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The Honorable Mac Thornberry
Chairman, Special Oversight Panel
on Department of Energy Reorganization
Committee on Armed Services
House of Representatives

Subject: Applicability of Environmental Laws to National Nuclear Security
Administration

Dear Mr. Chairman:

In your letter of April 28, 2000, you asked two questions regarding the applicability of federal, state, interstate, and local environmental, safety, and health requirements to the newly created National Nuclear Security Administration (NNSA). Specifically, you asked whether the National Nuclear Security Administration Act¹ narrows the waivers of sovereign immunity contained in existing environmental, safety, and health laws that apply to the Department of Energy (DOE) and the NNSA. This has been a concern of the attorneys general of several states. Second, you asked whether a bill now before the Committee on Commerce (H.R. 4288) might, if enacted, be interpreted to expand the application of existing environmental, safety, and health laws as they will be applied to the NNSA. After reviewing the statute and applicable law, we believe that the NNSA Act clearly states that current law will apply to the NNSA exactly as it applied to the NNSA's functions when performed previously by DOE. The continuation of current law necessarily carries forward all waivers of sovereign immunity in existing law, making further clarification superfluous. We also believe that the proposed amendments in H.R. 4288 may have the inadvertent effect of expanding or confusing existing waivers of sovereign immunity. Our reasoning is explained below.

¹ This is the popular name assigned to title XXXII of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, §§ 3201-99, 113 Stat. 512, 953-71 (1999). This opinion will use the terms NNSA Act or title XXXII interchangeably.

Background

Title XXXII of the National Defense Authorization Act for Fiscal Year 2000 created a new entity within DOE, the National Nuclear Security Administration. The law charged the NNSA with carrying out the vital national defense functions associated with the nuclear weapons program. It also transferred the employees and functions of the national security laboratories and nuclear weapons production facilities to NNSA.² NNSA came into existence on March 1, 2000. The statute contained two provisions that indicated how current law would apply to the NNSA. The first, section 3296, provided as follows:

“APPLICABILITY OF PREEXISTING LAWS AND REGULATIONS.

“Unless otherwise provided in this title, all provisions of law and regulations in effect immediately before the effective date of this title that are applicable to functions of the Department of Energy [that have been transferred to the NNSA] . . . shall continue to apply to the corresponding functions of the Administration.”

50 U.S.C. § 2484. Among the myriad laws that are and remain applicable to the functions transferred to the NNSA are key federal environmental statutes, such as the Clean Water Act and the Resource Conservation and Recovery Act (RCRA). Both of these environmental statutes contain broad waivers of sovereign immunity, which “continue to apply” to NNSA as they do to DOE.

Another provision, section 3261, reinforced the Administrator’s responsibility to comply with existing laws and requirements applicable to DOE in the areas of safety, health, and the environment. That provision reads as follows:

“ENVIRONMENTAL PROTECTION, SAFETY, AND HEALTH REQUIREMENTS.

“(a) Compliance Required.—The Administrator shall ensure that the Administration complies with all applicable environmental, safety, and health statutes and substantive requirements.”

50 U.S.C. § 2461. This provision was amplified by a requirement to develop implementing procedures and reiteration of the Secretary of Energy’s authority to ensure NNSA’s compliance. While the NNSA Act was under consideration by the

² Section 3291(c) of the NNSA Act allowed environmental cleanups at NNSA-operated facilities to be retained in the DOE Environmental Management Office. DOE’s Implementation Plan, dated January 1, 2000, confirmed DOE’s plan not to transfer ongoing cleanup responsibility to NNSA. For that reason, changes made by title XXXII would not affect implementation of the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9620 (1994).

Congress, the attorneys general of several states expressed concern that section 3261 might be interpreted as restricting existing waivers of sovereign immunity in federal environmental laws. That concern generated colloquies on both the House and the Senate floor during debate on the Act. The colloquies between Senators Patty Murray and John Warner³ and between Representatives Ike Skelton and Floyd Spence⁴ sought to clarify that the NNSA Act made no actual change in existing environmental, safety, or health law, and that no reduction in existing waivers of sovereign immunity was contemplated or intended. The language about which the attorneys general expressed reservations was enacted without change, and that, in turn, prompted the introduction of H.R. 4288.

