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Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service.

Regulatory Fees . . . or Taxes? Sorting Out the Difference

In recent months, several installation environmental law specialists (ELSSs) have contacted ELD concerning potential payment of various fees imposed by states for environmental services. The fees vary in name and type to include "hazardous waste management fees," "water pollution protection fees," and "fees for environmental services." This article re-examines the familiar issue of federal liability for state imposed regulatory fees and taxes. The first section provides a review and update of the law of fee/tax liability. The second section outlines the steps to obtain Headquarters, Department of the Army approval to refuse payment of state imposed fees after an ELS has concluded that a state or local regulator has imposed an unlawful tax.

Fee/Tax Liability

General

In general, the federal government is immune from state requirements including fees and taxes. This immunity is constitutionally established through the Supremacy Clause,¹ and

the Plenary Powers Clause.² In addition, the Supreme Court established very early that "the Constitution and the laws made in pursuance thereof are supreme . . . and control the laws of the respective states, and cannot be controlled by them."³

Regarding taxes, the federal government cannot be made to pay a tax without a clear "congressional mandate."⁴ Likewise, the federal government is not subject to state requirements unless it has clearly consented to such in an unequivocal waiver of sovereign immunity.⁵ These waivers cannot be implied,⁶ and must be strictly construed in favor of the United States.⁷

Statutory Scheme

Among the major environmental laws, there are four waivers of sovereign immunity concerning the issue of fees.

Clean Water Act (CWA): Congress waived immunity for "all [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent as any non-governmental entity including the payment of reasonable service charges."⁸

Resource Conservation and Recovery Act (RCRA): Federal facilities' solid and hazardous waste programs must comply with "all [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges."⁹ Unlike the CWA, the RCRA further defines these "reasonable service charges" to include:

" . . . fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed"¹⁰

1. U.S. CONST. art. VI, cl. 2.

2. U.S. CONST. art. I, § 8, cl. 17.

3. *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819).

4. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954).

5. *Hancock v. Train*, 426 U.S. 167, 198 (1976).

6. *Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554 (1920).

7. *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992).

8. 33 U.S.C.A. § 1323(a) (West 1999).

9. 42 U.S.C.A. § 6961(a) (West 1999).

10. *Id.*

Safe Drinking Water Act (SDWA): The 1996 amendments to the SDWA added a waiver as to regulatory fees that is virtually identical to the RCRA waiver.¹¹

Clean Air Act (CAA): The CAA waiver may be broader than those found in the CWA, RCRA, or SDWA, because it omits the word “reasonable” from its waiver that requires compliance with:

[A]ll [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent as any non-governmental entity. The preceding sentence shall apply . . . to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program¹²

Fees v. Taxes

All of the above waivers of sovereign immunity only concern fees assessed by states against the federal government. Fees are charges for services rendered by state or local governments in administering their environmental programs. As one court put it, the “classic regulatory fee” is a levy “imposed by an agency upon those subject to its regulation” and used to raise money that is then placed into “a special fund to defray the agency’s regulation-related expenses.”¹³ Besides such indirect regulatory purposes as targeted revenue raising, fees may also accomplish a direct regulatory purpose such as encouraging or discouraging certain behavior (for example, waste reduction). By contrast, taxes are enforced contributions to provide for the

general support of the entire community. The environmental waivers quoted above do not waive sovereign immunity for state taxation.

Drawing the distinction between a fee and a tax is legally important, but is often difficult to accomplish. In 1978 the Supreme Court in *Massachusetts v. United States*¹⁴ established a test for analyzing all government-imposed fees for services. Under the *Massachusetts* test, if a fee satisfies all of the following three prongs it may be paid as a reasonable service charge:

- (1) Is the assessment non-discriminatory?
- (2) Is it a fair approximation of the cost of the benefits received?
- (3) Is it structured to produce revenues that will not exceed the regulator’s total cost of providing the benefits?

