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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Application for Permit to Dredge in National Forest—State of Michigan

File: B-286951

Date: January 10, 2002

DIGEST

Section 404(t) of the Clean Water Act, 33 U.S.C. § 1344(t), requires federal agencies to comply with state substantive and procedural requirements governing discharge of dredged material in navigable waters, including payment of fees charged for processing an application for a permit to conduct dredge and fill activities in Hiawatha National Forest. Thus, we do not object to the Forest Service's use of its appropriated funds to pay the permit-processing fee imposed by Michigan.

DECISION

The Director for Financial Management, Forest Service Eastern Region, Milwaukee, Wisconsin, has requested an advance decision addressing the following issue: may the Forest Service pay a fee to the Michigan Department of Environmental Quality (DEQ) for the processing of a permit required by the Michigan Natural Resources and Environmental Protection Act, P.A. 1994, as amended. The DEQ asserts that section 404(t) of the Federal Water Pollution Control Act (commonly known as the Clean Water Act), 33 U.S.C. § 1344(t) (1994), authorizes it to charge permit application fees to federal agencies engaged in dredging and fill activities impacting lakes and streams, Great Lakes bottomlands, wetlands, floodplains, and dam construction within Michigan. For the reasons set forth below, we conclude that section 404(t) requires federal agencies to pay applicable fees for obtaining state permits for dredging and fill activities. Accordingly, we do not object to the Forest Service's use of appropriated funds to pay Michigan's permit processing fee.

Background

The Forest Service, United States Department of Agriculture, manages national forests and grasslands.¹ The Service has jurisdiction over four national forests in the state of Michigan and engages in projects involving the discharge of dredged material as defined in 33 C.F.R. § 323.2 (2001) and 40 C.F.R. § 227.13 (2001). These projects include fish habitat maintenance activities, stream culvert maintenance or installation, sediment basin dredging, and impoundment reconstruction, among others.

The Clean Water Act, 33 U.S.C. § 1251, governs the discharge of dredged material. Responsibility for the control of dredge and fill operations rests, generally, with the Corps of Engineers, subject to review by the Environmental Protection Agency (EPA). Section 404 of the Act, 33 U.S.C. § 1344, provides for the Corps to review applications for the discharge of dredge and fill material into navigable waters. Section 404(g) allows states to assume this authority; section 404(h) sets out criteria a state must satisfy in order to win approval to regulate. To date, only two states, Michigan and New Jersey, have obtained authority to regulate such discharges. 40 C.F.R. § 233.70 (1998). More importantly for this discussion, however, is that section 404(t) subjects the activities of federal agencies to state control of discharge of dredged materials: “[E]ach such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged and fill material to the same extent that any person is subject to such requirements.” 33 U.S.C. § 1344(t).

In 1993, Michigan enacted legislation requiring a permit for dredge and fill activities, Mich. Comp. Laws § 324.30304, and imposing fees for obtaining permits, Mich. Comp. Laws § 324.30306. Since 1993, the Forest Service and Michigan have disagreed over whether Michigan can require the Forest Service to pay the fees. See USDA/OGC Memorandum for Regional Forester, USDA, Forest Service Eastern Region, May 18, 1994. The Forest Service, referring to the “substantive and procedural” language of section 404(t), accepts Michigan’s requirement to obtain a dredging permit. It asserts, however, that because section 404(t) does not make specific reference to “fees,” the statute does not clearly and unambiguously subject federal agencies to a requirement to pay a permit-processing fee.

¹ Congress established the Service in 1905 to provide quality water and timber for the Nation’s benefit. Over the years the role of the Service has expanded to include forestry research, technical and financial assistance to state and private forestry agencies, and the management of the national forests for multiple uses and benefits and for the sustained yield of renewable resources while ensuring the productivity of the land and protecting the quality of the environment. See <http://www.fs.fed.us/intro/meetfs.shtml>.

