ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of: RICHARD T. MULL, Complainant, v. SALISBURY VETERANS ADMINISTRATION MEDICAL CENTER, Respondent.	ARB Case No. 09-107

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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Pursuant to 29 C.F.R. 1980.108(a)(1), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA") submits this brief as amicus curiae in response to the Administrative Review Board's ("ARB" or the "Board") October 7, 2009 order. In its order, the Board requested that OSHA respond to questions regarding the federal government's sovereign immunity from suit for equitable relief under section 211, the whistleblower protection provision, of the Energy Reorganization Act ("ERA"), 42 U.S.C. 5851. *See* ARB No. 09-107 (Oct. 7, 2009). For the reasons discussed below, the Assistant Secretary urges

the Board to reconsider its decision in *Pastor v. Department of Veterans Affairs*, ARB No. 99-071, 2003 WL 21269151 (2003), and to conclude that the ERA waives the sovereign immunity of federal licensees of the Nuclear Regulatory Commission ("NRC"), as well as the Department of Energy ("DOE") and the NRC.

STATEMENT OF THE ISSUES

1. Whether the whistleblower provision in the ERA waives the federal government's sovereign immunity.

2. Whether, assuming the ERA waives federal sovereign immunity, the relief available against the federal government under the ERA is limited to non-monetary damages.

3. Whether the APA's waiver of sovereign immunity for "other than money damages," 5 U.S.C. 702, applies to administrative adjudications.

STATEMENT OF THE CASE

Richard T. Mull filed a complaint against the Salisbury Veterans Administration Medical Center ("SVAMC"), a federal licensee of the NRC, alleging retaliation under section 211. *See Mull v. SVAMC*, ALJ No. 2008-ERA-00008 (April 13, 2009), slip op. at 2. Mull sought as relief, "reinstatement or front pay in lieu of reinstatement, back pay, protection from future retaliation, an injunction prohibiting further violations of the law, and attorneys fees as allowed by law." *Id.* at 7. Relying on the Board's decision in *Pastor*, SVAMC moved to dismiss Mull's

complaint on the ground that section 211 of the ERA did not waive the sovereign immunity of federal licensees of the NRC.

On April 13, 2009, the ALJ issued an order denying SVAMC's motion to dismiss. Recognizing that *Pastor* did not address the issue of the federal government's immunity for non-monetary damages, the ALJ concluded that section 211, along with section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. 702, waived the federal government's immunity for the specific "non-monetary damages" sought by Mull. *See Mull*, slip op. at 7. SVAMC moved the Board to grant interlocutory review on whether as a federal employer under section 211, it was entitled to sovereign immunity.

On October 7, 2009, the Board granted SVAMC's motion for interlocutory review and requested that the parties address specific questions concerning the scope and nature of the federal government's sovereign immunity under the ERA.[1] *See* ARB

[1] The Board presented the following questions for review:

> 1. If the federal government has waived its immunity under the ERA from suit for non-monetary damages, for what types of non-monetary damages may an administrative agency hold the federal government liable? Are non-monetary damages the same as equitable relief? Are back pay, front pay, employee benefits, and attorney fees money damages or equitable relief?
>
> 2. Does the APA, 5 U.S.C. 702, permit a party to prosecute a complaint against the federal government before an administrative agency, and if so, what types of

No. 09-107, at 4. The Board's order invited the Assistant Secretary to submit OSHA's views. *See id.* at 5.

ARGUMENT

I. THE WHISTLEBLOWER PROTECTION PROVISION OF THE ERA WAIVES FEDERAL SOVEREIGN IMMUNITY

Section 211 of the ERA prohibits an "employer" from retaliating against an employee for engaging in certain whistleblowing activities. *See* 42 U.S.C. 5851(a)(1).[2]

> administrative litigation cases have arisen under this section?
>
> 3. How is the term "other than money damages" in 5 U.S.C. 702 defined? Is all equitable relief considered to be "other than money damages"?

ARB No. 09-107, at 4-5.