The Department of Defense (DOD) issued a guidance document in June 1984 stating that all environmental service charges levied by a state should be evaluated against the three *Massachusetts* criteria.¹⁵ In 1996, a DOD instruction¹⁶ incorporated these criteria with others in guidance on when environmental fees are payable. Although the waivers of sovereign immunity noted above were passed after *Massachusetts*, they are consistent with it and may reflect an attempt by Congress to codify at least part of the test.¹⁷ Moreover, the Department of Justice (DOJ) has adopted the *Massachusetts* standard as the method for analyzing fee/tax issues. For example, in litigation involving state hazardous waste fees in New York, the DOJ argued that the test was applicable to bar the state from imposing the fees.¹⁸

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11. *Id.* § 300j6(a).

12. *Id.* § 7418(a).

13. *Maine v. Department of the Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992).

14. 435 U.S. 444 (1978). *Massachusetts* involved state immunity from federal taxation. The Court recognized that the states have a qualified immunity from federal taxation and established a three-pronged test to determine whether the immunity applies. By analogy the same principle may be applied in the context of state taxes on federal facilities. The use of the analogy was adopted by the First Circuit in *Maine v. Department of the Navy*. It should be noted, however, the test was not adopted by the Eighth Circuit in *United States v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990).

15. Memorandum, Assistant Secretary of Defense for Installations to Service Secretaries, subject: State Environmental Taxes (4 June 1984). Although this memorandum does not specifically mention the *Massachusetts* case, it details the *Massachusetts* criteria as the basis for determining whether fees from a state are reasonable service charges or taxes.

16. U.S. DEP’T OF DEFENSE, INSTR. 4715.6, ENVIRONMENTAL COMPLIANCE (24 Apr. 1996). This states that it is DOD policy to:

- 4.7. Pay reasonable fees or service charges to State and local governments for compliance costs or activities except where such fees are:
 - 4.7.1. Discriminatory in either application or effect;
 - 4.7.2. Used for a service denied to a Federal Agency;
 - 4.7.3. Assessed under a statute in which the Federal sovereign immunity has not been unambiguously waived;
 - 4.7.4. Disproportionate to the intended service or use; or
 - 4.7.5. Determined to be a State or local tax. (The legality of all fees shall be evaluated by appropriate legal counsel).

17. For example, the fee waivers in RCRA and SDWA define reasonable service charges to include “nondiscriminatory charges,” an apparent codification of the first prong of the *Massachusetts* test. These statutes also enumerate several types of fees that are payable, which may reflect a conclusion as to the benefits that such fees would provide to regulatory programs (i.e., addressing the second and third prongs of the test).

Analysis under Massachusetts

Each of the prongs of the *Massachusetts* test has been further illuminated by litigation concerning environmental fees.

Discrimination Prong: Under *Massachusetts* the federal government must not be treated any differently in the enforcement of the fee requirement than other regulated entities. For example, in a case involving the imposition of RCRA hazardous waste fees, a federal district court summarily found that a state, which exempted itself from imposition of the fees, violates the nondiscrimination prong of the *Massachusetts* test.¹⁹ Although analysis of this prong under the CAA may lead to a contrary result,²⁰ installations should nevertheless be alert to discriminatory air program fees.

The practice of states exempting their own programs is not uncommon. A recent ELD review of a Kansas statute revealed exactly this discrimination.²¹ Analysis under the discrimination prong is generally the easiest aspect of fee/tax review because a problem may be plain from statutory text. An ELS reviewing a state statute should be careful to look for any provisions of state law which exempt out any particular entity: government or private. If the entity is in the same legal position as the federal government (that is, a user of regulated substances, generator of regulated pollutants, or an applicant for environmental permits) it must be subject to the same fees.²²

