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# Equal Protection Under Environmental Law?

## DEFENDING FEDERAL INSTALLATIONS FROM DISCRIMINATORY STATE FINES

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The waivers of sovereign immunity are strictly conditioned on the federal government being afforded equal protection under the law.

The sovereign immunity defense has long been the primary “shield” employed by military attorneys tasked with defending federal installations from state-levied environmental fines.<sup>[1]</sup> Rooted in the Supremacy Clause of the U.S. Constitution,<sup>[2]</sup> the doctrine of sovereign immunity provides that the federal government is wholly immune from state regulation, including the payment of punitive fines, unless Congress has specifically consented to such regulation.<sup>[3]</sup> In the military environmental law context, this means that federal military installations are prohibited from paying environmental fines to the states<sup>[4]</sup> unless Congress has clearly and unambiguously authorized the payment of such fines through a waiver of sovereign immunity for the law allegedly violated.<sup>[5]</sup>

As part of its efforts to be a leader in the field of environmental regulation, and in recognition of the fact that the federal government is itself a major operator of facilities that contribute to pollution,<sup>[6]</sup> Congress has attempted to “put its money where its mouth is.” In so doing, Congress

has—for *some* environmental statutes—waived the federal government’s sovereign immunity from state environmental fines and granted consent for federal instrumentalities to pay them. Naturally then, the initial inquiry when evaluating a state environmental fine issued against a federal military installation is, “has sovereign immunity been waived to pay fines under this statute?”<sup>[7]</sup> The legal literature addressing this question is voluminous<sup>[8]</sup> but, in short, federal sovereign immunity from environmental fines has been waived only for the Resource Conservation and Recovery Act (RCRA),<sup>[9]</sup> the Safe Drinking Water Act (SDWA),<sup>[10]</sup> and the lead-based paint provisions of the Toxic Substances Control Act (ToSCA).<sup>[11]</sup>

Importantly though, this does *not* mean that every single fine levied under these laws must automatically be paid. The inquiry is more intensive. This is because the waivers of sovereign immunity in these statutes are both limited and conditional. Specifically, sovereign immunity is not waived to pay *all* fines, just *nondiscriminatory* ones.<sup>[12]</sup> In other words,

the waivers of sovereign immunity are strictly conditioned on the federal government being afforded equal protection under the law and military attorneys need to be ready to cite this requirement when negotiating and settling state environmental enforcement actions that include punitive fines. This article details the background of limited waivers of sovereign immunity, explains the scope of the equal protection requirement, and offers guidance on how attorneys citing this requirement can counter state environmental fines issued against federal military installations.

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#### LIMITED WAIVERS OF SOVEREIGN IMMUNITY

In order to understand whether or not a federal military installation can pay a state-levied environmental fine, one must first understand how to interpret Congressional waivers of sovereign immunity. The standard for interpreting these waivers can be found in the U.S. Supreme Court case of *Hancock v. Train*.<sup>[13]</sup> In that case, the Court struck down a state effort to require federal facilities to obtain state environmental permits on the grounds that sovereign immunity had not been waived, despite statutory language that led some to believe it had.

The Court held that “because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States,” a waiver of sovereign immunity and consent to state regulation will be found only where the statutory language evinces “specific congressional action” that is both “clear and unambiguous.”<sup>[14]</sup> Simply put, waiver is not to be taken lightly, nor found easily. In addition to being strictly construed in favor of the sovereign,<sup>[15]</sup> it must be “unequivocally expressed,” and “may not be implied or inferred.”<sup>[16]</sup>

In light of these strict requirements, waivers of sovereign immunity must be carefully analyzed across multiple variables, only one of which is whether or not payment of fines has been authorized.<sup>[17]</sup> Put differently, just because a statute waives the federal government’s sovereign immunity from compliance with substantive state regulation does not automatically mean that the federal government’s immunity from paying fines for failing to meet those substantive requirements has also been waived.<sup>[18]</sup> This, too, must be unequivocally expressed and language waiving sovereign immunity from paying fines “must not be read for more than what the language strictly allows”<sup>[19]</sup> or otherwise be “enlarged...beyond what the language requires.”<sup>[20]</sup> In fact, the Court has found that the need to construe waivers of sovereign immunity strictly is particularly acute when the waiver is associated with matters that will result in the expenditure of federal funds.<sup>[21]</sup>

The bottom line is waivers of sovereign immunity are extremely limited and, when evaluating whether or not a state-issued environmental fine can be paid, military environmental law attorneys “have no choice but to construe waivers very narrowly.”<sup>[22]</sup> It is with this in mind that we look at the waivers of sovereign immunity to pay fines under RCRA, SDWA and ToSCA.