On January 26, 2000, the Service requested that the DEQ review and comment on a project for excavation of material from Valley Spur Pond, and the removal of sand and placement of spoil on an existing upland hiking/ski trail within the Hiawatha National Forest. Expressing its desire to maintain a “cooperative working relationship with Michigan DEQ in preventing and controlling water pollution, and protecting our natural resources,” and declaring its intent to continue sharing information on its wetland and water-related projects within the state, the Service enclosed a “service-fee payment” of \$50 for processing a permit application. On August 21 of that year, the DEQ responded with a request for a further \$450 as a permit filing fee, as well as for additional information required for processing a permit application, including a project site plan, a cross section of the sediment trap, and details of the volume of material used, and dimensions of the area. The applications correction request cited Part 301, Inland Lakes and Streams, Part 303, Wetland Protection, Part 325, Great Lakes Submerged Lands Act, 451, P.A. 1994, as amended. Mich. Comp. Laws §§ 324.30101, 324.30301, 324.32501.

By letter dated September 1, 2000, the Service reiterated its request for review and comment on the project but declined to pay the additional fee based on its assertion of sovereign immunity as an agency of the federal government. The DEQ responded in a September 27 letter, asserting that section 404(t) of the Clean Water Act obligated the Forest Service to apply for a permit for its activities and to pay required fees. The Service subsequently requested an advance decision from our Office on whether it may pay the requested fee.

Analysis

At issue here is whether the “substantive and procedural” language of section 404(t) is sufficiently clear and unambiguous to constitute a waiver of the Supremacy Clause of the Constitution and subject federal agencies to state permit and fee requirements for dredge and fill activities. The Supremacy Clause provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., art. VI, cl. 2. From the earliest days of our Republic, the U.S. Supreme Court has recognized that state constitutions and laws cannot control or otherwise regulate federal functions without the consent of the Congress. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). “Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is a ‘clear congressional mandate,’ ‘specific congressional action’ that makes this authorization of state regulation ‘clear and unambiguous.’” Hancock v. Train, 426 U.S. 167, 179 (1976). Thus, where “Congress does not affirmatively declare its instrumentalities or property subject to regulation,” “the federal function must be left free” of regulation. Id. at 179; see also Mayo v. United States, 319 U.S. 441, 447 (1943).

Congress added section 404(t) to the Clean Water Act in 1977 at the same time it amended other provisions of the Clean Water Act, as well as the Clean Air Act and the Safe Drinking Water Act, in response to the Supreme Court's decisions in Hancock v. Train, 426 U.S. 167 (1976) and EPA v. California, 426 U.S. 200 (1976). In these decisions the Supreme Court held that the Clean Air Act and the Federal Water Pollution Control Act commonly known as the Clear Water Act did not clearly and unambiguously demonstrate congressional intent to subject federal facilities to state permit requirements. Section 313 of the Clean Water Act, for example, had provided that federal installations "shall comply with federal, state, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements." Pub. L. No. 92-500, 86 Stat. 875 (1972). Distinguishing substantive requirements of state law respecting control and abatement of pollution from procedural requirements employed to enforce those substantive requirements, the Court said: "[T]he 'requirements' language of section 313 refers simply and solely to substantive standards, to effluent limitations and standards and schedules of compliance." EPA v. California, 426 U.S. at 215.

In reaction to the Supreme Court's restrictive interpretations of the term "requirements" and its holdings in Hancock and EPA that states were powerless to enforce their pollution laws against federal facilities, Congress rewrote the three pollution control statutes. See H.R. Rep. No. 95-294, at 12 (1977). The 1977 amendments to those laws share similar wording. In each statute Congress emphasized that federal facilities must comply with all requirements regarding pollution control. For example, Congress clarified section 313 of the Clean Water Act, the provision at issue in the Supreme Court's EPA decision, stating that federal facilities "shall be subject to, and comply with all federal, state, interstate, and local requirements" (emphasis added), "whether substantive or procedural (including . . . any other requirement, whatsoever)." 33 U.S.C. § 1323(a). In addition, the 1977 amendment to section 313 expressly subjects federal facilities not only to state administrative authority but also to "any" state or local process and state or local sanctions. In the amended version of section 313, Congress specified that no claim of any immunity, including sovereign immunity, should interfere with the application of pollution laws to federal facilities. 33 U.S.C. § 1323(a) ("This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law"). The legislative history is illuminating: "The act has been amended to indicate unequivocally that all federal facilities and activities are subject to all of the provisions of state and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by federal agencies, has misconstrued the original intent." S. Rep. No. 95-370, at 67 (1977).