Benefits Prong: The fee charged must be a fair approximation of the benefits received to be considered “reasonable.” In announcing the three-part test in *Massachusetts*, the Supreme Court stressed that “[a] governmental body has an obvious interest in making those who *specifically benefit* from its services pay the cost”²³ Indeed, courts have determined that the “benefits to be examined in applying the test are those on whom the charges are imposed, not merely benefits to the public at large.”²⁴ Over the years, however, a strict application of the benefits prong has eroded. Litigation in New York illustrates this point, where a federal district court found that hazardous waste generator and transporter fees were permissible even though federal facilities did not receive specific service.²⁵ According to the court “the second prong of the *Massachusetts* test does not require an exact correlation, . . . between the costs of the overall services provided and the fees assessed for such services.”²⁶ The court noted that whether a federal entity actually uses any state services is irrelevant, because they constitute a “benefit” as long as the United States *could* use the state’s services in the future, if needed. Likewise, a simple showing that the dollar value of specific services rendered by the state was less than charges for those services was not enough to establish a lack of benefit. Such a showing does not take into account “overall” benefits that facilities receive as a result of program availability.²⁷ According to the court, the state need only show “a rational relationship between the method used to calculate the fees and the benefits available to those who pay them.”²⁸ The First Circuit pursued similar reasoning in a RCRA fee case.²⁹

18. New York State Dep’t of Env’tl. Conservation v. United States Dep’t of Energy, 850 F. Supp. 132, 135 (N.D. N.Y. 1994). The case involved fees imposed prior to a 1992 amendment to RCRA that created the waiver quoted above. The court was construing a previous waiver that obligated the federal government to pay “reasonable service charges.” *Id.*

19. New York State Dep’t of Env’tl. Conservation v. United States Dep’t of Energy, 89-CV-194 to 197, 1997 U.S. Dist. LEXIS 20718, at *22 (N.D. N.Y. Dec. 24, 1997). Ironically, the court ordered the United States to pay the fees because the state had corrected the discriminatory practice by retroactively paying the fees during the litigation.

20. United States v. South Coast Air Quality Management Dist., 748 F. Supp. 732 (C.D. Cal. 1990). The court held that it was not discriminatory to exempt a state from air fees while the United States must pay. The court reasoned that the CAA waiver of sovereign immunity was “to the same extent as any non-governmental entity . . .” *Id.* Accordingly, under the CAA, a state may be treated differently as it is considered a “governmental entity.”

21. Memorandum, Environmental Law Division, subject: Kansas Solid Waste Tonnage Fee (2 Aug. 1999). Referring to Kansas statute (65-3415b(a), the memorandum notes that “[t]he State of Kansas has established a statutory scheme that allows for the collection of solid waste tonnage or ‘tipping’ fees of \$1.00 for each ton of solid waste disposed in any landfill in the state.” Referring to Kansas statute (65-3415b(c)(5), the statute provides, however, that these fees do not apply to “construction and demolition waste disposed of by the state of Kansas, or by any city or county in the state of Kansas, or by any person on behalf thereof.” The memorandum concludes that the fee is discriminatory and should not be paid.

22. The DOD success in encouraging the state of California to revamp its hazardous waste fees to remove discriminatory provisions is another example of this approach.

23. *Massachusetts v. United States*, 435 U.S. 444, 462 (1978) (emphasis added).

24. *United States v. Maine*, 524 F. Supp. 1056 (D. Me. 1981).

25. New York State Dept. of Env’tl. Conservation v. United States, 850 F. Supp. 132 (N.D. N.Y. 1994).

26. *Id.* at 142.

27. *Id.* at 136.

28. *Id.* at 143.

The federal government has had little success in challenging environmental fees on the basis that they are excessive or do not approximate the costs of benefits received. The cases noted above demonstrate that federal courts may be expected to apply deferential standards when analyzing the “reasonableness” of environmental fees. An installation contesting a fee solely on the basis that there are little or no benefits should be alert to these broad standards. Given the current state of the law, the overwhelming majority of “benefits” analyses will lead to the conclusion that the state may levy the fee.

Fee Structure Prong: Is the fee structured to produce revenues that will not exceed the total cost to the state of the benefits supplied? If this prong is addressed strictly in terms of total program revenues as compared to expenditures, relief from payment of fees will be unlikely as long as there is a “rough relation between state regulatory costs and the fees charged.”³⁰ This analytical approach has not received much attention in practice probably because obtaining the fiscal information necessary to pursue it successfully would be difficult.

