UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

SHARYN ERICKSON,	)	
	)	
Complainant,	)	
	)	
v.	)	ARB Nos. 03-002
	)	03-003
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 4	)	03-004
	)	
	)	OALJ Nos. 1999-CAA-2
Respondent.	)	2001-CAA-8
	)	2001-CAA-13
	)	2001-CAA-3
	)	2001-CAA-18

RESPONDENT'S RESPONSE TO THE SUPPLEMENTAL BRIEFING ORDER

INTRODUCTION

On August 17, 2005, the Administrative Review Board, issued a Supplemental Briefing Order and Notice of Opportunity to File Amicus Curiae Brief ("Supplemental Briefing Order"), affording the parties the opportunity to address the application of the doctrine of sovereign immunity, in light of the Board's recent decision in Powers v. Tennessee Department of Environment and Conservation, ARB Nos. 03-061, 03-125, 2005 WL 1542546 (as revised and reissued, 2005 WL 1978973) (August 16, 2005) ("Mem. Op.").[1] Respondent, the United States Environmental Protection Agency, including EPA Region 4 and EPA Office of Inspector General (collectively, the "Agency" or "EPA"), responds to the Supplemental Briefing Order and requests

[1]The Board subsequently issued, on September 14, 2005, an Order Granting Extension of Time and Denying Leave to File Reply Brief, granting Respondent an extension of time to file a supplemental brief on or before September 23, 2005.

that these complaints be dismissed for lack of subject matter jurisdiction because there has been no clear, unequivocal waiver of Federal sovereign immunity.[2]

ISSUE

Are there clear, unequivocal waivers of Federal sovereign immunity in the statutory texts of the employee protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9610; the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622; the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367; and the Safe Drinking Water Act, 42 U.S.C. § 300j-9 ("SDWA")?

ARGUMENT

THE FEDERAL GOVERNMENT IS IMMUNE FROM ENVIRONMENTAL WHISTLEBLOWER LIABILITY

"It is elementary that 'the United States as sovereign is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941). "A waiver of the Federal Government's

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[2]Respondent requests that its response to the Supplemental Briefing Order be treated as a motion to dismiss Complainant's claims or, in the alternative, as a motion for summary judgment. Sovereign immunity is "jurisdictional in nature." Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 475 (1994). It is no bar that Respondent has not previously raised these jurisdictional issues, because lack of subject matter jurisdiction may be raised for the first time on appeal. Indeed, the Board has recognized, that, even when not raised by the parties, it is "obliged to inquire **sua sponte** whenever a doubt arises as to the existence of our subject matter jurisdiction." Pastor v. Dept. of Veterans Affairs, ARB No. 99-071, 2003 WL 21269151, *3 (May 30, 2003).

sovereign immunity must be unequivocally expressed in statutory text" and "will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996). Moreover, the Supreme Court has "frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." Department of the Army v. Blue Fox, 525 U.S. 255, 260 (1999). Also, "[s]overeign immunity is jurisdictional in nature." Federal Deposit Insurance Corporation v. Meyer, 510 U.S. 471, 475 (1994).

EPA acknowledges that the Secretary has previously found that the United States has waived its sovereign immunity from liability under the employee protection provisions of various environmental statutes. See, for example, Pogue v. United States Department of the Navy, No. 87-ERA-21, 1990 WL 656090 (Sec., May 10, 1990) (CERCLA); Conley v. McClellan Air Force Base, No. 84-WPC-1, 1993 WL 831968 (Sec., September 7, 1993) (FWPCA); Marcus v. United States Environmental Protection Agency, No. 92-TSC-5, 1994 WL 897260 (Sec., February 7, 1994) (CERCLA and SDWA); and Jenkins v. United States Environmental Protection Agency, No. 92-CAA-6 (Sec., 1994) (CERCLA, SDWA, CAA, FWPCA, and SWDA). Cf. Pastor v. Dept. of Veterans Affairs, ARB No. 99-071, 2003 WL 21269151 (May 30, 2003) (no waiver of sovereign immunity under the Energy Reorganization Act ("ERA")); Johnson v. Oak Ridge Operations Office, ARB No. 97-057, (Sept. 30, 1999) (sovereign immunity bars ERA and TSCA whistleblower complaints). These decisions, however, must be reexamined in light of the Board's more recent decisions, including, in particular, Powers and Pastor, and–once reexamined–they cannot stand. Indeed, Powers compels the conclusion that there has no more been an unequivocal waiver of Federal sovereign immunity under CERCLA, FWPCA, SWDA, TSCA, CAA, and SDWA, than an unequivocal abrogation of State sovereign immunity.

