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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193379 DATE: January 26, 1979

MATTER OF: Obligation of Federal Facility under Clean Air Act to Pay Fees ~~for Sacramento County Environmental Protection~~ Permits

DIGEST: In the absence of express Presidential exemption, the 1977 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, to same extent as nongovernmental entity, including obtaining permits and paying associated fees. Therefore Air Force must pay permit fee to municipal air pollution control authority for operation of equipment which would be subject to municipality's air pollution control regulations if operated by nongovernmental entity.

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The Deputy Director, Plans & Systems, United States Air Force, has forwarded a request by the Accounting and Finance Office of the 323d Flying Training Wing, Mather Air Force Base, California (Mather AFB), for an advance decision on whether Mather AFB must pay filing and operating permit fees for certain equipment (e.g., gasoline storage tanks, boilers, and paint spray booths) to the Air Pollution Control District, Sacramento County, California (APCD). The Accounting and Finance Officer is an authorized certifying officer and has a voucher before him for payment in the amount of $2,082.50.

The Accounting and Finance Officer has been informed by the APCD that it interprets the 1977 Amendment to section 118 of the Clean Air Act (Act), Pub. L. No. 95-95, section 116, 91 Stat. 711 (1977), classified to 42 U.S.C. § 7418, as making Mather AFB subject to all local requirements for the control and abatement of air pollution, including the obtaining of permits. Under Rule 70 of the APCD Rules and Regulations, a fee schedule is established for required permits. The Accounting and Finance Officer asks whether the APCD interpretation of this amendment is correct.

Additionally, he asks that we examine certain bases of exemption from the local regulations requiring permits or fees, if we decide that Federal agencies and departments, such as Mather AFB, are subject to local regulation. The specific bases of these exemptions advanced by the Accounting and Finance Officer are:

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(a) A statement in Air Force regulations (AFR 19-1, Attachment 2, paragraph (i)) that the Air Force "presently has no obligation" to obtain operating permits from State or local Governments although it must comply with emission limitations, which the Accounting and Finance Officer reads as an exercise of the President's authority under section 118(b) of the Act allowing him to exempt military equipment from compliance with section 118; and

(b) APCD's past practice of including Federal agencies within an exemption from paying permit fees given to State and local agencies.

In interpreting statutes, the first step is to look at the words by which the legislature undertook to give expression to its intent. Section 118, as amended, reads in pertinent part:

> "Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any, nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including * * * any requirement respecting permits and any other requirement whatsoever) * * *."

We believe that the plain meaning of this statute is consistent with the APCD interpretation. The legislative history supports this conclusion.

The 1977 Amendment to section 118 of the Clean Air Act was enacted primarily to subject Federal agencies and departments to all procedural and substantive requirements regarding air pollution control and abatement promulgated by State and local governmental units. The Clean Air Act Amendments originated in the House of Representatives as H.R. 6161. H.R. Rep. No. 95-294, 12-13 (1977), which accompanied H.R. 6161, says that section 118 of

the existing Clean Air Act constituted a waiver of sovereign immunity and that Federal facilities were required to comply with all State and local air pollution requirements, both substantive and procedural. Even more revealing is the additional statement that "This provision is intended fundamentally to overrule the Supreme Court's ruling in Hancock v. Train * * *."

In Hancock v. Train, 426 U.S. 167 (1976), the Supreme Court ruled that section 118 of the Clean Air Act did not subject Federal installations to State and local permit requirements. The Court said that "the Clean Air Act does not satisfy the traditional requirement that such intention [to bind the United States] be evinced with satisfactory clarity." The Court then specifically advised that, if the Congress intended that the United States be bound, "it need only amend the Act to make its intention manifest." Id. at 198. Clearly, the Committee heeded this advice.