Problems associated with the third prong are more easily identified when a state fails to restrict the use of environmental fees to related environmental programs. For example, ELD concluded that installations in Georgia should not pay certain hazardous waste fees because these revenues are placed into a fund from which the state legislature may make general appropriations. Similarly, DOJ’s Office of Legal Counsel opined that a District of Columbia CAA program of charging monthly fees for parking spaces was essentially designed to create a subsidy for its mass transit system.³¹ Environmental law specialists should raise concerns whenever state statutes allow environmental fees to be used for broad purposes or to be co-mingled with unrelated state funds.

Procedures for Approval to Not Pay Unlawful Fees

In resolving environmental fee/tax issues, it is essential that all DOD facilities within a state act in unison. Inconsistent approaches among installations to a fee/tax issue are a recipe for long-term contentious relations between the non-paying installation and the regulatory agency. To maintain an installation’s credibility and to avoid acrimony that can spill over into all media programs, thorough coordination among all DOD (and, preferably, all federal) installations and with headquarters

is required before deciding to not pay fees. Moreover, the ability of the United States to successfully litigate fee/tax cases may be thwarted by installations that take inconsistent positions on issues that arise.

As noted at the outset, the four environmental statutes discussed above all contain waivers of immunity for the payment of regulatory fees. In practice, installations should be paying all environmental fees assessed by states under these programs unless ELD, in consultation with other DOD services, makes a written determination that they are unlawful taxes. In general, when a state agency requests the payment of a regulatory fee, the installation ELS should be the first to analyze the issue of liability using the chart contained in the previous section. The ELS should research the state law, make copies of relevant statutes, and examine prior versions of the statutes to determine if there has been a recent change. In addition, the ELS should determine whether the installation has paid the fee in the past, and note any other relevant background information.

If the ELS concludes that the fee should not be paid, the ELS should diplomatically ask the regulatory agency to delay enforcement of the fee until it has been reviewed by higher federal authorities. Often times the state agencies will not be familiar with the concept of sovereign immunity, or the *Massachusetts* test. The ELS should explain the laws and request cooperation. The ELS should stress that the installation has a duty and obligation to maintain compliance with all state laws and regulations, but that a sovereign immunity issue affects the installation’s authority to pay the fee, and must be addressed at higher levels.³²

The ELS should next forward the ELS’s legal opinion detailing the specific statutory sections and relevant facts to the servicing Army regional environmental coordinator (REC) and the major command. The Army REC should alert the ELD and all Army installations within the jurisdiction to the issue and find out whether each installation has been paying the fees in question. Based on input from other Army installations, the Army REC should augment the factual summary and legal opinion with additional information and legal analysis. The Army REC then coordinates the issue with the designated DOD REC,³³ who has responsibility for developing a DOD position on issues of common concern to all military installations and RECs.³⁴ The DOD REC should serve as the primary point of contact with the state on the issue, to ensure that all military installations speak with one voice.³⁵ Should differences arise among

29. *Maine v. Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992). See *New York State Dep’t of Env’tl. Conservation v. United States*, 772 F. Supp. 91 (N.D. N.Y. 1991) (discussing the second and third prongs of the *Massachusetts* test).

30. *Maine v. Navy*, 973 F.2d at 1013.

31. Whether the District of Columbia’s Clean Air Compliance Fee May Be Collected from the Federal Government, Op. Office of Legal Counsel, DOJ, 1996 OLC LEXIS 10 (23 Jan. 1996). This opinion, while it did not specifically track with the structure of the *Massachusetts* test, is an excellent discussion of the legal principles that support it.

32. William D. Benton & Byron D. Baur, *Applicability of Environmental “Fees” and “Taxes” To Federal Facilities*, 31 A.F.L. REV. 253, 261 (1989). This article includes many practical tips on resolving fee/tax issues.

DOD services as to whether a fee in question should be paid, the DOD REC will have the primary responsibility to resolve those differences.