#### EQUAL PROTECTION AS A CONDITION ON WAIVERS OF SOVEREIGN IMMUNITY

Looking to the federal waivers of sovereign immunity in these statutes, one should note that the language of all three waivers provides that the federal government shall be subject to state requirements “*in the same manner, and to the same extent*” as any other person or nongovernmental entity.<sup>[23]</sup> In initially reading this, the natural takeaway is obvious: the federal government must comply with environmental regulations just like everyone else. Upon closer inspection though, one can see that there are two sides to that coin. In addition to having to follow the law like everyone else, the federal government must also be treated like everyone else.<sup>[24]</sup> Looking at it this way, and keeping in mind how narrowly waivers must be construed, it is clear that Congress’ waivers of sovereign immunity for these statutes are strictly

conditioned on the federal government being afforded equal protection under the law when state fines are levied.[25]

While one generally thinks of equal protection as an individual right, and not one afforded to the government,[26] Congress has required federal agencies to be treated in “the same manner and to the same extent” as nongovernmental entities to protect the federal government—the ultimate “deep-pocketed client”—from bearing a disproportionate share of the cost of state environmental compliance.[27] Put differently, the states may not treat the federal government differently than other regulated entities for the purpose of reaching into its deep pockets and taking additional money for themselves.[28]

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The principle against states reaching into the pocket of the federal government stems from a long line of case law extending all the way back to the foundational 1819 case of *McCulloch v. Maryland*.<sup>[29]</sup> There, the U.S. Supreme Court struck down a state levy that taxed federally chartered banks but not state-chartered banks.<sup>[30]</sup> This state levy was struck down not only because the state was impermissibly reaching into the pocket of the federal government without its consent, but also because it was doing so in blatantly discriminatory fashion. As such, even reading *McCulloch* narrowly, the primary is that state actions which discriminatorily “retard, impede, burden, or...control” federal operations—and especially their expenditures—are constitutionally impermissible.<sup>[31]</sup>

This concept is enshrined in two centuries of case law and is even seen in modern cases such as *Massachusetts v. U.S.*<sup>[32]</sup> The U.S. Supreme Court reaffirmed that monetary charges

against the government are unconstitutionally discriminatory when nongovernmental entities are treated differently and when such charges “control, unduly interfere with,” or otherwise “destroy [the government’s] ability to perform essential services.”<sup>[33]</sup> In fact, in the wake of this opinion, the U.S. Comptroller General’s office expressly opined that federal agencies are only liable for state-levied fines insofar as, *inter alia*, federally-owned facilities are treated in the same manner as non-federally owned facilities.”<sup>[34]</sup>

Ultimately then, the key takeaway for the military environmental law attorney is that waivers need to be read not as waiving sovereign immunity from paying fines *per se*, but only as waiving sovereign immunity from paying fines that are *nondiscriminatory*. In other words, the federal government is still wholly immune from paying fines that are in any way discriminatory. As such, when evaluating a state environmental enforcement action that levies a fine, any evidence that a state has treated a military installation differently than similarly-situated nongovernmental entities should provide grounds to refuse payment (at least until the fine is reduced to a point that it is fair and proportionate with the fines assessed to those entities).<sup>[35]</sup>

## THE EQUAL PROTECTION DEFENSE IN PRACTICE

In determining whether or not a federal military installation has been afforded equal protection in the state assessment of an environmental fine, one should first ask the regulator for the state’s civil penalty policy as well as the “penalty matrix” used to calculate the specific penalty in the case at hand. <sup>[36]</sup> Designed to protect the states from claims that their penalties are arbitrary, capricious, or otherwise made up out of thin air, both the penalty policy and the penalty matrix will give you an idea of how the state arrived at the amount of the fine it has levied.<sup>[37]</sup>

