U.S. Department of Justice

Environment and Natural Resources Division

90-11-6-16636/1

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SETTLEMENT COMMUNICATION: DO NOT DISCLOSE

March 23, 2018

Via e-mail

Mr. Peter LeFond, Esq.
Assistant Attorney General
6 State House Station
Augusta, ME, 04333-0006
Peter.LaFond@maine.gov

Re: C. Smith Site, Meddybemps, Maine.

Dear Peter:

This is in response to the letter sent by Mr. David Wright of Maine Department of Environment ("Maine DEP") to Mr. Cam Schuemann of DLA Disposition Services, dated December 1, 2017, which asserts Maine DEP's position on the United States' potential liability for costs incurred by the State of Maine at the C. Smith Site in Meddybemps, Maine, under Maine state hazardous waste cleanup requirements. The statements provided herein are provided in the context of a settlement negotiation and are subject to Rule 408 of the Federal Rules of Evidence. Nothing contained herein is an acknowledgement of any issue of fact or law on the part of the United States in connection with the State's claims regarding contamination alleged to be found at the C. Smith Site.

Regarding the claim based on Maine state law, Congress has not waived the United States' sovereign immunity from state law at privately-owned, third-party sites. The law is well established that the United States, including its agencies and instrumentalities, may not be sued unless Congress has explicitly consented to suit. "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Where Congress has waived the United States' sovereign immunity, its waiver is to be "construed strictly in favor of the sovereign." *McMahon v. United States*, 342 U.S. 25, 27 (1951). Indeed, waivers of sovereign immunity affecting the public treasury and federal funds are especially narrowly construed. *Lehman v. Nakshian*, 453 U.S. 156, 161 n.8 (1981); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947).

The need for a clear, unequivocal congressional statement applies with special force to state regulation of federal activities. In *Hancock v. Train*, 426 U.S. 167, 179 (1976), the Supreme Court observed that "[p]articular deference should be accorded" to the rule requiring a waiver of sovereign immunity to be clear and unambiguous where "the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign." *See also id*. at 178-79 (noting the "fundamental importance of the principles shielding federal installations and activities from regulation by the States").

Thus, a plaintiff asserting state law claims against the United States must demonstrate a clear and unequivocal waiver of sovereign immunity for its claims, the waiver must be construed strictly in favor of the United States, and it may not be expanded beyond what the statutory language requires. Furthermore, ambiguities in the scope or coverage of the waiver must be resolved in favor of the United States. *Department of Energy v. Ohio*, 112 S. Ct. 1627, 1639 (1992). Here, there is no clear and unequivocal waiver of the United States' sovereign immunity from claims under state law at privately-owned, third-party sites.

In the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), Congress enacted a limited waiver of sovereign immunity for certain claims under state law, but not with respect to facilities that are not currently owned or operated by the United States. 42 U.S.C. § 9620(a)(4). Section 120(a)(4) of CERCLA provides in relevant part:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

42 U.S.C. § 9620(a)(4) (emphasis added).

This language, plain on its face, unambiguously limits the waiver of sovereign immunity to facilities that <u>are currently owned or operated</u> by the United States. Since 1993, judicial decisions on the matter have consistently held that "§ 120(a)(4) only waives sovereign immunity for state law claims related to facilities currently owned or operated by the United States." *City of Fresno v. United States*, 709 F.Supp.2d 888, 909 (E.D. Cal. 2010); *see also Gen. Motors Corp. v. Hirschfield Steel Serv. Ctr., Inc.*, 402 F.Supp.2d 800, 804 (E.D. Mich. 2005); *Miami-Dade County v. United States*, 345 F.Supp.2d 1319, 1354 (S.D. Fla. 2004); *Crowley Marine Servs., Inc. v. Fednav Ltd.*, 915 F.Supp. 218, 222 (E.D. Wash. 1995); *Rospotch Jessco Corp. v. Chrysler Corp.*, 829 F.Supp. 224, 227 (W.D. Mich. 1993). A single decision prior to 1994 found that § 120(a)(4) extended state law jurisdiction to former federally owned or operated facilities. *See e.g., Tenaya Assoc. Ltd. P'ship v. United States Forest Serv.*, *No*. CV-F-92-5375 REC, 1995 WL 433290 (E.D. Cal. May 19, 1993). I note that the rationale for this decision was flawed, and has been uniformly and expressly rejected in the subsequent decisions that are cited above. Moreover, even this disfavored interpretation of CERCLA § 120(a)(4) does not apply to the C.

Smith Site because this Site was never a federally owned or operated facility and thus falls beyond CERCLA § 120's limited waiver of federal sovereign immunity for state law claims.

Because the C. Smith Site at issue in this case is not currently owned or operated by the United States, CERCLA does not waive the United States' sovereign immunity for claims under Maine state law. Without acknowledging any liability on the part of the United States with respect to response costs incurred at the Site by the State of Maine, the only statutory provisions that either the State of Maine or a potentially responsible party could advance in support of a theory of liability against the United States under CERCLA (as opposed to under state law) are found either at CERCLA § 107(a) or § 113(f). CERCLA § 107(a)(4)(A) provides for the recovery of costs by a State, while § 113(f) provides for the recovery of contribution. There is no cause of action under CERCLA for the State of Maine or a potentially responsible party to compel the performance or response action by a federal agency.

At multiple sites in the State of Maine, the United States and the State of Maine have worked collaboratively to address the United States' potential liability for costs incurred by the State of Maine under CERCLA. For example, you and I recently negotiated settlements where the United States agreed to pay set dollar amounts to the State of Maine to settle cost recovery claims at the Portland-Bangor Waste Oil Sites in Casco and Ellsworth, Maine, and at the Hooper Sands Road Site located in South Berwick, Maine, under CERCLA. Likewise, prior settlements for recovery of costs at this Site, as well at the related Smith Junkyard Sites and Eastern Surplus Superfund Site, in Meddybemps, Maine, have all been addressed through settlement of CERCLA claims. Accordingly, I am willing to discuss potential recovery of costs by the State under CERCLA that are not inconsistent with the National Contingency Plan (*see* CERCLA § 105), but not a response action by the U.S. Department of Defense.

In order to further our subsequent discussions, please provide me with supporting documentation for the summary of the response costs provided with the State's December 1, 2017 letter, including more specific descriptions of the activities generally listed in the summary spreadsheet, any status reports prepared by the on-scene coordinator for the Site for the relevant period of time, relevant planning and public notice documents, and any other documentation that would be help us understand the nature and scope of the costs that the State seeks to recover. The documentation can be sent to me either electronically by email at amy.dona@usdoj.gov, or by U.S. mail or commercial courier at the following addresses:

U.S. Mail:

Amy Dona
United States Dept. of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044

Commercial Courier:

Amy Dona

United States Dept. of Justice
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601 D Street, NW
Suite 8000
Washington, D.C. 20004

I look forward to hearing back from you, reviewing the documentation supporting the State's CERCLA claim, and continuing our discussions to resolve this matter. Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,

/s/ Amy J. Dona
Amy J. Dona
U.S. Department of Justice
Environmental and Natural Resources Division
Environmental Defense Section

cc: James Hewitt, Esq., DLA Disposition Services (via e-mail)