In 1977, the Congress also amended the Clean Air Act to clarify the provision that was at issue in the Supreme Court's Hancock decision, namely, section 118 of the Act. As pertinent here, Congress amended section 118 to subject federal facilities to "any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other

requirement whatsoever).” Pub. L. No. 95-95, Title I, § 116(a), 91 Stat. 711 (1977), codified at 42 U.S.C. § 7418(a). The legislative history of the amendment in no uncertain terms states that the intent of the 1970 Clean Air Act was that federal facilities must comply with all substantive and procedural air pollution requirements of federal, state, interstate, or local law to the same extent as any person subject to such requirements. See, e.g., H.R. Rep. No. 95-294, at 12 (1977). The conference report explained:

The purposes of this provision are several: (1) to clarify that section 118 of the existing Clean Air Act constitutes a waiver of sovereign immunity, such that federal facilities and persons operating them must comply with all state and local air pollution control requirements; (2) to clarify that the federal facilities must comply with ‘procedural’ as well as ‘substantive’ requirements; (3) to authorize enforcement against such facilities and persons by the same means, process, sanctions, and jurisdiction as for any non-federal source; and (4) to permit states to enforce national hazardous emission standards and new source performance standards against federal facilities. This provision is intended fundamentally to overrule the Supreme Court’s ruling in Hancock v. Train, which was decided after the committee adopted last year’s bill.

H.R. Rep. No. 95-564, at 136-37 (1977) (Conference Report).

The House Report went into more detail:

In 1970, Congress enacted section 118 of the Clean Air Act. That provision declared the clear and unequivocal policy of the United States that the facilities, real and personal property, owned by the U.S. Government were to comply with all substantive and procedural requirements of federal, state, interstate or local law intended to control air pollution . . . Adoption of section 118 of the act was intended to remove all legal barriers to full federal compliance . . . The historic defense of sovereign immunity was waived by Congress.

In the committee’s view, the language of existing law should have been sufficient to insure federal compliance in all of the aforementioned situations. Unfortunately, however, the U.S. Supreme Court construed section 118 narrowly in Hancock v. Train . . . The new section 113 of the bill is intended to overturn the Hancock case and to express, with sufficient clarity, the committee’s desire to subject federal facilities to all federal, state, and local requirements—procedural, substantive, or otherwise—process, and sanctions . . .

By using the words ‘procedural’ and ‘substantive’ in the amendment, the committee intends to make clear the duty of all federal agencies to comply with inspection, recordkeeping, monitoring, reporting, and other

requirements, not merely to obtain permits or to meet emission limits and schedules of compliance.

H.R. Rep. No. 95-294, at 197-200 (1977).

Section 8(a) of the Safe Drinking Water Amendment of 1977, also, subjected federal agencies to all state and local requirements whether substantive or procedural. Pub. L. No. 95-190, 91 Stat. 1393 (1977), codified at 42 U.S.C. § 300j-6(a).

At the same time Congress revised these three laws in response to the Court's decisions, the Congress added section 404(t) to the Clean Water Act to specifically address federal discharges of dredged material. Friends of the Earth v. U.S. Navy, 841 F.2d 927 (9th Cir. 1988)(Navy required to obtain a dredging permit for dredging activities under the immunity waiver of section 404(t) and "water pollution" under the immunity waiver of section 313). Section 404(t) requires federal agencies to comply with state requirements "both substantive and procedural" and "to the same extent that any person is subject to such requirements." Not only does this language use some of the same wording Congress utilized to amend the other pollution statutes in response to the Court's decisions, the congressional intent underlying the enactment of 404(t) was the same as the intent underlying the amendment of section 313. S. Rep. No. 95-370, at 67-69 (1977).