Next, one should seek records of enforcement actions that the state has taken in other cases involving the same or similar allegations against nongovernmental entities. Some states will have an online database through which you can search all proposed and previously executed enforcement actions in that state by violation type and year.<sup>[38]</sup> In other states, there is no online database and one must request that

the regulators produce such records.<sup>[39]</sup> Either way, one must analyze these past cases to see how nongovernmental entities have been fined and to get a sense of what the fair, “going rate” is for a particular violation. This is the best way to ensure that the federal government has been afforded equal protection under the law.

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Using this information, if one determines that the state fine levied upon the federal government is in any way disparate from those assessed against nongovernmental entities in factually similar cases, one must assert that the fine is discriminatory and cannot be paid because sovereign immunity has not been waived. Then, looking to the “going rate” in those similar cases, one can—using analogy and distinction—argue for a reduced, fair, and more appropriate fine. The following case example is instructive:

The U.S. Environmental Protection Agency has delegated State X the authority to enforce RCRA through State X’s hazardous waste management regulations.<sup>[40]</sup> As part of its daily military operations, Base Y generates and stores hazardous waste. After conducting a RCRA compliance inspection, State X issues a notice of violation against Base Y. In addition to alleging a single count of failure to conduct and document weekly inspections of a hazardous waste accumulation area for two months, the enforcement action assesses a \$7,500 fine.<sup>[41]</sup>

After looking at State X’s civil penalty policy and penalty matrix, and upon seeking and obtaining records of enforcement actions that State X has taken against nongovernmental

entities in other recent cases involving allegations of failure to conduct and document weekly inspections of hazardous waste accumulation areas, Base Y’s environmental law attorney discovers the following pertinent facts:

- Company A failed to conduct inspections for four months and was fined \$5,000.
- Company B failed to conduct inspections for three months and was fined \$3,750.
- Company C, in addition to improperly disposing of hazardous waste, failed to conduct inspections for two months and was fined \$8,000.
- Company D failed to conduct inspections for two months and was fined \$2,500.
- Company E failed to conduct inspections for eight months and was fined \$10,000.
- Company F failed to conduct inspections for five months and was fined \$6,250.

In further examining these other cases, Base Y’s environmental law attorney should note that although the fines levied against Company C and Company E are in relative proximity to the \$7,500 assessed in the instant case, those cases are clearly distinguishable from the case of Base Y. First, whereas Base Y has not been alleged to have committed *any* other violations, Company C’s case entailed another, more significant violation. Second, whereas Base Y is only alleged to have failed to conduct and document its inspections for a period of 2 months, Company E failed to conduct its inspections for 8 months. Moreover, looking even more closely at the other cases, Base Y’s environmental law attorney should also notice that the cases of Companies A, B, and F are distinguishable as well. Specifically, they all received *lower* fines despite failing to conduct and document their inspections for *longer* periods of time than Base Y did. Indeed, the case of Company D is perfectly analogous to that of Base Y, but its fine is only one-third of what Base Y was fined.

In light of these facts, it should be clear to Base Y's environmental law attorney that State X has denied Base Y equal protection under the law. This is not only because the fine assessed is close to the ones levied against much more egregious nongovernmental violators (namely Company C, but also Companies A, E and F), but also because the fine is significantly different from those assessed against similarly-situated private entities that committed essentially the same conduct (Companies B & D). Put more simply, the "going rate" for failing to conduct and document inspections at hazardous waste accumulation areas is clearly about \$1,250 a month and Base Y has been denied equal protection under the law by being assessed a fine that is well above that "going rate."

