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DECISION

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

JAN 4 1979

FILE: B-192805 DATE:

MATTER OF: Payment of State permit fee by Federal agency under section 404(t), Federal Water Pollution Control Act

DIGEST:

Section 404(t), Federal Water Pollution Control Act, as amended, requires Federal agencies to comply with State substantive or procedural requirements governing discharge in navigable waters of dredged material to same extent as "any person." Section 67, Pub. L. No. 95-217. Federal agencies must get permits if required by State for activity in question, whether or not State has taken over from United States administration of program for issuance of dredging permits. In present case, however, Wisconsin permit requirement does not pertain to dredging activities. Therefore, section 404(t) does not apply and permit fee may not be paid.

This is in response to a request for an advance decision from an authorized certifying officer of the Forest Service, United States Department of Agriculture (Forest Service), regarding payment of a $75 fee to the Wisconsin Department of Natural Resources (DNR) for the processing of a permit under Wis. Stat. Ann. §§ 30.28, 31.29 (Supp 1978, West). DNR contends that it is empowered to collect a permit fee from the Forest Service under the authority of § 404(t) of the Federal Water Pollution Control Act (WPCA), 33 U.S.C.A. § 1344(t), as added by § 67(b) of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1606. For the reasons set forth below, we find that, without a clearer basis to conclude that a private person engaging in the same activity planned by the Forest Service would be subject to a State requirement governing the discharge of dredged or fill material, the permit fee may not be paid.

The Forest Service plans to construct an impoundment to create a wildlife flowage in the Chequamegon National Forest (Chequamegon) on the East Fork feeder to Lynch Creek in Sawyer County, Wisconsin. This construction will create a wetland where none previously existed. As a result of this construction, incidental discharges of dredged and fill material may flow into Lynch Creek.

Section 404(t), added by the 1977 Amendments, is the final portion of the section of the WPCA dealing with the discharge of dredged and fill material into navigable waters. It provides:

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> "Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary [of the Army] to maintain navigation."

Section 404(t) was enacted in response to the decisions in Environmental Protection Agency v. California, 426 U.S. 200 (1976) and Minnesota v. Hoffman, 543 F. 2d 1198 (8th Cir. 1976); cert. denied 430 U.S. 977 (1977). S. Rep. No. 95-370, 67-68 (1978). In Environmental Protection Agency v. California, supra, the issue arose under the 1972 Amendments to the WPCA. Under the law, a State which qualified could assume from the Federal Government the role of regulating the discharge of pollutants (other than dredged or fill material) into navigable waters. Pub. L. No. 92-500, 86 Stat. 880. The question in EPA was whether Federal installations discharging water pollutants into navigable waters in a State with a federally-approved program were required to secure permits from the State.

Section 313 of the WPCA then 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. The Court, finding no clear congressional mandate, concluded that the quoted language, while it required Federal installations to comply with State substantive requirements, did not require them to obtain State permits.

Minnesota v. Hoffman, supra, involved the discharge into navigable waters by the Corps of Engineers of dredged material. Discharge of dredged spoil was specifically excepted from the system of pollution discharge regulation discussed in Environmental Protection Agency, supra, under which a State could assume the Federal regulatory role. The 1972 version of section 404 required that a permit be secured from the Corps of Engineers by anyone seeking to discharge dredged spoil into navigable waters. The State of Minnesota argued that the Corps was required by section 313 of the 1972 version of the act, quoted in part above, to comply with State water quality control standards with respect to the Corps' own dredging operations in State navigable waters.

Rejecting this contention, and relying in part on Environmental Protection Agency, supra, the Court of Appeals stated that it found no "clear Congressional mandate" in the 1972 version of section 404 that the dredging operations of the Corps be subject to State control. Rather, the Court found the overriding congressional intent in the 1972 Amendments to be that these dredging activities necessary for the maintenance of commerce not be "unreasonably impeded." 543 F. 2d at 1206. The Court therefore held that Minnesota's substantive water pollution standards were not applicable to the Corps' dredging activities.

The 1977 Amendments to the WPCA, which, as discussed above, were intended to overcome the effect of these two decisions, changed the quoted language of the 1972 version of section 313 to require that Federal officers, agents, and employees--

> "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 water pollution in the same manner, and to the same extent as any nongovernmental entity * * *." Section 61(a), Pub. L. No. 95-217.

As amended by the 1977 Amendments, section 313 goes on to say, more specifically, that--

> "The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever) * * *."

