



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act

File: B-253179

Date: November 29, 1993

DIGEST

The Justice Department is advised that litigative awards against the United States to reimburse claimants for the government's share of response costs and natural resource damages paid or payable under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1988), are payable from the permanent, indefinite Judgment Fund appropriation created by 31 U.S.C. § 1304 (1988), to the same extent as are other litigative awards against the United States.

DECISION

The Justice Department has asked whether the permanent, indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304 (1988), may be used to pay litigative awards obtained against federal agencies in order to reimburse claimants for the agencies' share of "response costs" and "natural resource damages" paid or payable by claimants under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. §§ 9601-75 (1988). As explained below, so long as the criteria otherwise applicable to requests for payment from the Judgment Fund are satisfied, such litigative awards may be paid from the Judgment Fund.

BACKGROUND

As its name suggests, CERCLA, enacted in 1980, established a far-reaching program to remedy many years of often unknowing, but potentially devastating, contamination of the environment caused by the disposal of hazardous waste. Under this statutory scheme, those who generate or transport hazardous waste and those who own or operate sites where it is found (known as "potentially responsible parties" or PRPs) are generally required to share strict, joint-and-

several liability for clean-up of the hazardous waste sites.¹ 42 U.S.C. §§ 9607(a)(1)-(3), (b), 9613(f)(1). This liability includes the costs of assessing and remedying the harm done, containing or removing the waste, and additional "damages" for injury to, or loss of, "natural resources." 42 U.S.C. § 9607(a). (The award of interest on these assessments is specifically authorized as well. Id.)

Primary responsibility for implementation and enforcement of CERCLA is given to the President, who has delegated these responsibilities to the Environmental Protection Agency (EPA) and certain other federal agencies.² E.g., 42 U.S.C. §§ 9604, 9615; Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987), as amended, Exec. Order No. 12777, 56 Fed. Reg. 54757 (1991). Among other things, the act authorizes EPA to order PRPs to contain or clean up contaminated sites, to enter into legally-binding, negotiated agreements (issued either as administrative orders or consent decrees), and to bring lawsuits to compel PRP compliance and collect fines. 42 U.S.C. §§ 9606, 9622. In the alternative, EPA may choose to begin (or even complete) the cleanup itself and seek reimbursement from the PRPs at a later time. 42 U.S.C. §§ 9604(a), 9613(f). The option to initiate or complete site cleanup with subsequent reimbursement from PRPs is also available to the states, as regulators, and to private citizens and the PRPs, themselves. 42 U.S.C. § 9613(f).

The costs incurred in initiating or completing cleanup prior to seeking reimbursement are known as "response costs." EPA funds its initial outlays of response costs from the amounts Congress appropriates annually to it from the Hazardous Substance Response Trust Fund, commonly known as the Superfund. 42 U.S.C. § 9611(a)(1), (c)(3). See also 26 U.S.C. § 9507. This fund consists of money appropriated from the Treasury, along with industry-based fee collections, penalty and punitive damage awards, and other amounts recovered from persons liable to the government under the act. Id. Congress appropriates fixed sums from

¹Some courts have concluded that, under certain circumstances, individual PRPs may avoid joint-and-several liability, essentially by proving which portions of the damage are attributable to their actions. Cf., e.g., Bell Petroleum Services, Inc. v. Sequa Corp., No. 91-8080 (5th Cir., Sept. 28, 1993).

²State regulatory bodies and Indian tribes may apply to the President to enter into agreements to allow them to implement and enforce CERCLA, as well. 42 U.S.C. § 9604(d). In addition, private parties, including both citizens and PRPs, are authorized to bring lawsuits to compel compliance with the act. 42 U.S.C. §§ 9613(f)(1), 9659.

this fund for use by EPA to implement CERCLA. 26 U.S.C. § 9507(c)(1); 42 U.S.C. § 9611(a) (authorization). See also, e.g., Pub. L. No. 102-389, 100 Stat. 1571, 1598-99 (1992) (appropriation). EPA deposits amounts recovered from PRPs in reimbursement of its response costs directly into the Superfund; EPA may not re-use those amounts without further appropriation action. See 42 U.S.C. § 9507(b)(2), (c)(1).

PRPs can also be held liable under CERCLA for the assessment and restoration of damage to and destruction of "natural resources." 42 U.S.C. § 9607(a)(4)(C), (f)(1). Under CERCLA, natural resource damage awards may only be collected by "trustees," which are presidentially-designated units of federal or state government, or Indian tribes. 42 U.S.C. § 9607(f). The trustees are authorized to retain and use, without further appropriation, any recoveries they make under CERCLA, in order to restore, replace, or acquire the equivalent of any natural resources lost on account of the improper disposal of hazardous waste. 42 U.S.C. § 9607(f)(1).