As noted above, Army RECs should coordinate factual summaries and legal opinions with the ELD as well as the DOD REC. This will allow ELD to make coordination with the headquarters elements of the other DOD services, if needed.³⁶ In addition, for RCRA fee/tax questions, ELD effects any necessary policy coordination with the Army secretariat (the DOD-designated executive agent for RCRA issues)³⁷ through the Army General Counsel. The Environmental Law Division also consults with DOJ to determine if a particular position will be supported in case of litigation over RCRA-based fees.

The key to resolving fee/tax issues efficiently is the initial research and opinion by the ELS, followed by further development and active coordination of the issue by both the Army and DOD RECs. Following the procedures outlined above will allow the installation to resolve each fee/tax issue while minimizing damage to working relationships with regulators. That is, regulators should be instructed that fee/tax issues are significant legal and policy matters that are addressed by "higher headquarters," and that decisions to withhold payments for particular fees are not made at the installation level. Major Cotell and Lieutenant Colonel Jaynes.

33. Where the Army REC is also the DOD REC, that office would perform dual functions. See U.S. DEP'T OF DEFENSE, INSTR. 4715.2, DOD REGIONAL ENVIRONMENTAL COORDINATION para. 4.3.1 (3 May 1996). Under this Instruction, the Army REC also serves as the DOD REC for EPA Regions 4, 5, 7, and 8. Air Force RECs are also DOD RECs for Regions 2, 6, and 10. Navy RECs are also DOD RECs in Regions 1, 3, and 9. *Id.* para. 3.1.

34. *Id.* para. 5.4.1. Under this policy, the DOD REC for each region is responsible for monitoring and coordinating the consistent interpretation and application of DOD environmental policies on military installations.

35. *Id.* para. 5.2.1.

36. Coordinating fee/tax issues typically results in the ELD preparing legal opinions on whether a particular fee is payable. Sample analyses for fee issues in Georgia, California, and Kansas are available on request.

37. U.S. DEP'T OF DEFENSE, INSTR. 4715.6, ENVIRONMENTAL COMPLIANCE, enclosure 2 (24 Apr. 1996).

Fee/Tax Template

The following summarizes the foregoing discussion into a template for analyzing fee/tax issues:

A. *Closely examine the applicable waiver of sovereign immunity.*

That is, look at the waivers reviewed above for the CWA, RCRA, SDWA, or CAA to see if the fee in question is clearly within the general scope of the waiver.

B. *Does the levy pass each of the prongs in the Massachusetts v. United States test?*

The following three prongs reflect a lens for further examining waivers of sovereign immunity for regulatory fees based on judicial decisions. If the answers to all three of the primary questions are yes, then the fee is a payable service charge, not an unlawful tax.

1. Is the levy imposed in a nondiscriminatory fashion?

- Are there regulated entities within the state on whom the fee is not imposed?
- Are those entities similarly situated with the federal government (i.e., do they generate regulated substances and apply for environmental permits)?
- Is the state government required to pay its own fees?

2. Is the levy based on a fair approximation of the costs of the benefits (i.e., is it associated with a discernible benefit to the payor)?

-- Characteristics associated with benefits to the payor (i.e., "user" fees):

- payments are made in return for government-provided benefits
- duty to pay arises from voluntary use of services (e.g., receipt of a permit)
- failure to pay results in termination of services
- levy is imposed by an *agency* in capacity as vendor of goods and services
- payments are calculated to recoup actual costs of regulating the payor
- services, though not actually used by payor, are available to the payor
- payments, though not actually equal to direct services received, support overall general benefits of the regulatory program

-- Characteristics not associated with benefits to the payor (i.e., taxes):

- liability arises from status (e.g., assessments for property owners)
- failure to pay results in penalties
- duty to pay arises automatically, regardless of services provided
- levy is imposed by the *government* in capacity as a sovereign agent
- payments are fixed and charged the same to all users
- payments are used to provide benefits to the public at large
- services are not available to the payor

3. Is the levy structured to produce revenues that will not exceed the total cost to the state government of the benefits to be supplied to the payor?

- Does it demonstrably support only the cost to the state of administering the regulatory program?
- Does it produce net revenues to the state for potentially unrelated uses (i.e., non-regulatory government programs or the general public)?