It is a generally recognized rule of statutory construction that similar statutes should be read in pari materia. The reading of statutes in pari materia is of particular application when the word or phrase being interpreted has acquired special, non-literal significance as a legal term of art. Morissette v. United States, 342 U.S. 246, 263-65 (1952); Boca Ciega Hotel, Inc. v. Bouchard Transportation Company, Inc., 51 F.3d 235 (11th Cir. 1995). Application of this rule of construction is relevant here because several federal courts have determined that, where possible, similar language in the Clean Air and Clean Water Acts should be given a similar construction. United States v. Anthony Dell'Aquila, Enterprises and Subsidiaries, 150 F.3d 329, 338, n. 9 (3rd Cir. 1998); United States v. Stauffer Chemical Co., 684 F.2d 1174 (6th Cir. 1982), aff'd, 464 U.S. 165 (1984). In the context of these laws, the phrase "substantive and procedural" has evolved into a precise legal term of art.

We think that section 404(t)'s waiver of immunity with respect to state requirements "both substantive and procedural" includes the payment of permit fees. Congress clearly was on notice that the Supreme Court in EPA had concluded that "requirements," as used in section 313 of the Clean Water Act and in the particular facts presented in EPA, did not include federal payment of state permit fees.²

² In EPA, California argued that section 313 authorized states to require federal dischargers to obtain state permits. 426 U.S. at 210. California further argued that the language in section 313 which required federal agencies to comply with all requirements "including the payment of reasonable service

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Equally clear is that Congress adopted the “both substantive and procedural” requirements language in section 404(t) in reaction to the Supreme Court’s holdings in Hancock and EPA. Certainly the use of the phrase “substantive and procedural” to capture the totality of legal “requirements” is a familiar one. It communicates quite naturally the notion that not only do substantive environmental standards apply but also the procedural means for implementing those standards, for example, permits among others. If this much is recognized, it is a short step, given the statutory language and legislative history noted above, to conclude that “state . . . requirements both substantive and procedural” includes non-discriminatory (“to the same extent that any person is subject to such requirements”) permit fees. See United States v. South Coast Air Quality Management District, 748 F. Supp. 732 (1990) (section of Clean Air Act requiring federal entities to comply with state and local requirements respecting control and abatement of air pollution in the same manner as any nongovernmental entity unambiguously waives immunity with respect to federal facilities’ obligation to pay air pollution regulatory fees).

We have implicitly viewed section 404(t) as authorizing the payment of permit fees for over 20 years. In a 1979 decision, we interpreted section 404(t) to require federal agencies to comply with state permit requirements: “Federal facilities are unconditionally required by section 404(t) to obtain state permits, if the state has a requirement to control discharge of dredged or filled material.” 58 Comp. Gen. 193, 196 (1979). The Forest Service had asked whether section 404(t) required it to pay a Wisconsin state fee for a state permit covering Forest Service plans to create new wetlands. Because the Wisconsin permit regulated the construction and operation of dams, not the discharge of dredged material, we said that section 404(t) was not applicable and that the Forest Service could not pay the Wisconsin fee. The

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charges” must refer to charges incident to a state permit program. Id. at 215. Thus, California asserted, such charges were a “requirement” that federal agencies were obligated to pay. The Court, however, rejected California’s argument stating that:

[I]t is not immediately clear from the face of section 313 that the phrase does refer to application and service charges associated with [a] . . . permit program. Indeed, the term ‘service charges’ might as well be taken to refer to recurring charges for performing a service such as treating sewage, as to fees for accepting and processing a permit application. The EPA so reads the statute and it is not an unreasonable construction.

Id. at 216-17. The Court held that the requirements language of section 313 refers “simply and solely to substantive standards,” not to procedural requirements including permit fees. Id. at 215.

implication of our 1979 decision, however, is that had the Wisconsin permit covered the discharge of dredged material, section 404(t) would have required payment of the permit-processing fee. See also 58 Comp. Gen. 244 (1979) (amendment to section 118 of the Clean Air Act requires federal facilities to abide by state and local laws regarding abatement and control of pollution including obtaining permits and paying associated fees); B-193862, Apr. 30, 1979 (under the Safe Drinking Water Amendments of 1977, the National Park Service, and its federal water treatment facilities, are subject to state requirements, “whether substantive or procedural,” and may pay permit fees).