[2] Under 42 U.S.C. 5851(a)(1), an employer is prohibited from retaliating against an employee who:

> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 ("AEA") (42 U.S.C. 2011 et seq.);
> (B) refused to engage in any practice made unlawful by this chapter or the [AEA] . . . ;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision . . . of this chapter or the [AEA];
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the [AEA], as amended, or a proceeding for the administration or enforcement of any requirements imposed under this chapter or the [AEA], as amended;
> (E) testified or is about to testify in any such proceeding or;
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in

"Employer" is defined to include the DOE and the NRC, as well as federal licensees of the NRC, such as the respondent SVAMC. *See id.* at 5851(a)(2).[3] Although section 211 prohibits an "employer" from retaliating against an employee, it subjects the "person" alleged to have violated the statute to specific procedures and remedies. *See* 42 U.S.C. 5851(b), (c), (d), (e). Neither section 211 nor any other provision of the ERA defines "person."

In *Pastor*, the Board concluded that, even though the definition of "employer" under section 211 included federal licensees of the NRC, section 211 did not waive the sovereign immunity of federal licensees for monetary damages. *See* 2003 WL

> any other action to carry out the purposes of this chapter or the [AEA], as amended.

[3] 42 U.S.C. 5851(a)(2), provides that the term "employer" shall include:

> (A) a licensee of the [NRC] or of an agreement State under section 274 of the [AEA];
> (B) an applicant for a license from the [NRC] or such an agreement State;
> (C) a contractor or subcontractor of such a licensee or applicant;
> (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the [AEA], but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;
> (E) a contractor or subcontractor of the [NRC];
> (F) the [NRC]; and
> (G) the Department of Energy.

Subsections (E), (F), and (G) were added to the definition of employer by Congress in 2005. *See* Pub. L. No. 109-58, Title VI, § 629, 119 Stat. 785 (Aug. 8, 2005).

21269151, at *1.[4] Specifically, the Board reasoned that under the statutory language, an "employer" is prohibited from retaliating against whistleblowers, but only the "person" who allegedly retaliated is subject to the process and remedies for such retaliation. *See id.* at *11. The Board further reasoned that because "person" is not defined in section 211 and is generally a term of art that does not include the federal government, the use of the term "person" created the presumption that the federal government is not among the entities subject to monetary damages under the ERA's whistleblower provision. *See id.* at *13. Therefore, the Board concluded that section 211 did not contain the requisite unequivocal waiver of sovereign immunity. *See id.* at *14.

The Assistant Secretary respectfully urges the Board to reconsider its decision in *Pastor* and to conclude that the ERA waives the sovereign immunity of the DOE and the NRC, as well as federal licensees of the NRC. The whistleblower provision of the ERA incorporates the AEA's definition of "person," 42 U.S.C. 2014(s), which includes the federal government. Moreover, a 2005 opinion by the Department of Justice's Office of Legal Council ("OLC") compels the Board to revisit its *Pastor* analysis. *See* United States Department of Justice Office of

[4] In *Pastor*, the complainant sought only monetary damages. *See id.* at *2.

Legal Counsel Opinion Letter to Howard M. Radzely, Solicitor, Department of Labor (2005) ("OLC Opinion").[5] The Assistant Secretary's position that the federal government's sovereign immunity is waived under the ERA is further bolstered by Congress' amendment of the ERA in 2005 to include the NRC and the DOE within section 211's definition of "employer."

1. Section 211 of the ERA Incorporates the Atomic Energy Act's Definition of "Person," Which Includes the Federal Government, and Therefore the ERA Waives Federal Sovereign Immunity

The ERA and the AEA form an integrated statutory scheme; the ERA grew out of the AEA. *See, e.g., U.S. v. Construction Products Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996) ("The AEA, as amended by the ERA, establishes a comprehensive regulatory framework for the ongoing review of nuclear power plants in the United States."). Accordingly, many provisions of the ERA explicitly reference, and incorporate standards from, the AEA.[6]

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[5] The OLC opinion is available at http://www.justice.gov/olc/2005/waiver-whistleblower-provisions-environmental-statutes.pdf.