In addition, the 1977 Amendments added section 404(t). Since the Minnesota decision held that section 313 did not apply to the Corps' own dredging activities, the Congress added subsection (t) to section 404, the section of the act dealing specifically with dredging activities and permits. While section 404(t) does not (as does section 313, as amended) specifically mention permit requirements as among the requirements with which Federal facilities must comply, it qualifies the word "requirements" with the same phrase, "substantive and procedural," which is said in section 313 to include "requirements respecting permits."

The purpose of the 1977 Amendment to section 404 was--

> "to insure that the dredge and fill activities of the U.S. Army Corps of Engineers are carried out in compliance with State, local, or interstate substantive or procedural requirements." S. Rep. No. 95-370, supra, 67.

Although the legislative history speaks in terms of activities of the Corps (presumably because it was the Corps' activities which were at issue in Minnesota and also because most of the Federal dredge and fill operations in navigable waters are conducted by the Corps), section 404(t) says that activities of all Federal agencies are covered.

A separate amendment to section 404 by the 1977 Amendments establishes a program, analogous to that in section 402 for other forms of pollutants, whereby the States can, upon qualifying, assume responsibility from the Corps for issuance of dredge and fill permits in their own navigable waters. Wisconsin has not done so.

In an opinion recommending that this matter be submitted to our Office, counsel for the Department of Agriculture concedes that, if the State of Wisconsin had a federally-approved program whereby it had assumed responsibility for issuance of permits for dredging activities in navigable waters, the Forest Service would have had to secure such a permit. (This is not because the Forest Service is discharging dredged spoil--it is, rather, building an impoundment--but by virtue of section 404(f)(2), which says that a federally-approved State program must cover discharges of dredged or fill material which are incidental to an activity either introducing a new use of navigable waters, or impairing the reach, circulation, or flow of such waters).

The mandate of section 404(t) that Federal agencies comply with State requirements does not depend on whether the State has assumed the Corps' regulatory responsibility. 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. (See in this connection section 510 of the Act, 33 U.S.C. § 1370, which says that except as expressly provided, the FWPCA does not prevent the States from adopting or enforcing pollution control standards more stringent than the Federal standards under the Act and does not impair or affect any right or jurisdiction of the States with respect to their waters.)

Accordingly, if the State of Wisconsin had a law governing dredging and filling which would require anyone doing what the Forest Service proposes to get a permit, the Forest Service would also be required to get a permit. In this case, however, counsel for the Forest Service apparently denies that such a State requirement exists:

> "The present wording of the Wisconsin statutes is aimed at the effect of the impoundment, and not at the 'discharge' effect. The fee is for the statutory purpose of reviewing and processing the transformation of the stream from basically public recreational use (boating) to a wildlife purpose (wetland creation). The Wisconsin statute creating the fee requirement is not essentially relevant to the congressional direction in section 404(t), and the demand [for a permit] is not supported by it."

We understand the position of the Forest Service to be that if the State had a program regulating dredging and filling activities, and requiring a permit for those engaging in such activities, the Forest Service would be required to obtain such a permit, whether the State program were federally-approved or based solely on State law. However, the Forest Service asserts that Wisconsin has neither a federally-approved program nor a State program which covers the kind of incidental discharge of dredge or filled material taking place here.

The State assessment of the fee in question is based on sections 30.28 and 31.39, Wisconsin Statutes. Section 31.39 gives the State authority to charge a fee for carrying out its duties under sections 31.02 to 31.38. Those sections deal generally with State regulation of dams and bridges affecting navigable waters. Those seeking to construct or operate dams on navigable waters must get State permits. Sections 31.04, .05, .07. But, among the permit requirements in chapter 31, we find no explicit reference to control of the discharge of dredged or fill material.

Similarly, section 30.28 of the Wisconsin Statutes gives the State authority to charge a fee for carrying out its duties under sections 30.10 to 30.37. None of those sections clearly requires a State permit for the discharge of dredged spoil. Section 30.12 requires a permit for the deposit of material upon the bed of any navigable water "where no bulkhead [i.e., shore] line has been established" or beyond a bulkhead line. But it seems reasonably clear that section 30.12 is not a water pollution control requirement, which is what section 404(t) of the WPCA contemplates, but a requirement intended to preserve navigability.

While ordinarily we do not question the interpretation by a State of its own laws, in this case the Forest Service has raised what appears, on the present record, to be a valid objection to the State's claim that its law is, by virtue of section 404(t), applicable to the Forest Service's planned construction. Accordingly, the fee may not be paid.

R.F.KELLER

Deputy Comptroller General
of the United States