For the foregoing reasons, we think that section 404(t) subjects an agency not just to a state permit requirement but also to any nondiscriminatory state permit-processing fees. As recognized in our two 1979 decisions, a processing fee is necessarily a part of the procedural requirement for a permit. Section 404(t), by its own terms, clearly expects federal agencies to comply with state procedural requirements “to the same extent that any person is subject to such requirements.” See also S. Rep. No. 95-370 at 67-68 (Federal agencies “should be bound by the same requirements [substantive or procedural] as any other discharger into public waters”). Federal agencies, then, should pay any fees the state imposes on other permit applicants.

The Forest Service argues that the omission of any reference to “fees” in section 404(t) is a clear indication that the Congress did not intend for federal agencies to pay such fees. The Forest Service, in this regard, contrasts section 404(t) with the Clean Water Act’s other immunity waiver provision, section 313, discussed above, which subjects federal activities resulting in the discharge of pollutants to comply with all state requirements including, among others, “the payment of reasonable service charges.” 33 U.S.C. § 1323(a). According to the Forest Service, “[t]he fact that Section 404(t) did not waive the federal government’s immunity in regard to the payment of reasonable service charges becomes even more evident when Section 404(t) is compared to the Section 313 waiver.” USDA/OGC Memorandum, July 6, 2000.

We do not, however, find the contrast to section 313 meaningful. First, the 1977 amendments to section 313 did not add a reference to service charges. As we have explained, the Court in *EPA v. California*, 426 U.S. at 216-217. We note that, but for the enactment of section 404(t) in 1977, the requirement to pay Michigan’s permit processing fees would be governed by the blanket immunity waiver in section 313(a) as revised in 1977. See generally John Michael Chamberlain, Note, State Regulation of Federal Dredging Projects: Sovereign Immunity and the Issues of Reasonable Fees, *Hastings West-Northwest J. Env’t L. & Pol.*, Fall, 165, 169-170 (1995); Cf. *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (1988)(federal government’s immunity waived by both sections 404(t) and 313; Navy required to obtain a permit for dredging under section 404(t) and water pollution activities under section 313).

Second, Congress has consistently and unambiguously stated its intention that, with regard to the reduction and control of pollution of all kinds, federal facilities are to be placed on an equal footing and be subject to the same processes and sanctions as private companies. See, e.g., H.R. Conf. Rep. No. 102-886, at 17-18 (1992); H.R. Rep. No. 102-111, at 5 (1992) (Federal Facilities Compliance Act of 1992 reaffirming intent of the Resource Conservation and Recovery Act)³.

Third, where the Congress is convinced that there are circumstances that would justify the retention of immunity, it has provided unambiguous language exempting federal facilities or allowing the President to exempt federal facilities. For example, section 404(r) of the Clean Water Act contains a specific exemption for certain federal projects:

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

33 U.S.C. § 1344(r); see also 33 U.S.C. § 1323(a) (President may exempt uniquely military property from the immunity waiver of section 313 if he determines it to be in the paramount interest of the United States to do so).

In sum, we do not interpret the Supremacy Clause, and the Supreme Court case law applying it, as requiring the level of specificity that the Forest Service expects. In our view, the reference in section 404(t) to procedural requirements establishes the

³ The Federal Facilities Compliance Act of 1992 amended section 6001 of the Solid Waste Disposal Act to read that “reasonable service charges” include, but are not limited to, “fees or charges assessed in connection with the processing and issuance of permits”. The House Report states that the change “reaffirms and clarifies existing language which requires that federal agencies pay those fees and charges which other persons are subject to under federal, state, interstate and local solid or hazardous waste regulatory programs.” H.R. Rep. No. 102-111, at 6 (1992).

obligation of federal agencies to comply with state regulatory processes for dredging activities, including the payment of permit fees. The inclusion of “substantive and procedural” in section 404(t), particularly when read in pari materia with other contemporaneous environmental statutes controlling similar activities, subjects the Forest Service to Michigan’s permit processing fee.

In conclusion, we find that section 404(t) requires the Forest Service to pay the permit-processing fee imposed by the state of Michigan in order to obtain a permit for dredging activities. Accordingly, we would not raise an objection to the Forest Service’s use of its appropriated funds for this purpose.

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