H.R. 4288 contains provisions that spell out in detail the environmental, safety, and health laws and requirements applicable to NNSA. In particular, it reiterates that NNSA is subject to procedural as well as substantive requirements of federal, state, interstate, and local laws. With regard to enforcement mechanisms, H.R. 4288 borrows language from the Federal Facilities Compliance Act, which was enacted to ensure that state law enforcement of RCRA would be maximally effective. It also expressly restates the continued applicability to NNSA facilities and functions of all levels of environmental, safety, and health laws.

NNSA Act Made No Change in Application of Environmental, Safety, and Health Laws

The issue raised by the attorneys general derives from the fact that federal environmental laws such as the Clean Water Act and RCRA include waivers of sovereign immunity that allow federal, state, interstate, and local requirements to be applied to and enforced against federal facilities. As the source of their apprehension, the attorneys general pointed to section 3261 and its directive to comply with “all applicable environmental, safety, and health statutes and substantive requirements,” and to section 3296’s pronouncement that all existing law continues to apply to NNSA, “[u]nless otherwise provided in this title” (emphasis added). They voiced concern that NNSA would selectively apply federal environmental statutes to its activities, ignore procedural requirements altogether, and justify that action based on the presumed constriction of sovereign immunity they infer from the language quoted above.

The attorneys general base their analysis on the fact that waivers of sovereign immunity are disfavored by the courts. They cite the Supreme Court decisions in Hancock v. Train, 426 U.S. 167 (1976) and Department of Energy v. Ohio, 503 U.S. 607 (1992), which found that specific federal environmental laws contained incomplete waivers of sovereign immunity, and that the states’ enforcement authority was

³ 145 Cong. Rec. S11194 (daily ed. Sept. 22, 1999).

⁴ 145 Cong. Rec. H8305 (daily ed. Sept. 15, 1999).

limited as a result.⁵ Both of these decisions were promptly addressed by legislation. The Clean Air Act Amendments of 1977 remedied the problem identified in Hancock by modifying the requirements to which federal entities were subject to include “any requirement whether substantive or procedural.” This refinement has since been included in other federal environmental laws as well.⁶ Responding to the Ohio decision, which identified loopholes in the waivers of sovereign immunity contained in RCRA and the Clean Water Act, Congress enacted the Federal Facilities Compliance Act.⁷ This statute amended RCRA to close the gap and allow recovery of “punitive” as well as “coercive” penalties assessed under state law. Of importance here, the Federal Facilities Compliance Act did not amend the Clean Water Act or other federal environmental statutes to incorporate that expanded waiver of sovereign immunity.

The Hancock and Ohio decisions do indeed stand for the proposition that waivers of sovereign immunity are narrowly applied by the courts. Their relevance to interpreting the law applicable to NNSA is questionable, however, in view of the fact that the NNSA Act contains no waiver of sovereign immunity. Rather than waiving sovereign immunity, the NNSA Act merely continues existing law, including whatever waivers of sovereign immunity already exist.⁸ The requirement in section 3261 that NNSA comply with all applicable environmental, safety, and health statutes is a directive to comply with all existing law, including specifically “any requirement” of RCRA or of the Clean Air and Clean Water Acts, “whether substantive or procedural.”⁹

The remaining part of section 3261(a) requires NNSA to comply with “all applicable . . . substantive requirements.” Coupled with the next provision, section 3261(b),

⁵ Hancock interpreted the extent to which federal facilities were covered by the Clean Air Act’s waiver of sovereign immunity. The Hancock Court differentiated between substantive and procedural requirements, holding the latter were not applicable to federal entities, unless sovereign immunity was expressly waived for them. Ohio differentiated between penalties contained in federal and state law, holding that punitive penalties in state laws implementing the Clean Water Act and RCRA could not be exacted from federal facilities because the federal law waivers of sovereign immunity were insufficient.

⁶ The Clean Air Act provision is found at 42 U.S.C. § 7418. See, also, the Clean Water Act, 33 U.S.C. §§ 1323, and 1344; the Safe Drinking Water Act, 42 U.S.C. § 300j-6; RCRA, 42 U.S.C. § 6961; and the Medical Waste Tracking Act, 42 U.S.C. § 6992e.

⁷ Pub. L. No. 102-386, 106 Stat. 1505 (1992).

⁸ The considerable evidence in the legislative history that Congress intended no waiver of sovereign immunity and no change at all in environmental, safety, and health laws would be of no importance in determining the existence of a waiver. To be effective, a waiver of sovereign immunity must be absolutely clear on its face. However, the legislative history is and remains instructive in confirming that the NNSA Act did not abrogate those waivers of sovereign immunity already existing in law.