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**The federal government is still wholly immune from paying fines that are in any way discriminatory and military environmental law attorneys need to be ready to cite this restriction when negotiating and settling state environmental enforcement actions that include punitive fines.**

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Consequently, the attorney should contact the attorneys and regulators at State X and inform them that Base Y is legally precluded from paying fines for violations of state environmental regulations when those fines are in any way discriminatory.<sup>[42]</sup> Further, the attorney should aver that based on the evidence here, the proposed penalty of \$7,500 is clearly, impermissibly discriminatory. Rather than just refusing to pay though, and putting the burden of calculating a new fine back on State X, efficiency demands that the attorney counter-offer with a proposal to settle the case for \$2,500.<sup>[43]</sup> Not only is this perfectly in line with the fair, equitable "going rate" (and the fine levied in the analogous case of Company D), but it enables quick resolution of the case while also allowing Base Y to accept responsibility for its violation without stepping afoul of the Constitution or federal law.

## CONCLUSION

Military environmental law attorneys should be aware that all waivers of the federal government's sovereign immunity from paying state-levied environmental fines need to be construed very narrowly. Such narrow construction of the waivers found in RCRA, SDWA, and the lead-based paint provisions of ToSCA reveals that those waivers are strictly conditioned on the federal government being afforded equal protection under the law inasmuch as it is required to be treated "in the same manner, and to the same extent" as nongovernmental regulatees. Simply put, under these statutes, the federal government is still wholly immune from paying fines that are in any way discriminatory and military environmental law attorneys need to be ready to cite this restriction when negotiating and settling state environmental enforcement actions that include punitive fines.<sup>[44]</sup> As always, base-level attorneys are invited and encouraged to contact the Regional Environmental Counsel's office for assistance with these cases.<sup>[45]</sup>

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## ENDNOTES

- [1] See Lt Col Harry M. Hughes & Major Mitzi O. Weems, *Federal Sovereign Immunity Versus State Environmental Fines*, 58 A.F. L. REV. 207, 210 (2006). “The availability of sovereign immunity as a defense against punitive fines only acts as a shield to the payment of the fine, not as a sword against complying with the underlying statute.”
- [2] U.S. CONST. ART. VI, CL. 2 states “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land . . .”
- [3] Sovereign immunity is not specifically mentioned in the Constitution, but the U.S. Supreme Court has found it to be implicit in the Supremacy Clause. See *McCulloch v. Maryland*, 17 U.S. 316 (1819).
- [4] While the federal government drafts and enacts environmental laws, the states implement and enforce them through an arrangement called “Cooperative Federalism.” Hughes & Weems, *supra* n. 1 at 207. For a more expansive discussion of Cooperative Federalism see also Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 E.L.R 10326 (1985) “The federal government is the nation’s most important drafter of environmental laws, but state and local governments are the most important enforcers.”
- [5] See Hughes & Weems, *supra* n. 1 at 211-12. “federal agencies have no authority to use appropriated funds to pay fines or penalties resulting from their activities. Only when an express statutory waiver of sovereign immunity exists may a federal agency do so.”