[6] *See, e.g.*, 42 U.S.C. 5841(g)(2) (personnel necessary for exercising responsibility under nuclear research provision of the ERA relating to licensing or other regulatory functions under the AEA are transferred to the NRC); 42 U.S.C. 5842 (with certain exceptions provided for in the AEA, the NRC has licensing and regulatory authority pursuant to various chapters of the AEA); 42 U.S.C. 5843(b)(1) (NRC may delegate to the Director of Nuclear Reactor Regulation the principle licensing and regulation involving facilities and materials licensed under

Indeed, the whistleblower activities protected under section 211 of the ERA expressly incorporate the standards and requirements of the AEA. *See* 42 U.S.C. 5851(a)(1). By expressly incorporating the substantive requirements and standards of the AEA in establishing what constitutes a protected activity under the ERA's whistleblower provision, that provision logically incorporates the definition of "person" from the AEA. The definition of "person" in the AEA includes any "Government agency other than the [Atomic Energy] Commission[.]" 42 U.S.C. 2014(s).[7] It would be unreasonable, in the Assistant Secretary's view, to incorporate the standards of the AEA in

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the AEA or the construction and operation of reactors licensed under the AEA); 42 U.S.C. 5844(b) (NRC may delegate to the Director of Nuclear Material Safety and Safeguards the principle licensing and regulation involving facilities and materials licensed under the AEA or review safety and safeguards of facilities and materials licensed under the AEA); 42 U.S.C. 5846 (director or officer of firm licensed or regulated pursuant to the AEA who has information that there is a failure to comply with the AEA shall notify the NRC and any director or officer who fails to do so is subject to a civil penalty in an amount provided for in the civil penalties provision of the AEA); 42 U.S.C. 5848 (NRC shall submit annual report to Congress for facilities licensed or regulated pursuant to the AEA); 42 U.S.C. 5851(a)(1) (protected activity for whistleblower protection includes reporting or testifying regarding violation of the AEA).

[7] The term "government agency" is defined, in turn, as "any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government." 42 U.S.C. 2014(l).

establishing what activities are protected under section 211 of the ERA, and not also incorporate the definition of "person" from the AEA to make *all* covered employers subject to the whistleblower provision in the statute.

To the extent this analysis conflicts with the analysis in *Pastor*, *Pastor*'s analysis is erroneous. Because the ERA and the AEA are so intertwined, the Assistant Secretary is not convinced by the Board's reasoning in *Pastor*, *see* 2003 WL 21269151, at *13-14, that the separate amendments of the AEA and ERA over the years indicates that the definition of "person" in the AEA is limited to the AEA.

2. The OLC Opinion, and the Board's Decisions in *Erickson* and *Kanj*, Compel the Conclusion that Section 211 Waives Federal Sovereign Immunity

The Board should reverse its decision in *Pastor* in light of the OLC Opinion. In its opinion, the OLC analyzed language in the whistleblower protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. 7622, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. 6971, and the Federal Water Pollution Prevention and Control Act ("FWPCA"), 33 U.S.C. 1367, and concluded that the CAA and SWDA waived the federal government's sovereign immunity, but that the FWPCA did not. These whistleblower protection provisions contain a similar structure and language as section 211 of the ERA -- they use two different terms, only one of which terms is defined in the statute. *See* CAA, 42 U.S.C. 7622

("employer" is prohibited from discriminating, "person" is subject to the procedures and remedies; "employer" is not defined, "person" is defined to include the government); SWDA, 42 U.S.C. 6971 ("person" is prohibited from discriminating and is subject to the procedures, "party" is subject to the remedies; "person" is defined to include the government, "party" is not defined); FWPCA, 33 U.S.C. 1367 ("person" is prohibited from discriminating and is subject to the procedures, "party" is subject to the remedies; definition of "person" does not include the federal government, "party" is not defined). The OLC concluded that, where the federal government was included in the definition of one of those terms, federal sovereign immunity was waived. *See* OLC Opinion at 3-4. Thus, the CAA and the SWDA waived federal sovereign immunity, but the FWPCA did not because the FWPCA did not define "party" and its definition of "person" did not include the federal government. *See id.*