⁹ 42 U.S.C. §§ 6961, 7418, and 33 U.S.C. § 1323.

which directs the Administrator to develop procedures for meeting “such requirements,” that language is best interpreted as a statutory directive to comply with DOE orders on the subjects of the environment, safety and health. These orders are not statutes or regulations and the NNSA might, arguably, have been excused from compliance if they had not been included in section 3261. An argument of that sort would have been bolstered by the fact that title XXXII insulates NNSA and its employees from direction and control by Department of Energy personnel other than the Secretary of Energy.¹⁰ This interpretation was also confirmed by the legislation’s sponsor in a colloquy on the Senate floor¹¹ and deserves additional weight because it also explains why only substantive requirements were mentioned. NNSA was expressly required in subsection (b) of section 3261 to develop its own procedures for applying those substantive internal requirements.

H.R. 4288 Is Unnecessary and Risks Expanding Existing Law

Since we believe that the NNSA Act did not withdraw or limit the waivers of statutory immunity in existing law, we also conclude that H.R. 4288 is unnecessary to accomplish its purpose: “[t]o clarify that environmental protection, safety, and health provisions continue to apply to the functions of the National Nuclear Security Administration to the same extent as those provisions applied to those functions before transfer to the Administration.” Moreover, in seeking to add precision to the provisions of the NNSA Act, H.R. 4288 also adds language which might have the unintended effect of expanding existing law.

The provisions of most concern relative to sovereign immunity are the new subsections (a) and (e) and particularly paragraph (e) (3) which would be added to section 3261.¹² New subsection (a) would direct NNSA to comply with the “matters” listed in subsection (e). Subsection (e) would add an enumeration of environmental,

¹⁰ Pub. L. No. 106-65, § 3213, 113 Stat. 958 (1999).

¹¹ “Section 3261 was included to make clear NNSA’s obligation to continue to comply with environmental laws and DOE environmental orders.” 145 Cong. Rec. S11194 (daily ed. Sept. 22, 1999) (remarks of Sen. Warner in answer to Sen. Murray’s question.)

¹² The bill would also add a “savings clause,” new subsection (d), to section 3261. It reads as follows: “Nothing in this title shall be construed to limit, impair, enlarge, or otherwise alter the matters described in subsection (e), or any obligation of the Administration or the Department to comply with any such matter.” This provision was probably intended to respond to the concern of the attorneys general that the continued application of existing law to NNSA, as specified in section 3296, was qualified by the expression, “[u]nless otherwise provided in this title.” We view that qualifying language as the unavoidable acknowledgment that title XXXII made many substantive changes to existing law applicable to DOE, most notably to the Department of Energy Organization Act. The attorneys general viewed that as building in the exceptions they found in section 3261. Since there are no such exceptions, there is no reason to impute a hidden meaning to the qualifying introductory phrase.

safety, and health matters applicable to NNSA. The proposed subsection reads as follows:

“(e) MATTERS INCLUDED.— The matters referred to in subsections (a) and (d) are requirements, whether procedural or substantive, of—

- “(1) Federal environmental, safety, and health laws, regulations, and rules, including any waivers of Federal sovereign immunity in any such laws;
- (2) State, interstate, or local environmental, safety, and health laws, regulations, and rules for which the Federal Government has waived its sovereign immunity;
- (3) orders, permits, licenses, and other directives issued pursuant to the laws, regulations, and rules and requirements referred to in paragraphs (1) and (2), including—
 - “(A) civil and administrative fines and penalties, whether coercive or punitive, and whether imposed for isolated, intermittent, or continuing violations;
 - (B) fees and charges; and
 - (C) civil and administrative processes, authorities, and sanctions, including injunctive relief; and
- (4) agreements entered into pursuant to those laws, regulations, and rules.”

The proposed paragraph (3)(A) and (B) adopts, nearly verbatim, the language Congress enacted in the Federal Facilities Compliance Act. The paragraph applies the fines, penalties, fees and charges without apparent exception or limitation to those “[s]tate . . . laws . . . for which the Federal Government has waived its sovereign immunity.” If this language were applied to punitive penalties under the Clean Water or Clean Air Acts, it would expand the existing waivers of sovereign immunity contained in those laws today.