- [6] See William A. Wilcox, Jr., *Special Issues in Environmental Law Involving Federal Agencies*, 14 VILL. ENVTL. L. J. 39 – 40 (2003). See also Breen, *supra* n. 4 at 10326. “The federal government is charged with providing leadership in environmental protection, and the public scrutinizes the government’s stewardship of the federal environment.”
- [7] See Major F. Scott Risley, *The Receipt, Negotiation, and Resolution of Environmental Enforcement Actions*, 54 A.F. L. REV. 89, 95 (2004). “As to the substantive response to an Enforcement Action response, the analysis begins with a determination as to whether or not the government as waived sovereign immunity.”
- [8] See Hughes & Weems, *supra* n. 1; Wilcox, *supra* n. 6; Breen, *supra* n. 4; Capt William A. Wilcox, Jr., *The Changing Face of Sovereign Immunity in Environmental Enforcement Actions*, 1993 Army Law. 3 (1993); Kenneth M. Murchison, *Waivers of Immunity in Federal Environmental Statutes in the Twenty-First Century: Correcting a Confusing Mess*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 359 (2008); For the most succinctly comprehensive compendium see Lt Col Barbara B. Altera, *Payment of Fines and Fees to the Environmental Protection Agency and the States*, The Reporter, Vol. 44, Number 3 (2006).
- [9] This includes RCRA’s Solid and Hazardous Waste Management provisions at 42 U.S.C. § 6961 as well as its Underground Storage Tank provisions at 42 U.S.C. § 6991f
- [10] 42 U.S.C. § 300j-6.
- [11] 15 U.S.C. § 2688.
- [12] See *infra* at discussion on “Equal Protection as a Condition on Waivers of Sovereign Immunity.”
- [13] 426 U.S. 167 (1976).
- [14] *Id.* at 179.
- [15] *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951) and *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927).
- [16] Hughes & Weems, *supra* n. 1 at 214.
- [17] See Breen, *supra* n. 4 at 10328
- [18] See generally Breen, *supra* n. 4.
- [19] Hughes & Weems, *supra* n. 1 at 214.
- [20] *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951) and *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927).
- [21] *Lane v. Pena*, 518 U.S. 187, 192 (1996).
- [22] Hughes & Weems, *supra* n. 1 at 215.
- [23] See *supra* fn 9-11.
- [24] Lt Col Michael Van Zandt, *Defense of Environmental Issues in the Administrative Forum*, 31 A.F. L. REV. 183, 194 (1989) (“The state may not impose greater requirements upon the federal entity than those imposed upon the private sector or other public agencies.” To that end, “if the state enforces the standard more stringently against the federal agency then it does against the private parties, that is a discriminatory act and is not allowed under the waiver [of sovereign immunity].”)
- [25] Further supporting the conclusion that these waivers of sovereign immunity are strictly conditioned on equal protection under the law is the fact that each of these waivers also expressly require that “reasonable service charges” be “nondiscriminatory.” See *supra* fn 9-11. In fairness, “reasonable service charges” are separate and distinct from punitive fines but, nevertheless, the U.S. Supreme Court has held that statutory words must be read in their context. *Graham County Soil and Water Conservation District v. U.S. ex. rel. Wilson*, 130 S. Ct. 1396, 1412 (2010). Reading the word “nondiscriminatory” in the context of the requirement that the federal government be regulated “in the same manner, and to the same extent” as nongovernmental entities, one cannot reasonably conclude that Congress actually intended to preclude the payment of discriminatory service charges while permitting the payment of discriminatory fines. The most sensible contextual reading is that all monetary charges must be nondiscriminatory.
- [26] Of course, the Supremacy Clause is not a source of federal rights, but it does “secure” existing federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights created by statute, or by regulation, are “secured” by the Supremacy Clause. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979).