In Powers, the Board recently held that the doctrine of "state sovereign immunity" barred whistleblower complaints against the States under CERCLA, FWPCA, SWDA, TSCA, CAA, and SWDA, the very same statutory claims involved, here. Mem. Op. at 12. The Board stated that although Congress had the authority to abrogate a state's sovereign immunity, the Congressional intent to do so "must be unmistakably clear." Id. at 5 (citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)). The Board also concluded that the Congressional intent must be clear on the face of the statutory language itself, and that "legislative history cannot supply an abrogation [of sovereign immunity] that does not appear clearly in the statute itself." Mem. Op. at 8. Applying these principles to each of the environmental whistleblower provisions in question, the Board noted, first, that under CERCLA, only a "party" is subject to administrative process and remedial orders by the Secretary for violations of the whistleblower provision. Id. at 7. CERCLA's employee protection provides, in part, that: an opportunity for a public hearing shall be provided "at the request of any **party**;" "the **parties**" shall be entitled to present relevant information at any such hearing; the "**parties** shall be given written notice of the time and place of the hearing;" and the Secretary may issue an order against "the **party** committing such violation." 42 U.S.C. § 9610(b) (emphasis supplied). The term "party" is not defined in CERCLA. Because CERCLA did not expressly define the term "party" to include the states, the Board concluded that there was "no unequivocal abrogation of sovereign immunity." Mem. Op. at 7.[3]

[3]The Board also noted that the "citizen suit" provision of CERCLA, 42 U.S.C. § 9659(a)(1), authorizing civil actions against "any person," including "any . . . governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution," "suggests only a limited abrogation of immunity." 2005 WL 1542546, *5. If analyzed in connection with the question of whether Congress has clearly abrogated State

The Board, in Powers, concluded that there was no unequivocal waiver of state sovereign immunity in CERCLA, notwithstanding that CERCLA's employee protection provision states that "[n]o **person** shall fire or in any other way discriminate against . . . any employee" (42 U.S.C. § 9610(a)), and CERCLA defines "**person**" to include a "State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). The Board also refused to base a finding of an equivocal Congressional waiver of sovereign immunity on legislative history that CERCLA's employee protection provision was applicable to State employees "to the same extent as any employee of a private employer." Mem. Op. at 8.

The Board disposed of Powers' FWPCA and SWDA claims on the same basis, simply ruling that the "same analysis [as the CERCLA analysis] applies to FWPCA . . . and SWDA." Mem. Op. at 7. The FWPCA employee protection provision, like CERCLA, states generally that no "person shall fire, or in any other way discriminate against . . . any employee." 33 U.S.C. § 1367(a). "Person" is defined as "an individual, corporation, partnership, association, State,

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sovereign immunity, this provision would impart some circularity to the analysis. The doctrine of State sovereign immunity is no obstacle to a suit in Federal court against a state, if (1) Congress unequivocally intends to abrogate state sovereign immunity and (2) Congress' intent to abrogate State sovereign immunity is "a valid exercise of its power." See, e.g., Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 726 (2003). Assume that Congress were to enact a statute that stated: "Congress hereby unmistakably abrogates State sovereign immunity, to the extent permitted by the Constitution." The limiting language, "to the extent permitted by the Constitution," would properly been seen not as casting doubt on the clarity of Congress' intent to abrogate State sovereign immunity, but as pertaining to the second prong of the test; that is, whether the abrogation is a valid exercise of Congressional power. If the Constitution does not, in particular circumstances, permit Congress to abrogate state sovereign immunity, regardless of its clear intent to do so, state sovereign immunity remains intact. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72 (2000). (The Board, in Powers, did not reach this question. Mem. Op. at 8.) Accordingly, the fact that the citizen suit provisions refer to the Eleventh Amendment sheds little light on whether Congress unequivocally intended to abrogate State sovereign immunity.

municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5).[4] Like CERCLA, the FWPCA only provides for whistleblower proceedings and remedies against a "party" and the term "party" is not expressly defined to include a state. 33 U.S.C. § 1367(b).