With certain exceptions not relevant here, CERCLA provides that federal departments, agencies, and instrumentalities of the United States are subject to and must comply with the act's requirements, "both procedurally and substantively" the same as other, non-governmental PRPs. 42 U.S.C. §§ 9607(g), 9620(a)(1), (a)(3), (j). This waiver of sovereign immunity specifically includes liability for monetary awards (with interest) for response costs and natural resource damages. Id. The government's CERCLA liability can arise under administrative orders or agreements, under judicial orders, or under compromise settlements negotiated by the Justice Department in lieu of actual or imminent litigation. Claims against federal agencies (as PRPs) may be pursued by private citizens, state governments, Indian tribes, EPA (as the primary CERCLA enforcer), or by natural resource trustees. Liability frequently arises as a result of claims filed by other PRPs for contribution. As would be expected under a scheme of joint-and-several liability, PRPs held liable for costs and damages under the act, including damages to natural resources, retain the right to seek "contribution" from other PRPs in order to spread the liability proportionately amongst the responsible parties. 42 U.S.C. § 9613(f)(1).

DISCUSSION

There is no discussion anywhere in CERCLA or its legislative history concerning the source from which to cover the federal government's liability for the cleanup of past disposal of hazardous waste by the United States and its agencies and instrumentabilities. The Justice Department

suggests that most of these sums should be paid from the Judgment Fund. The Judgment Fund is a permanent, indefinite appropriation which is generally available to pay amounts owed by the United States under judgments, Justice Department compromise settlements, and certain specified administrative awards. Generally speaking, before payment may be made from this fund, this Office must certify that an award satisfies four basic criteria. 31 U.S.C. § 1304(a)(2). First, the award must be final. 31 U.S.C. § 1304(a). Second, it must provide monetary, rather than injunctive, relief. E.g., 70 Comp. Gen. 225, 228 (1991). Third, the award must have been made under one of the authorities specified in 31 U.S.C. § 1304(a)(3), which include, but are not limited to, 28 U.S.C. § 2414 (United States District court judgments and compromise settlements negotiated by the Justice Department to dispose of actual or imminent litigation) and 28 U.S.C. § 2517 (Court of Federal Claims judgments). Fourth, payment of the award must not be "otherwise provided for." 31 U.S.C. § 1304(a).

This decision addresses the fourth criterion. To be "otherwise provided for" means that there is some source of funds other than the Judgment Fund which is legally available to pay the award. E.g., 66 Comp. Gen. 157, 160 (1986). Justice asserts that, as a general matter, there is no other source of payment for amounts owed by the government as a result of CERCLA litigation. We agree.

Agency appropriations are not available to pay litigative awards, unless provided for by law. The Judgment Fund was created to provide a source of payment for many, if not most, of the litigative awards against the United States. E.g., B-251061.2, Feb. 10, 1993. The Judgment Fund legislation specifies that those judgments and awards which are "otherwise provided for" may not be paid out of the Judgment Fund. Consequently, subject to certain exceptions not relevant here, it would take an affirmative act of the Congress, for example, language in CERCLA, to render these awards payable from some source other than the Judgment Fund.

We have found nothing in CERCLA's language or its legislative history specifying the source of payment for contribution judgments or compromise settlements. Nor does the act or its legislative history make the Superfund or any other appropriation (including the appropriations of the agencies responsible for either implementing or complying with the act) legally available to pay such awards.

Congress is normally presumed to be aware of existing law.³ Accordingly, we view Congress' silence in this regard as an acceptance of the application of the same statutes and rules of appropriations law (including those relating to the Judgment Fund) which would ordinarily apply to the payment of claims and judgments against the government in other contexts. Thus, so long as the criteria normally applied are otherwise satisfied with respect to particular CERCLA contribution judgments and Justice Department compromise settlements, those awards will normally be payable from the Judgment Fund.

As is evident from the nature of the criteria, certification of specific awards can be made only on a case-by-case basis. For example, by its very nature, "finality" cannot exist in any given case until the government has either determined not to seek further judicial review of the award, the time for seeking that review has expired, or the appellate possibilities have been exhausted. E.g., B-129227, Dec. 22, 1960. Similarly, it is not possible to determine whether payment of an award is "otherwise provided for," except by review, on a case-by-case basis, of such things as the nature of the defendant agency, the type of judgment, or the funding scheme applicable to the agency or the program involved. The Judgment Fund is not available, for example, where the particular agency has received an appropriation which is specifically available to pay judgments and compromise settlements against it. However, we can find nothing in the language or legislative history of CERCLA to indicate that, by their nature, judgments or Justice

³Albernaz v. United States, 450 U.S. 333, 341-42 (1981):

"Congress cannot be expected to specifically address each issue of statutory construction which may arise. But, as we [the Supreme Court] have previously noted, Congress is 'predominantly a lawyer's body,' . . . and it is appropriate for us 'to assume that our elected representatives . . . know the law.' . . . As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the [established] rule and legislated with it in mind. It is not a function of this Court to presume that 'Congress was unaware of what it accomplished'" (Citations omitted.)

Department compromise settlements of actual or imminent litigation for claims against federal agencies for contribution of response costs or natural resource damages are inherently uncertifiable for payment from the Judgment Fund.

for *William J. Bowler*
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