The Senate Report on a similar amendment to section 118 was in accord with the House Report. S. Rep. No. 95-127, 57-58. Additionally, the Senate Report explicitly stated that the intent of the language in the amendment requiring Federal compliance with both substantive and procedural requirements was to include requirements to obtain operating and construction permits and to pay reasonable service charges. Id. at 58.

Since Federal facilities are required to obtain State and local permits, Mather AFB must do so, unless there be some special basis for exemption. Section 118(b) of the Clean Air Act, as amended, 91 Stat. 711 (1977), authorizes the President to exempt any emission source of any executive department from State and local regulations for a period of 1 year. Additionally, the President may issue regulations exempting classes of Armed Forces equipment uniquely military in nature. In either case the sole criterion in the law is that "he determines it [the exemption] to be in the paramount interest of the United States."

The former exemption authority--for any particular emission source in the executive branch--existed prior to the 1977 Amendment. The latter exemption, for uniquely military equipment of the Armed Forces, did not. Compare section 5, Pub. L. No. 91-604, 84 Stat. 1689 with section 116(a), Pub. L. No. 95-95, 91 Stat. 711.

President Carter has issued Executive Order 12088, 43 Fed. Reg. 47707 (October 13, 1978), which sets forth the guidelines for

agencies seeking exemptions pursuant to section 118(b) of the Act. As opposed to the previous practice of delegating the authority to grant exemptions to department heads (see section 5, Executive Order 11752, 3A C.F.R. 240, 244 (1973)), the President has retained this authority. The President has stated that he will personally review each request for exemption. Statement on signing Executive Order 12088, 14 Weekly Comp. of Pres. Doc. 1769 (October 16, 1978).

We find no indication that the President has acted personally to exempt the emission sources at Mather AFB or the classes of equipment, */ nor does the Accounting and Finance Officer cite any specific exemption action. He suggests only that paragraph (i), Attachment 2, AFR 19-1, may constitute an exemption, under the President's authority to issue regulations exempting uniquely military property from compliance with section 118.

Air Force Regulation 19-1 properly directs Air Force bases to comply with all local procedural and substantive requirements regarding air pollution. (Section A.2.a(14).) This directive appears to be contradicted by Attachment 2, paragraph (i), which states that the Air Force need not obtain permits from State or local Governments for facilities which emit pollutants but comply with emission limitations. Paragraph (i) of Attachment 2 in effect restates the holding in Hancock v. Train, supra, which, as discussed above, is no longer the law by virtue of the amendment to section 118 of the Act. We note that in the first paragraph of Attachment 2, certain provisions of the Clean Air Act are referred to by outdated United States Code references. These Code references are to the classification used prior to the August 7, 1977, effective date of the Amendments to the Act, which resulted in a reclassification of the Act from 42 U.S.C. § 1857 et seq. to 42 U.S.C. § 7401 et seq. See note at Pub. L. No. 95-95, section 1, 91 Stat. 685 (1977). It thus appears that Attachment 2 did not take into account the changes brought about by the 1977 amendment to section 118.

Moreover, paragraph (i) of Attachment 2 does not purport to be a Presidential exemption; it does not cite a Presidential determination that an exemption is in the paramount national interest and is not limited either to a specific emission source or to uniquely military property. We therefore find no basis to conclude that paragraph (i) exempts Mather AFB from payment of the fees.

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*/ From the description provided, it does not appear that the equipment is "uniquely military," as it must be to qualify for the exemption.

Finally, the fact that the APCD may in the past have considered that Federal facilities were exempt from paying permit fees is not significant. As Federal facilities were previously exempt from the requirement of obtaining permits (Hancock v. Train, supra), the APCD lacked legal authority to impose fees. Alternatively, even assuming that the APCD, after enactment of the 1977 amendments, had authority to charge Federal facilities a permit fee, but decided as a matter of policy to include Federal facilities in its stated exemption for State and local governmental agencies, there is no legal principle precluding the APCD from changing this policy.

Accordingly, the voucher may be certified for payment.

Deputy Comptroller General
of the United States