The SWDA is similarly constructed. The employee protection provision prohibits discrimination by a "person." 42 U.S.C. § 6971(a). "Person" is defined to include a "State, municipality, commission, [or] political subdivision of a State." 42 U.S.C. § 6903(15). The operative remedial language of SWDA's employee protection, however, only provides for proceedings and remedies against a "party," which is not expressly, unequivocally defined to include the states. See 42 U.S.C. § 6971(b).

The Board, in Powers, had even less difficulty finding that Congress had not abrogated state sovereign immunity under TSCA, CAA, and SDWA. Under TSCA, "an 'employer, is prohibited from discriminating against whistleblowers, but only a 'person' who discriminated is subject to the process and remedies for discrimination." Mem. Op. at 7. Because "'person' is not defined in TSCA to include a state, there was no unequivocal abrogation of sovereign immunity." Id.[5] Similarly, "[u]nder CAA, an 'employer' is prohibited from discriminating

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[4]As discussed, below (infra at 9), the definition of a "person" under the FWPCA is narrower than the CERCLA definition of a "person."

[5]Powers supports a finding that there is no waiver of Federal sovereign immunity from TSCA whistleblower liability, but that issue has, in any event, previously been decided by the Secretary. See Stephenson v. NASA, No. 94-TSC-5, 1995 WL 848070, *4 (Sec., July 3, 1995) (no waiver of Federal sovereign immunity). Moreover, in the instant case, the Administrative Law Judge dismissed Complainant's TSCA claim. Because the existence of Federal sovereign immunity from TSCA's environmental whistleblower liability is clear and is unchanged by Powers, EPA will not, in this supplemental brief, further address waiver of sovereign immunity under TSCA (although many of the contentions made in this brief by EPA apply with equal force

against whistleblowers . . . but only a 'person' who discriminated is subject to process and remedies for discrimination." Id. Because "'employer' is not defined to include states," even though "'person' is defined in CAA to include states," there is "no unequivocal abrogation of sovereign immunity." Id. Powers concluded that "[t]he same analysis applies to SDWA." Id.

The Powers analysis applies with equal strength to the question of whether Congress has unequivocally waived Federal sovereign immunity and compels a reexamination of the Secretary's older decisions finding waivers of Federal sovereign immunity. It should be noted, at the outset, that there is no substantive difference in the level or degree of clarity with which Congress must indicate an intent to abrogate state sovereign immunity or to waive Federal sovereign immunity. The Supreme Court has indicated Congress' intent to abrogate state sovereign immunity must be "unmistakably clear." Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 726 (2003). Congressional waivers of Federal sovereign immunity must be "clear and unequivocal" and broad waivers may not be inferred. Dept. of Energy v. Ohio, 503 U.S. 607, 619 (1992). The Supreme Court has treated these standards interchangeably. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243, 246 (1985) (stating Congress must use "unmistakable language" and concluding there was "not the kind of **unequivocal** statutory language sufficient to abrogate" State sovereign immunity) (emphasis supplied); Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 478 (1987) ("the Court consistently has required an unequivocal expression that Congress intended to override" State sovereign immunity); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984) (an

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to most or all of the environmental whistleblower provisions, including TSCA).

