

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
))
) RCRA (9006) Appeal No. 99-2
United States Air Force)
Tinker Air Force Base)
))
))

REMAND ORDER

U.S. EPA Region VI ("Region") has filed an appeal with the Environmental Appeals Board from a May 19, 1999 accelerated decision issued by Administrative Law Judge Barbara A. Gunning ("ALJ"). Order on Respondent's Motions to Dismiss and for Accelerated Decision ("Accelerated Decision"). The Accelerated Decision concerns a complaint filed by U.S. EPA Region VI ("Region") against the United States Air Force, Tinker Air Force Base ("USAF") alleging various violations of the underground storage tank ("UST") regulations issued pursuant to Subtitle I of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"). See 42 U.S.C. §§ 6991-6991i. The decision concludes that the EPA does not have the authority under RCRA's UST provisions to assess administrative penalties against another federal agency.

On April 18, 1999, the Department of Defense ("DOD") requested that the Department of Justice's Office of Legal Counsel ("OLC") provide a formal legal opinion as to EPA's authority to assess penalties against other federal agencies for violations of the UST regulations. The OLC issued its opinion on June 14, 2000. In that opinion, OLC concluded that "RCRA clearly grants EPA the authority to assess penalties against federal agencies for UST violations * * *."

Memorandum for Douglas A. Dworkin, General Counsel, DOD, and Gary Guzy, General Counsel, EPA, from Randolph D. Moss, Acting Assistant Attorney General, Re: EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act.

In light of OLC's legal opinion, the Board ordered the USAF to show cause why the Accelerated Decision should not be reversed and this matter remanded to the ALJ for further proceedings. Order to Show Cause (June 29, 2000). USAF submitted its response to the Board's order on July 13, 2000. Respondent-Appellee's Response to June 29, 2000 Order to Show Cause ("USAF Response"). The USAF asserts that the OLC opinion is incorrect, that the OLC opinion is not binding on the Board, and that the issues raised in this matter remain

before the Board for resolution. In its response, the Region asserts that the OLC opinion is dispositive of the issue before us and is binding on all parties in this case. Appellant-Complainant Response to June 29, 2000 Order to Show Cause (July 25, 1999).

Upon consideration, we conclude that as to the pending case the OLC opinion should be regarded as dispositive. As the Region points out, the OLC opinion was issued at DOD's request by the Assistant Attorney General for the Office of Legal Counsel on behalf of the Attorney General pursuant to Executive Order No. 12,146. 44 Fed. Reg. 42,659 (1979). That Order states, in part:

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.

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

Exec. Order No. 12,146, at §§ 1-401 and 402. Thus, where, as here, a legal dispute exists between two Executive agencies and the dispute is submitted to the Attorney General for resolution, it is the Attorney General (through the OLC) that

is the final arbiter of that dispute "prior to proceeding in any court." Indeed, the USAF itself has asserted that any decision of the Board in this matter would ultimately be appealable to the OLC. USAF Response at 20.

Under these circumstances, the USAF has failed to convince us that we should retain this matter on our docket. While the USAF may be correct that the Board is authorized under 40 C.F.R. part 22 to resolve disputes of this nature, where such a dispute has been submitted to the OLC for resolution and the OLC has issued a legal opinion, the Board will defer to that opinion, absent a compelling reason to do otherwise. The USAF has not convinced us that such a compelling reason exists in this case. Accordingly, the Accelerated Decision is reversed and this matter is remanded for further proceedings.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Ronald L. McCallum
Environmental Appeals Judge

Dated: 7/27/2000

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Remand Order in the Matter of United States Air Force, Tinker Air Force Base, RCRA (9006) Appeal No. 99-2, were sent to the following persons in the manner indicated:

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Dated: 7/27/2000

_____/s/
Annette Duncan
Secretary