The Federal Facilities Compliance Act amended section 6001 of RCRA¹³ and its parent law, the Solid Waste Disposal Act, to broaden their waiver of sovereign immunity and override the Supreme Court’s Ohio decision. In that decision, the Court held that because of limitations in the statutory waivers of sovereign immunity in RCRA and the Clean Water Act, federal facilities were not subject to punitive penalties assessed by states under either of those acts. Congress chose to remedy that situation as regards RCRA, but has not yet similarly amended the Clean Water Act.¹⁴

¹³ 42 U.S.C. § 6961 (1994).

¹⁴ The waiver of sovereign immunity in the Clean Air Act as regards state law imposed fines and penalties has not been tested in litigation, but it is not as broad as the waiver in the Federal Facilities Compliance Act.

Subparagraph (e) (3) could be viewed as subjecting NNSA to punitive penalties that might be imposed under the Clean Water Act by requiring the same compliance as the Federal Facilities Compliance Act, without regard to the more limited extent of the waiver of sovereign immunity in the underlying law.

In addition, paragraph (e) (3) would also expand on the language borrowed from the Federal Facilities Compliance Act in two respects. First, that Act authorizes the payment of “reasonable service charges.” That term is defined in the statute as nondiscriminatory permit application fees and the like. Subparagraph (3)(B) refers more broadly to “fees and charges,” and thereby could be construed as allowing interest, attorney’s fees, and other monetary consideration, for which authority to use federal appropriations may be limited. See, for example, 27 Comp. Gen. 560 (1948) (interest added to late payments not permitted, absent statute); B-236958, Oct. 3, 1989 and B-195809–O.M., March 30, 1981 (limitations on post-judgment interest payable from judgment fund); 63 Comp. Gen. 260 (1984) (attorney’s fees payable if authorized by statute); B-193862, April 30, 1979 (state fee for issuing water operator’s certificate is personal expense of certified employee). Second, the Federal Facilities Compliance Act makes clear that no employee, agent, or officer of the United States may be subjected to personal liability for any act or omission within the scope of official duties. No such limitation is included in H.R. 4288.

It is true that, as a potential waiver of sovereign immunity, the language in H.R. 4288 would be scrutinized in the same careful way as the Hancock and Ohio cases demonstrate. In such circumstances, courts might well conclude that these provisions were not clear enough to be deemed an expanded waiver of sovereign immunity, but considering that the existing law is clear, the bill would risk confusion and litigation to test this point.

Conclusion

The attorneys general are understandably vigilant about preventing any possible infringements of states’ authority to carry out the RCRA, Clean Air Act and Clean Water Act programs and the state laws through which they implement those programs in their respective jurisdictions. However, in this instance we believe the law is clear and their concern, though genuine, is unnecessary. Even if title XXXII had been silent on the questions of continuing application of preexisting law, the NNSA obligation to comply with environmental, safety, and health laws already on the books would have been clear. Considering the fact that the law included an explicit statement that all preexisting statutes and regulations would continue to apply, that the NNSA was directed to observe all environmental, safety, and health requirements, and that legislative history evidences congressional intent not to disturb existing law in any way, additional clarification is unnecessary. H.R. 4288 may also risk introducing uncertainty about the extent of waivers of sovereign immunity by engrafting what may be the broadest waiver of sovereign immunity in any federal environmental law onto preexisting laws with more limited waivers.

We trust the foregoing is helpful to you. We are issuing an identical letter today to the co-requestor of this opinion, Representative Ellen O. Tauscher, Ranking Minority Member of the Special Oversight Panel.

Sincerely yours,

Robert P. Murphy
General Counsel

Proposed legislation to clarify the applicability of environmental, safety, and health laws to the newly created National Nuclear Security Administration (NNSA) is unnecessary. Existing law, title XXXII of Pub. L. No. 106-65 (1999), is already clear. Environmental, safety, and health laws, regulations and Department of Energy (DOE) orders continue to apply to NNSA, as they did to DOE when it performed the same functions before enactment of title XXXII. Statutory waivers of sovereign immunity contained in federal laws remain in tact, permitting states to enforce substantive and procedural requirements of state, interstate and local law to the same extent as before. Bill to clarify the continued application of existing law further risks expanding waivers of sovereign immunity applicable to NNSA. H.R. 4288, 106th Cong., 2d Sess. analyzed.