"unequivocal expression" of Congressional intent is required to abrogate State sovereign immunity).[6]

Furthermore, as with State sovereign immunity, a waiver of Federal sovereign immunity must be clearly, unequivocally expressed in the statutory text, itself. The Board noted in Powers that "legislative history cannot supply an abrogation [of State sovereign immunity] that does not appear clearly in the statute itself." Mem. Op. at 8 (rejecting arguments based on CERCLA's legislative history). Similarly, a Congressional waiver of Federal sovereign immunity must be "unequivocally expressed **in the statutory text**," and "legislative history cannot supply a waiver that does not appear clearly in any statutory text." Lane v. Pena, 518 U.S. 187, 192 (1996) (emphasis supplied). The Board has previously implicitly recognized that the test for finding of a waiver of Federal sovereign immunity is similarly stringent as the test for finding abrogation of State sovereign immunity. "The Supreme Court has set high standards for determining that sovereign immunity has been waived." Pastor v. Dept. of Veterans Affairs, ARB No. 99-071, 2003 WL 21269151, *4 (May 30, 2003). And, "the waiver must be established by the statute itself" and not supplied by reference to the legislative history. Id.

The key to the Powers' analysis of CERCLA, FWPCA, and SWDA , is that–although the employee protection provisions prohibited a "person" (which, by definition, included the States) from discriminating against whistleblowers–"only a 'party' who discriminated is subject to the

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[6]Indeed, the Board's decision in Powers strongly suggests that the tests for finding Congressional abrogation of State immunity or waiver of Federal immunity are substantially the same. The Board initially notes that Congress' intent to abrogate State sovereign immunity "must be unmistakably clear." Mem. Op. at 5. In applying that test, however, the Board shifts to the language used in cases on waivers of Federal sovereign immunity, concluding repeatedly that there is no "**unequivocal**" abrogation of sovereign immunity under the whistleblower provisions in question. Id. at 7.

process and remedies for discrimination," and a "party" is not defined to include the States. Mem. Op. at 7. The Powers' analysis of CAA employee protection is similarly focused on the precise language of that particular provision. The CAA employee protection provision prohibits an "employer" from discriminating against an employee. 42 U.S.C. § 7622(a). An employee who believes he or she has been discriminated against "by any person," may file an administrative complaint, and DOL shall investigate the complaint and notify "the person alleged to have committed such violation of the results of the investigation;" and the Secretary may order relief against "the person" who committed a violation. 42 U.S.C. § 7622(b). Although "'person' is defined in CAA to include states, . . . 'employer' is not defined to include states," and "[t]here is thus no unequivocal abrogation of sovereign immunity." Mem. Op. at 7.

This same carefully focused analysis applies with equal force to the question of Federal sovereign immunity. Under CERCLA, FWPCA, and SWDA, the Federal Government, like the States, is not defined as a "party" "subject to the process and remedies for discrimination." Accordingly, the Powers' rationale compels the conclusion that there has been "no unequivocal [waiver] of [Federal] sovereign immunity" from whistleblower liability under CERCLA, FWPCA, and SWDA. Mem. Op. at 7.

For the FWPCA, it is even less apparent that Congress intended to waive Federal sovereign immunity than that Congress sought to abrogate state sovereign immunity. Even if reliance were placed on the initial paragraph of the FWPCA employee protection provision, which states, in part, that "[n]o **person** shall fire, or in any other way discriminate against . . . any employee" (33 U.S.C. § 1367(a)) (emphasis supplied), Congress excluded the Federal Government from the definition of a "person." The FWPCA provides that "person" means "an

individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," without expression inclusion of the Federal government. 33 U.S.C. § 1362(5). There is a "longstanding interpretive presumption that 'person' does not include the sovereign." Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 780 (2000).

With respect to the CAA, the Federal Government is no more clearly, unequivocally defined as an "employer" who is covered by the CAA employee protection provision than are the states. See 42 U.S.C. 7622(a). As in Powers, "'employer' is not defined to include [the Federal Government]" and "[t]here is thus no unequivocal [waiver] of sovereign immunity." Mem. Op. at 7. Also as in Powers, the term "person," is defined, in the general definition section of the CAA, to include "any agency, department, or instrumentality of the United States." 42 U.S.C. § 7602(e). That general definition, however, should no more be found to be an unequivocal waiver of Federal sovereign immunity than Powers found it to be an abrogation of state sovereign immunity. Indeed, elsewhere in the Act, where Congress used the term "person" to intend a waiver of sovereign immunity, such waiver was clear and unmistakable. For example, in authorizing citizen suits to enforce the air quality standards under the Act, Congress specifically, expressly provided that such actions may be brought "against any person (including . . . the United States)." 42 U.S.C. §7604(a)(1). If Congress intended, merely by providing in the general definition section of the CAA that the term "person" generally included the United States, to enact a broad waiver of sovereign immunity from liability under the CAA, it would have been unnecessary to specifically, expressly provide that citizen suits could be brought under the Act against any person "including the United States." To avoid rendering the citizen suit

authorizing language a mere redundancy and to ensure that all the provisions of the CAA are given meaning, the more plausible reading is that Congress did not intend that the general definition of the term "person" would, itself, constitute a waiver of sovereign immunity.[7]