- [27] See Murchison, *supra* n. 8 at 359.
- [28] Such action is far too akin to state taxation of federal entities. See Bill S. Forcade & Elizabeth D. Anderson, *How to Minimize Civil Penalties in Environmental Enforcement*, 30 E.L.R. 11031 (Like taxes, “most state civil penalties are paid to the general revenue fund.”) State taxation of federal entities is expressly prohibited. See *infra* n 25. For an extensive discussion of the caselaw addressing state taxation of federal entities and intergovernmental immunity doctrine see also *U.S. v. New Mexico*, 455 U.S. 720 (1981).
- [29] 17 U.S. (4 Wheat) 316 (1819).
- [30] *Id.*
- [31] See *First Agricultural National Bank of Berkshire County v State Tax Commission*, 392 U.S. 339, 349-51 (1968) (Marshall, J., dissenting).
- [32] 435 U.S. 444 (1976).
- [33] *Massachusetts v. US* specifically addressed a federal levy against the states, but the fundamental principle still applies. In fact, the “*Massachusetts test*” is the standard applied by the federal government when evaluating intergovernmental charges. See also *U.S. v. City of Renton*, 2012 U.S. Dist LEXIS 73261 (2012) (citing *Massachusetts* and explaining that the key to the discrimination analysis is whether or not the federal government is being treated differently than “nongovernmental entities.”).
- [34] Breen, *supra* n. 4 at 10330 (quoting Unpub. Comp. Gen. dec. B-191747 (June 6, 1978)).
- [35] Christopher D. Carey, *Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects*, 44 A.F. L. Rev. 1, 13 (1998).
- [36] For a general discussion of how to proceed after receiving a Notice of Violation or other Enforcement Action see Risley, *supra* n. 7. See generally Forcade and Anderson *supra* n. 26, for a general discussion of how the enforcement process works and how to minimize penalties in enforcement actions.
- [37] For an extensive discussion of both civil penalty policies and the factors used to calculate penalties See *id supra* n. 26 at 11035. In most cases, states consider three factors when calculating a penalty amount: (1) the potential for harm, (2) the extent of deviation, and (3) a “multi-day factor” that increases the amount of the penalty by a set amount for each day it was committed. Generally, the greater the potential for harm, extent of deviation, and number of days the violation was committed, the higher the fine will be. Additionally, states will also have “upward” adjustments for fines in cases in which they perceive particularly egregious behavior such as “willful and negligent conduct” as well as “downward adjustments” for positive factors like “history of compliance” and “cooperative behavior.” When it comes to these penalty policies and the matrices therein, some states will just adopt the EPA Penalty Policy for the governing statute in question. See e.g. EPA RCRA Penalty Policy at <https://www.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-civil-penalty-policy> (last visited July 15, 2020). Others will implement their own policies but even these will substantially mirror the guidelines in the EPA policies. In any event, these penalty policies and matrices are the starting point for determining how the state calculated a fine in a particular case, and if the fine is fair.
- [38] See e.g., the Georgia Environmental Protection Division’s Enforcement page at <https://epd.georgia.gov/rules-laws-enforcement/enforcement> (page last accessed on July 10, 2020).
- [39] In states that do not feature a public database of previously executed enforcement actions, regulators will sometimes be reluctant to provide records from other cases. If this situation presents itself, counsel should aver that the documents are needed as part of the government’s assessment to determine if sovereign immunity has been waived and, if necessary, include the demand in a formal request. Such a request can be styled either as a discovery request (enforceable by an administrative adjudicator) or as a FOIA request under the state rules.
- [40] This is how the “Cooperative Federalism” arrangement described at *supra* n. 4 frequently works in practice.
- [41] Some cases involve fines in the millions of dollars, but a case with a small fine like this one is particularly instructive. This is because when faced with the option of paying a small fine for an undisputed environmental violation, installation commanders will often prefer to just pay the fine for the purpose of achieving a quick solution (and fear of damaging the base’s relationship with the regulators if they balk at paying the fine). Military environmental attorneys need to be prepared to hold the hard line and firmly assert that fines—no matter how small—cannot be paid in the absence of a waiver of sovereign immunity. To do so is a violation of the Anti-Deficiency Act at 31 U.S.C. 1341, which is a criminal violation.
- [42] When initially presenting this argument to state officials, it is often best to present it as a fiscal law issue under the Anti-Deficiency Act, rather than a constitutional one under the Supremacy Clause. This is because they are frequently unfamiliar with sovereign immunity doctrine. Also, be advised that many state officials will be taken aback by the use of the word “discriminatory” because tend to think of discrimination in the invidious sense that it is used in civil rights law. Military environmental law attorneys should just make clear that we use the term in the sense that the U.S. government must be treated “in the same manner, and to the same extent” as nongovernmental entities.
- [43] Given that sovereign immunity is a matter of constitutional magnitude, the burden is clearly on the state to demonstrate exactly why a given fine is nondiscriminatory. Accordingly, another approach to take before making a formal counter-offer, could be to approach the state officials with the evidence of discrimination and demand that they explain why it is not discriminatory.
- [44] In the event a state is unrelenting in its insistence that it can assess and enforce a discriminatory fine against a federal instrumentality, one additional option for the federal attorneys before resorting to litigation is to contact the U.S. Government Accountability Office (GAO) for a formal opinion on whether or not a particular fine can be paid. Total impasse is unlikely, but the Department of Justice needs to be consulted before resulting to litigation, as the risk of even higher monetary liability increases with litigation.
- [45] See AFI 32-7001, para 7.2.3.10.2 (“Installations shall seek, through appropriate organizational-levels, approval of the AFLOA/JACE Division Chief . . . prior to paying a fine or penalty [] to a regulatory agency or host nation as part of a settlement. When substantial legal issues are involved, AFLOA/JACE will consult with SAF/GCN and SAF/IEE before approving payments of fines [or] penalties. . . .” See also DoDI 4715.06.