The OLC's analysis of the language in the whistleblower protection provision of the CAA directly conflicts with the Board's analysis of this same language in *Powers v. Tennessee Department of Environment and Conservation*, No. 03-61, 03-125, 2005 WL 1542546, at *4-6 (ARB June 30, 2005). In *Powers*, the Board adopted its reasoning in *Pastor* and concluded that the CAA did not waive state sovereign immunity because "employer" was not defined in the CAA and therefore it could not include

states, despite the fact that "person" was defined in the CAA to include states. *See id*. Thus, the Board reasoned in *Powers*, as it did in *Pastor*, that, if one of the terms in the statute is undefined, sovereign immunity is not waived, regardless of the fact that the sovereign is included in the definition of the other term. By contrast, the OLC reasoned that, if one of the terms in the statute is defined and that definition includes the sovereign, sovereign immunity is waived, regardless of the lack of a definition of the other term. The OLC's reasoning is the same regardless of whether the sovereign, through its inclusion in the definition of one of the terms, is prohibited from retaliating (*i.e.*, SWDA) or is subject to the remedies provided for in the statute (*i.e.*, CAA).[8]

Not only did the OLC's analysis of the CAA directly conflict with the Board's analysis of this same language in *Powers*, but the Board has since adopted the OLC's reasoning and

[8] For instance, in analyzing the CAA, the OLC reasoned that "[a]lthough the term 'employer' is not defined, the relevant provision in section 7622 authorizes whistleblower suits against any 'person,' and the federal Government is expressly included in the definition of 'person'"; therefore, the OLC concluded, Congress waived the government's sovereign immunity under the CAA's whistleblower provision. OLC Opinion at 3-4. The OLC did not appear to attach any importance to the lack of a definition of "employer" in the CAA, even though the statute's whistleblower protection provision prohibits an "employer" from retaliating. Similarly, the OLC did not appear to attach any importance to the lack of a definition of "party" in the SWDA, even though the whistleblower protection provision in this statute subjects a "party" to the remedies.

effectively abandoned its own contrary reasoning. Noting the binding effect of OLC opinions on federal agencies, *see Smith v. Jackson*, 246 U.S. 388, 389 (1918) (doubts of Auditor of Canal Zone "should have been subordinated" to ruling of Attorney General), the Board applied the OLC Opinion in *Erickson v. Environmental Protection Agency*, No. 03-2, 03-3, 03-4, 03-64, 2006 WL 1616646 (ARB May 31, 2006), in concluding that the CAA and SWDA waive federal sovereign immunity. Thus, *Erickson* effectively reversed *Powers*. *See Kanj v. Viejas Band of Kumeyaay Indians*, No. 06-74, 2007 WL 1266963, at *3 (ARB April 27, 2007) (in concluding that the FWPCA abrogated tribal sovereign immunity, the Board noted that "the framework OLC applied to whistleblower claims against the federal government under the SWDA and CAA must be applied to whistleblower claims against sovereign tribes under the [FWPCA]").

The reasoning in *Powers* followed directly from the reasoning in *Pastor*, and the Assistant Secretary urges the Board now to explicitly reverse *Pastor*. As noted above, the language in the CAA's whistleblower protection provision is substantially similar to that in section 211 of the ERA. They both prohibit an "employer" from discriminating; they both subject a "person" to certain procedures and remedies. Section 211 of the ERA defines "employer" and that definition includes certain federal agencies (*i.e.*, licensees of the NRC, the DOE, and the NRC).