Just as, in Powers, the "same analysis" of state sovereign immunity resulted in the conclusion that there had been no abrogation of immunity under SDWA, so, here the "same analysis" leads to the determination that there has been no waiver of Federal sovereign immunity under SDWA. Again, as in the CAA, the SDWA employee protection provision states that no "employer" may discriminate. SDWA does not, however, define "employer" to include the Federal government, and "[t]here is thus no unequivocal [waiver] of sovereign immunity." Mem. Op. at 7.

Nothing in the so-called "Federal facilities" provisions of certain of the environmental statutes compels the conclusion--otherwise contrary to Powers--that Congress unequivocally waived Federal, although not state, sovereign immunity. FWPCA, CAA, SWDA, SDWA, and CERCLA all contain what are sometimes referred to as Federal facilities provisions.[8] None of these provisions specifically states that Congress waives the Federal government's immunity

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[7]Under SWDA and CERCLA, too, the several States and the United States are generally encompassed within the term "person," as provided in those Acts general definition sections. 42 U.S.C. §§6903(15), 9601(21). That general definition was not deemed an equivocal waiver of sovereign immunity in Powers. As in the CAA, if generally defining "person" to include the Federal Government was intended by Congress as a clear, unmistakable waiver of sovereign immunity, it would have been unnecessary to specifically indicate that citizen suits under the SWDA and CERCLA could be brought against a person, "including the United States." 42 U.S.C. §6972(a)(1), 9659(a)(1). Construing the general definition of "person" as a waiver of sovereign immunity would render the later, unequivocal waiver a mere redundancy.

[8]TSCA contains no such provision.

from whistleblower liability. Indeed, none of these provisions refers expressly to the whistleblower provisions, at all.

Although reflecting a Congressional intent to waive Federal sovereign immunity in certain respects under the environmental statutes, these provisions cannot support the contention that Congress has unequivocally waived Federal immunity from any and all liability related in any way to the various environmental statutes. Indeed, the courts have refrained from an overly expansive reading of the scope of the waiver of sovereign immunity found in the Federal facilities provisions. See, for example, Dept. of Energy v. Ohio, 503 U.S. 607, 627-628 (1992) (closely reviewing the, then existing, FWPCA and SWDA Federal facilities provisions and rejecting an "apparently expansive" reading of those provisions and failing to find a clear, unequivocal waiver of immunity from the particular liability in question); City of Jacksonville v. Dept. of the Navy, 348 F.3d 1307 (11th Cir. 2003) (finding immunity from certain liabilities waived by the CAA Federal facilities provision, but no unequivocal waiver, in the text itself, that immunity from all CAA-related liabilities was waived). Rather, examination must be made in each instance whether Congress unequivocally waived immunity from the particular claim or liability in question. Powers teaches that the focus, in the first instance, is on text of the statutory language used to create the liability or claim. See also, Bath v. U.S. Nuclear Regulatory Commission, ARB No. 02-041 (Sept. 29, 2003) ("A basic requirement of sovereign immunity analysis is that it focus on the text that relates to liability.") Here, none of the general Federal facilities provisions provides the clarity of Congressional intent that is manifestly lacking in the whistleblower provisions, themselves.

