	
OPS/FIELD TARGET	6,043	5,601	4,794	21%
Special Purpose Offices				
Naval Petro Reserves	57	56	0	100%
Golden Field Office	42	39	37	
Energy Tech Centers	626	537	527	
Naval Reactors	149	138	134	
Strategic Petro Reserves	130	112	106	
SPEC PURPOSE TARGET	1,004	882	804	20%

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