

The background of the slide is a close-up, slightly blurred image of the United States flag, showing the red and white stripes and the blue field with white stars. The flag is draped and appears to be waving.

Federal Facilities Compliance and the Clean Air Act

The state of sovereign immunity caselaw
under the CAA throughout the States

Federal Facilities Compliance

- Clean Air Act Section 118 contains a waiver of sovereign immunity.
- Waiver language has been the subject of several different court cases throughout the United States.

Federal Facilities Compliance

- 2 questions dealt with by the various Courts:
- Does Section 118 of the CAA waive punitive penalties imposed by the state and locals for past air pollution violations?
- Should the question above be decided by the State or the Federal Courts?

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- US vs. GA DNR
 - GA administrative case involving modification of boilers without a permit at Ft. Benning and the US Penitentiary in Atlanta.
 - Administrative Law Judge (ALJ) held sovereign immunity waived and imposed \$20,000 in penalties against both facilities. Army appealed the ALJ's decision to federal district court.
 - Federal court held sovereign immunity not waived. Georgia may not impose civil penalties for past violations. Decision not appealed.

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- Charleston Naval Shipyard vs. SCDHEC
 - SC administrative case involving abatement of asbestos without providing notice at the Charleston Naval Shipyard.
 - ALJ held sovereign immunity not waived. SC cannot impose civil penalties for past violations. Decision not appealed.

Federal Facilities Compliance

- U.S. vs. TN Air Pollution Control Board
 - TN administrative case dealing with asbestos violations at Milan Army Ammunition Plant.
 - ALJ held sovereign immunity waived and imposed \$2500 penalty. Army appealed decision. District Court upheld ALJ's decision.
 - Decision upheld by the 6th Circuit on appeal. States in the 6th Circuit (TN, KY, MI, & OH) can impose penalties for past violations. Decision not appealed.

Federal Facilities Compliance

- California vs. US
 - CA judicial case against the Air Force involving NOx violations.
 - Case dismissed by federal district court after finding that sovereign immunity had not been waived. Decision appealed to 9th Circuit.
 - 9th Circuit vacated the federal court's decision and remanded to state court. State court held sovereign immunity waived and that penalties can be imposed.
 - Decision not appealed. Penalties can be imposed in the 9th Circuit (AL, AZ, CA, HI, ID, MT, NV, OR, WA).

Federal Facilities Compliance

- Jacksonville vs. US Dept. of Navy
 - Jacksonville local air program judicial case involving violations of aerospace MACT, chrome NESHAP, among others, at NAS Jacksonville and Mayport Naval Station.
 - Federal district court held sovereign immunity waived. No penalties can be imposed for past violations.
 - 11th Circuit overturned decision on appeal. Decision not appealed to U.S. Supreme Court

Federal Facilities Compliance

- Sierra Club vs. TVA
 - AL judicial case brought by citizens group involving opacity violations at TVA.
 - Federal district court held sovereign immunity not waived. Penalties cannot be imposed for past violations.
 - 11th Circuit upheld federal court's decision in 2005 following Jacksonville vs. Navy. Decision not appealed to the US Supreme Court.

Federal Facilities Compliance

- NC vs. TVA
 - NC judicial case bringing common law nuisance action for excess emissions transported to NC from TVA facilities outside the State.
 - Federal district court held sovereign immunity waived.
 - 4th Circuit upheld the decision in 2008.

Federal Facilities Compliance

- TVA decision focuses on three issues:
 - Discretionary function
 - Supremacy Clause
 - An earlier court holding - *Ferris v. Wilbur*

Federal Facilities Compliance

- Discretionary function:
 - TVA argues the challenged conduct involves element of judgment or choice (exemption generally arises from Federal Tort Claims Act)

Federal Facilities Compliance

- Discretionary function:
 - Court finds:
 - “Sue and be sued” language in TVA enabling legislation waives sovereign immunity normally extended to the Federal Government under the Federal Claims Tort Act.
 - TVA is a corporate entity separate and distinct from the Federal Government itself.

Federal Facilities Compliance

- Supremacy Clause:
 - TVA argues state nuisance actions do not embody an objective, quantifiable standard and do not fall within the waiver of the Supremacy Clause in Section 118(a) of the Clean Air Act.

Federal Facilities Compliance

- Supremacy Clause:
 - Court finds:
 - “Common law standards” = “requirements” under Section 118(a) of the Clean Air Act.
 - Lawsuit falls within Congress’ waiver of Supremacy Clause protections.

Federal Facilities Compliance

- Court holding in *Ferris v. Wilbur*
 - TVA argues the NC lawsuit allows judicial department to interfere with the reasonable discretion of the executive.

Federal Facilities Compliance

- Court holding in *Wilbur v. Ferris*
 - Court finds:
 - *Wilbur v. Ferris* is merely an early case applying the discretionary function doctrine. But no statutory discretionary function exception at issue. That decision rested on separation of powers.
 - Further, *Ferris* was a suit against an executive official under the direct authority of the President.

Federal Facilities Compliance

- So where are we?
 - 6th and 9th Circuit:
 - Sovereign immunity waived
 - 11th Circuit:
 - Sovereign immunity not waived
 - 4th Circuit:
 - Will TVA play a role?

Federal Facilities Compliance

- Options available:
 - Don't impose civil penalties for violations;
 - Continue to litigate and take the issue all the way to the US Supreme Court;
 - Refer cases to US EPA; or
 - Request congressional action to clarify waiver of sovereign immunity in Section 118 of the Clean Air Act.

Federal Facilities Compliance

- Questions?

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