The FWPCA's Federal facilities provision, for example, is headed "federal facilities pollution control." 33 U.S.C. §1323. This section generally provides that, "notwithstanding any immunity," Federal agencies are subject to and must comply with requirements "respecting the control and abatement of water pollution." 33 U.S.C. § 1323(a). The employee protection provision of the FWPCA is **not** clearly, unequivocally a "requirement . . . respecting the control and abatement of water pollution." The employee protection provision is at best two or three steps removed from requirements, such as those prohibiting the discharge of pollutants (see 33 U.S.C. § 1311), directly regulating water pollution control and abatement.[9] Whatever impact the FWPCA's "federal facilities" provision may have on Federal agencies' liability for discharge of pollutants or failure to maintain required permits, a waiver of sovereign immunity from employment discrimination claims is not unequivocally contained in such provision.[10]

The CAA also contains a "federal facilities" provision, headed: "control of pollution from Federal facilities." 42 U.S.C. §7418. This provision generally states that each "department, agency, and instrumentality of the . . . Federal Government" is subject to all requirements for

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[9]That the employee protection provision is not deemed to be a requirement "respecting the control and abatement of water pollution" is further demonstrated by Congress' division of administrative responsibility under the Clean Water Act. Administrative responsibility for the water pollution control and abatement provisions of the Act–indeed, overall administrative responsibility–is given to EPA (see, e.g., 33 U.S.C. § 1251(d)). However, investigative responsibility for the employment-related (as opposed to pollution-control related) employee protection provision is understandably given to DOL.

[10]Moreover, the FWPCA federal facilities provision only applies to Federal agencies "(1) having jurisdiction over any property or facility or (2) engaged in any activity resulting, or which may result in the discharge or runoff of pollutants." 33 U.S.C. § 1323(a). Complainant has not and cannot make any showing that EPA had "jurisdiction" of any covered "property or facility" or was "engaged in [covered] activity" that might be relevant to any claim that EPA failed to comply with any requirement "respecting the control and abatement of water pollution."

"the control and abatement of air pollution," "notwithstanding any immunity of such agencies . . . under any law or rule of law." 42 U.S.C. § 7418(a). Here, too, it defies plain meaning to construe the employee protection provision, under DOL's administrative purview,[11] as an air pollution "control and abatement" requirement. Whatever may be the precise scope and breadth of the CAA Federal facilities provision's waiver of sovereign immunity, it does not clearly and unequivocally waive immunity from employment discrimination claims under the employee protection provision.[12]

The SDWA also generally provides that each "department, agency, and instrumentality of the . . . Federal Government" is subject to all requirements "respecting the protection of such wellhead areas, respecting such public water systems, and respecting any underground injection," and that the "United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such . . . requirement." 42 U.S.C. §300j-6(a). Again, however, it cannot reasonably be contended that the employee protection provision, under DOL's administrative purview,[13] is a requirement for the protection of "wellhead areas" or "public water systems" or "underground injection." The SDWA Federal facilities provision, whatever the

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[11]As with the Clean Water Act, EPA has overall Federal administrative responsibility for the CAA, including the authority to promulgate regulations. See 42 U.S.C. § 7601.

[12]As under the FWPCA, the CAA federal facilities provision only applies to Federal agencies "(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants." Complainant has not and cannot show that EPA had jurisdiction of any covered "property or facility" or "engaged in [covered] activity" that might be relevant to any claim that EPA failed to comply with some requirement "respecting the control and abatement of air pollution."

[13]As with the Clean Water Act and the CAA, EPA has overall Federal administrative responsibility for the Drinking Water Act, including the authority to promulgate regulations. See 42 U.S.C. § 300j-9(a).

precise contours of its waiver of sovereign immunity, is certainly no clear and unequivocal waiver of sovereign immunity from liability under the employee protection provision.[14]

The SWDA also contains a "Federal facilities" provision, which provides that each "department, agency, and instrumentality of the . . . Federal Government" is subject to all requirements "respecting control and abatement of solid waste or hazardous waste disposal and management," and states that the "United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such . . . requirement." 42 U.S.C. § 6961(a). Again, however, it cannot reasonably be contended that the employee protection provision, under DOL's administrative purview,[15] is a requirement for the "control and abatement of solid waste or hazardous waste disposal and management," and the Federal facilities provision of the SWDA is no clear and unequivocal waiver of sovereign immunity from employment discrimination liability.[16]

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[14]Again, as with the FWPCA and CAA, the SDWA Federal facilities provision does not simply apply broadly to all Federal agencies, but only to Federal agencies "(1) owning or operating any facility in a wellhead protection area; (2) engaged in any activity at such facility resulting, or which may result, in the contamination of water supplies in any such area; (3) owning or operating any public water system; or (4) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 300h(d)(2)." Not only does this limiting language reaffirm that the Federal facilities provision only relates to requirements "respecting the protection of wellhead," etc., but underscores that there must be some nexus between the claimed violation and the Federal agencies' facilities, operations or activities relating to "wellhead protection," etc. In any event, again, Complainant has not and cannot show that EPA owns or operates a "facility in an wellhead protection area."