The CAA defines "person" and that definition includes the federal government. Applying the OLC's reasoning to the ERA's whistleblower protection provision, Congress' inclusion of licensees of the NRC (and the DOE and the NRC after 2005) in the definition of "employer" compels the conclusion that the federal government has waived its sovereign immunity as to those government entities.[9]

3. Congress' Amendment of Section 211 to Specifically Include the DOE and the NRC within the Definition of "Employer" Bolsters the Conclusion that the ERA Waives Federal Sovereign Immunity

Congress' amendment in 2005 to section 211's definition of "employer" bolsters the conclusion that the whistleblower protection provision waives the federal government's sovereign immunity. By amending the definition of "employer" to include the DOE and the NRC, Congress explicitly prohibited those federal agencies from retaliating against an employee for protected whistleblowing activities. *See* Pub. L. No. 109-58, Title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). This amendment would be meaningless if the government is immune from suit. Such an interpretation violates a basic principle of statutory

[9] Both the CAA and the SWDA allow complaints to be filed against the "person," and "person" is defined to include the federal government. The ERA does not define "person." We do not believe, however, that the OLC's analysis suggests that the use of the term "person" is determinative. Rather, the analysis suggests that the determinative factor is that one of the terms expressly includes the federal government.

construction that avoids interpreting a statute in a way that renders part of the statute superfluous. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Hibbs v. Winn,* 542 U.S. 88, 101 (2004) (internal quotation marks and citation omitted).

The Board's reasoning in *Pastor* would render the part of section 211 prohibiting the DOE and the NRC from retaliating against an employee superfluous, because there would be no means of enforcing the prohibition. *See Dewsnup v. Timm*, 502 U.S. 410, 427 (1992) ("If possible, [courts] should avoid construing [a] statute in a way that produces . . . absurd results."). In sum, Congress' amendment to section 211's definition of "employer" would be nonsensical if employees of the DOE and the NRC could not file suit to remedy the prohibited retaliation.[10] Therefore, Congress' amendment supports interpreting the ERA as waiving the sovereign immunity of the DOE, the NRC, and federal licensees of the NRC. *But see Lane v. Pena*, 518 U.S. 187 (1996) (holding that there is no waiver of federal sovereign immunity, even if the statute at issue grants an individual certain rights

[10] Arguably, were relief in the form of "non-monetary damages" available against the federal employers covered under section 211, inclusion of the DOE and NRC within the definition of employer would not be meaningless. As discussed *infra*, however, we do not believe that if sovereign immunity for monetary damages has not been waived under section 211, sovereign immunity for "non-monetary damages" has been waived.

against the federal government, if the statute provides no remedies for violations of those rights absent a waiver of sovereign immunity).

II. ANY WAIVER OF SOVEREIGN IMMUNITY IN THE ERA APPLIES TO ALL THE REMEDIES PROVIDED FOR BY THE STATUTE AND IS NOT LIMITED TO A SUBSET OF THOSE REMEDIES

In its October 7, 2009 order, the Board asked:

> If the federal government has waived its immunity under the ERA from suit for non-monetary damages, for what types of non-monetary damages may an administrative agency hold the federal government liable? Are non-monetary damages the same as equitable relief? Are back pay, front pay, employee benefits, and attorney fees money damages or equitable relief?

ARB No. 09-107, at 4.

Regardless of whether the specific remedies listed in section 211 of the ERA are characterized as monetary damages or as equitable relief, absent express statutory authority, there is no basis to interpret the statute as permitting only a subset of the remedies listed when the federal government is the employer. The types of remedies available under the statute do not depend on the identity of the employer. Thus, there is no basis to conclude that the ERA does not waive sovereign immunity for monetary damages, but does waive it for non-monetary damages. If the ERA has not waived the federal government's sovereign immunity for monetary damages under section 211, it has not waived the federal government's sovereign immunity for any of the remedies provided for in the statute. *See Loeffler*

v. Frank, 486 U.S. 549, 554 (1988) (federal government immune from suit absent waiver of sovereign immunity); *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 255 (5th Cir. 2006) ("The federal government enjoys complete sovereign immunity except as it has consented to be sued and consented to submit to liability.").