[15]As with the other environmental statutes, EPA has overall Federal administrative responsibility for the SWDA, including the authority to promulgate regulations. See 42 U.S.C. § 6912.

[16]Also, the SWDA Federal facilities provision only concerns Federal agencies "(1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any

CERCLA also contains a Federal facilities provision, which provides that each "department, agency, and instrumentality of the United States" is subject and shall comply with CERCLA, "including liability under section 9607." 42 U.S.C. § 9620(a)(1). The CERCLA Federal facilities section is lengthy and must be read as a whole. The seemingly broad language of the first paragraph of the section, must be read together with the remaining paragraphs before it can be determined whether Congress has unequivocally waived Federal sovereign immunity from employment discrimination liability, in particular. In this regard, although specifically referring to Section 9607 and liability for the costs of "removal or remedial action," "response" costs, and "loss of natural resources," the Federal facilities provision does not expressly, specifically waive immunity from employee protection claims. Id. The CERCLA Federal facilities provision also expressly states that rules applicable to "preliminary assessments" for "facilities at which hazardous substances are located;" National Contingency Plan evaluations of such facilities; "inclusion on the National Priorities List;" and "remedial actions at such facilities" also apply to Federal facilities. 42 U.S.C. §9620(a)(2). The evident paramount thrust of CERCLA's Federal facilities provision relates ultimately to the clean-up of Federally-owned or operated facilities or sites. 42 U.S.C. § 9620. This provision also falls short of a clear and unequivocal waiver of sovereign immunity from employment discrimination liability.

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activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste." 42 U.S.C. §6961(a). Complainant has not and cannot show that EPA has any such facility or site or engaged in any such activity. Further, Complainant cannot show any nexus between any alleged violation of any relevant requirement "respecting the control and abatement of solid waste or hazardous waste disposal and management" and any such facility, site or activity.

To be sure, the Secretary's early decisions on Federal sovereign immunity placed some reliance on the Federal facilities provisions in finding waivers of sovereign immunity. See, for example, Pogue, 1990 WL 656090, *3; Conley, 1993 WL 831968; Marcus, 1994 WL 897260, *2; and Jenkins, 1994 WL 897221, *2. Those decisions, however, can no longer survive the holdings of Powers and Pastor. In the first instance, those holdings in those early decisions rest heavily on an analysis of the significance of the terms "person," "party," and "employer," as found in various employee protection provisions, that is directly at odds with Powers' consideration of the same terms, albeit in the context of State sovereign immunity. Pogue, for example, concluded that there was an unambiguous waiver of sovereign immunity because the Federal government was generally included as a "person" in CERCLA's general definition of that term and because CERCLA's whistleblower provision provided that no "person" shall discriminate against any employee. 1990 WL 656090, *2. As discussed above, Powers reached an entirely different conclusion, rejecting the argument that because the States were included within CERCLA's general definition of a "person," there was an abrogation of sovereign and concluding, instead, that because "'party' is not defined . . . to include states, there is no unequivocal abrogation of sovereign immunity." Mem. Op. at 7.

The other early decisions are similarly in conflict with Powers. Jenkins, for example, deemed it sufficient for a waiver of Federal sovereign immunity under the SDWA that, although the term "employer" was not so defined, the term "person" was generally defined to include the Federal government. 1994 WL 897221, *2; see also, Marcus, 1994 WL 897260, *2. Powers found the opposite: because the term "employer" was not defined to include the States (or the

Federal government), there was no unequivocal abrogation of sovereign immunity, even though States were encompassed by the SDWA's general definition of a "person." Mem. Op. at 7.

In addition, the Secretary's early decisions (in contrast to the more recent decisions of Powers and Pastor) failed to fully adhere to the Supreme Court's direction that a waiver of sovereign immunity must be "unequivocally expressed in the statutory text" and that legislative history cannot supply a waiver that is not so clearly expressed in the text itself. Lane, 518 U.S. 187, 192. Pogue, decided before the Supreme Court's decision in Lane, however, undertook to resolve ambiguities about whether there was a waiver of sovereign immunity by resorting to legislative history, indicating at the outset that it would look to "legislative history if the statutory language is unclear." 1990 WL 656090, *2.[17] Indeed, in concluding that there was a waiver of sovereign immunity, Pogue expressly relied on "the legislative history of the 1986 CERCLA amendments." Id. at *5. Moreover, in finding a waiver of sovereign immunity, Pogue was **not** careful to strictly construe any waiver in CERCLA "in favor of the sovereign," (Lane, 518 U.S. at 192), but took the opposite tack, liberally construing CERCLA, "a remedial statute," to find a waiver of sovereign immunity. 1990 WL 656090, *3.

The Secretary's early decisions in Conley, Marcus and Jenkins, also decided before the Supreme Court's decision in Lane, similarly relied heavily on legislative history to find a waivers of Federal sovereign immunity from liability under various employee protection provisions. Conley, for example, cites language in a Senate Report to conclude that Congress "contemplated

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[17]Pogue also relied significantly on its view that "any employee," as used in CERCLA's employee protection provision, meant "all" employees; excluded no employees; and included Federal employees. The Courts, however, have been reluctant to find a clear, unequivocal waiver of sovereign immunity merely by use of such broad terms as "any" or "all."

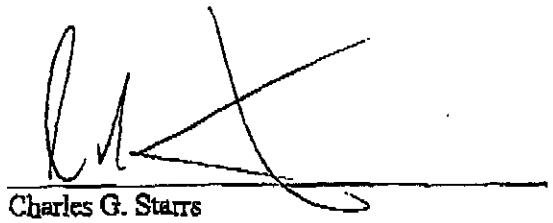
that whistleblower protections would assist in implementing the [FWPCA's] standards." 1993 WL 831968, *2. Conley discusses at some lengthy and relies upon legislative history concerning certain 1977 amendments to FWPCA. Id. at *4; see also, Marcus, 1994 WL 897260, *2 (discussing legislative history of the SDWA and the FWPCA); Jenkins, 1994 WL 897221, *2-3 (discussing reports and testimony concerning the FWPCA and CAA and stating that "legislative history supports" the determination that there was a waiver of sovereign immunity). Conley also quotes from the "legislative history of the Clean Air Act." 1993 WL 831968, *2.

These varied, sometimes lengthy, references to legislative history strongly indicate that, contrary to the command of Lane v. Pena, the Secretary's early decisions faced, at best, ambiguous indications of possible waivers of sovereign immunity and strove to use legislative history to resolve those ambiguities. But as the Supreme Court has made clear, and as the Board has recently recognized in Powers and Pastor, any waiver of sovereign immunity must be unequivocally "established by the statute itself." Powers, 2003 WL 21269151, *4; see also, Bath, ARB No. 02-041 ("legislative history is not a valid basis for inferring legislative intent to waive sovereign immunity").

CONCLUSION

For all the foregoing reasons, there has been no clear, unequivocal of Federal sovereign immunity from whistleblower liability under CAA, CERCLA,, FWPCA, SDWA, SWDA, and TSCA, and Complainant's claims should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I certify that copies of the foregoing RESPONDENT'S RESPONSE TO THE SUPPLEMENTAL BRIEFING ORDER were sent to the following persons by placing the same in the interoffice mail this 23 day of September to be sent by overnight delivery:

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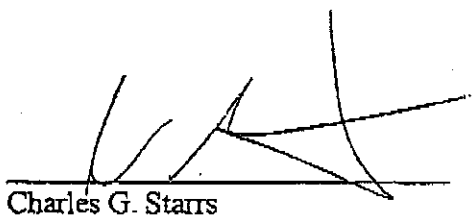

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