Likewise, if the ERA has waived the federal government's sovereign immunity for non-monetary damages, it has also waived the federal government's sovereign immunity for monetary damages. *See Ardestani v. INS*, 502 U.S. 129, 137 (1991) (internal quotation marks and citation omitted) ("Once Congress has waived sovereign immunity over certain subject matter, [a court] should be careful not to assume the authority to narrow the waiver that Congress intended[.]"). In short, any sovereign immunity waiver applies to all the remedies listed in the statute.

III. THE WAIVER OF FEDERAL SOVEREIGN IMMUNITY IN SECTION 702 OF THE APA DOES NOT EXTEND TO ADMINISTRATIVE ADJUDICATIONS

The Board asked:

> Does the APA, 5 U.S.C. 702, permit a party to prosecute a complaint against the federal government before an administrative agency, and if so, what types of administrative litigation cases have arisen under this section?

ARB No. 09-107, at 4.

Section 702 of the APA states, in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .

5 U.S.C. 702 (emphases added). This provision constitutes a general waiver of sovereign immunity and is not limited to suits under the APA; it is applicable to cases under other statutes. *See United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003) (en banc) (citing other circuits that have similarly applied the APA).

Contrary to the ALJ's suggestion, however, section 702 of the APA does not apply to administrative adjudications. "It is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums." *West v. Gibson*, 527 U.S. 212, 226 (1999) (Kennedy, J., dissenting); *see McGuire v. U.S.*, 550 F.3d 903, 913 (9th Cir. 2008) ("[T]he Supreme Court has recognized that a waiver of sovereign immunity can be forum-specific: '[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.'") (quoting *Minnesota v. United States,* 305 U.S. 382, 388 (1939)). Given these principles, the explicit reference in the text of section 702 to "judicial review" in "a

court of the United States," precludes applying section 702's general waiver of sovereign immunity to administrative adjudications.

While *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) ("*SCSPA*"), may initially seem to lead to the contrary conclusion, it does not reach so far. In *SCSPA*, the Supreme Court held that the sovereign immunity guaranteed to the states in the Eleventh Amendment applies in federal administrative proceedings as it does in court proceedings. *See id.* at 760. The Court noted that the Eleventh Amendment refers to "judicial power" and "any suit in law or equity," which could imply that the guarantee of state sovereign immunity set out in the Eleventh Amendment applies only in judicial forums.[11] *See id.* at 753. However, the Court also noted that there was extensive precedent for extending state sovereign immunity beyond the literal text of the Eleventh Amendment. *See id.* at 754. The Court concluded that the Eleventh Amendment's guarantee of state sovereign immunity applied to an administrative adjudication because such an adjudication is very similar to civil litigation. *See id.* at 756-59.

[11] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." U.S. CONST., amend XI.

It does not follow from *SCSPA* that the waiver of federal sovereign immunity for non-money damages in section 702 of the APA applies to administrative adjudications. First, there is no precedent for extending the waiver of sovereign immunity in section 702 of the APA beyond the literal text of the statute as there is for expanding the guarantee of state sovereign immunity in the Eleventh Amendment. More importantly, in *SCSPA*, the Court expanded the language in the Eleventh Amendment to preserve the states' sovereign immunity. In marked contrast, expanding the language in section 702 to non-judicial bodies would enlarge the waiver of the government's sovereign immunity. Thus, *SCSPA* does not apply to section 702 of the APA.[12]

[12] Because section 702's waiver of sovereign immunity does not apply to administrative adjudications, the Assistant Secretary does not address the Board's questions regarding the nature and definition of the term "other than money damages" as used in section 702.

CONCLUSION

For the reasons set forth above, the Assistant Secretary respectfully requests that this Board interpret the ERA as waiving the federal government's sovereign immunity as to all the remedies provided for in the statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the Assistant Secretary for the Occupational Safety and Health Administration's Brief of the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae were served on the following individuals on this ____ day of December, 2009:

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