



IN REPLY REFER TO:

United States Department of the Interior



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August 9, 1994

MEMORANDUM

TO: State Director, Bureau of Land Management, CA
State Director, Bureau of Land Management, NV

FROM: Acting Regional Solicitor, Pacific Southwest Region

SUBJECT: Water System Fees Billed by State/County to
Federal Agency Small Water Systems

This memorandum presents our legal opinion in response to your question that originated from the District Managers for Carson City, NV and Bakersfield, CA whether the Bureau of Land Management is required to pay the \$350.00 fee as invoiced by County Health Departments in California for analyses, monitoring and testing done on small water systems. We conclude that, absent certain limited exceptions described in this memorandum, your bureau is required to pay this fee. This opinion is being provided to other Interior bureaus with facilities in California so that a consistent position is taken on this issue.

FACTS

The initial request for an opinion was received from the Bureau of Land Management's (BLM) Bakersfield District concerning an invoice received from the Health Department, County of Mono, CA for Crowley Lake Campground. A second request was received from the BLM District Manager, Carson City, NV concerning an invoice received from the Health Department, County of Alpine, CA for Indian Creek Reservoir Campground. Each invoice is in the amount of \$350.00 for the annual small water system fee "mandated" by the California Safe Drinking Water Act of 1989, sometimes referred to as Assembly Bill 2995. California Health and Safety Code § 4010 et seq. The source of drinking water for both of these campgrounds is ground water provided to the public through a water system. As described in the cover memorandum from Alpine County, the fee is to "support [sic] County Health Department's Small Water System Program requirements of assuring that small

water systems in California counties meet all Federal and State standards and requirements as mandated under the Safe Drinking Water Act."

DISCUSSION

1. The California Safe Drinking Water Act Implements the State's Authority to Ensure Clean Drinking Water in Community Water Systems.

Various agencies within the Department of the Interior are owners and/or operators of small public water systems² in California as defined in the California Safe Drinking Water Act of 1989, Health and Safety Code (hereinafter "H&SC") § 4010 et seq. Many of these systems also meet the definition of noncommunity water

¹ Subsequent to receiving the opinion requests from BLM, the Fish and Wildlife Service, Sacramento Refuge Complex, and the Bureau of Reclamation, Central California Agency, Folsom, contacted the Solicitor's Office with the same question concerning invoices received by their respective offices from the local County Health Department.

² Public Water System is defined as follows:

a system for the provision of piped water to the public for human consumption that has 15 or more service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. A public water system includes the following:

(1) Any collection, treatment, storage, and distribution facilities under control of the operator of the system which are used primarily in connection with the system.

(2) Any collection or pretreatment storage facilities not under the control of the operator that are used primarily in connection with the system.

(3) Any person who treats water on behalf of one or more public water systems for the purpose of rendering it safe for human consumption.

CA. H&SC § 4010.1(f).

systems³ as defined in the Act. The invoices for the public water system fee were sent by the County Health Departments based on an amendment to the California Safe Drinking Water Act of 1989.

Article 2.5, Financial, and in particular § 4019.10 was added to the California Act in 1989 by State Assembly Bill 2995, to provide for fees to be imposed and collected from small public water systems in order to reimburse the State Department of Health Services for costs incurred for "conducting, monitoring, surveillance, and water quality evaluation relating to public water systems." H&SC § 4019.10(c). This section states that the fees charged "shall be sufficient to pay, but in no event shall exceed, the department's actual cost in conducting these activities." Id.

This section of the Act also classifies water systems based on the number of service connections, and sets forth the amount of the fee to be imposed. The notices received by BLM classified the campground systems as noncommunity water systems and assessed a fee of \$350.00 which is in accordance with H&SC § 4019.10(c). For the purposes of this memorandum, it is assumed that this characterization of the BLM systems is correct and thus the campgrounds are public water systems as defined in the Act and the fee was properly assessed as described in the Act. However, the Act provides for⁴ variances and exemptions which may apply to a particular system.

2. The Fee May be Assessed Against the Federal Government if there is a Waiver of Sovereign Immunity.

In general, before the United States is required to submit itself to a state process, such as obtaining a permit or paying fees, there must be a waiver of sovereign immunity. Such waiver of sovereign immunity must be "unequivocally expressed" in the statutory language. United States v. Idaho, 113 S. Ct. 1893

³ Noncommunity water systems are defined as:

(h) . . . a public water system that meets one of the following criteria:

(1) Serves at least 25 nonresident individuals daily at least 60 days of the year, but not more than 24 yearlong residents.

H&SC § 4010.1(h)(1).

⁴ See the discussion in Attachment A concerning exemptions and variances in the California Act.

(1993; United States v. Nordic Village, Inc. 112 S. Ct. 1011 (1992)). In a case discussing the waivers contained in § 118 of the Clean Air Act, 42 U.S.C. § 7418, § 6001 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6961, § 313 of the Clean Water Act, 33 U.S.C. § 1323, and § 8 of the Safe Drinking Water Act, 42 U.S.C. § 300j-6(a) the court recited the standard for waiver of sovereign immunity that there must be a "clear and unambiguous expression of congressional intent to waive immunity." State of Ohio v. U.S. Dept. of the Air Force, 17 Env'tl. L. Rep. 21,210 (S.D. Ohio 1987); See also, U.S. v. South Coast Air Quality Management District, 748 F.Supp. 732 (C.D. Cal. 1990) (both cases cite Hancock v. Train, 426 U.S. § 167 (1976)). Thus, there must be a clear statement in a federal statute that waives this immunity before a federal agency is required to comply with a state requirement. An executive branch employee cannot waive the sovereign immunity of the United States, only Congress can.

3. The Federal Public Water Systems Act (Safe Drinking Water Act) Provides a Waiver of Sovereign Immunity that Gives States Authority to Monitor and Control Federal Public Water Systems and Collect Service Fees.

Under the Public Water Systems Act, 42 U.S.C. § 300f et seq. (also referred to as the Federal Safe Drinking Water Act and hereinafter referred to as the SDWA), the federal government gives the states primary enforcement responsibility for public water systems and sets forth the requirements a state must meet in order to be allowed to enforce drinking water standards. 42 U.S.C. § 300g-2. The California Safe Drinking Water Act meets these requirements, and California can, therefore, assume the primary responsibility for enforcing compliance with pollution and contaminant standards for drinking water in the State.

The SDWA (§ 8 of the 1977 amendments) requires federal entities to comply with the Act in the following manner:

Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system . . . shall be subject to, and comply with, all Federal, State and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water . . . 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 recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced

in Federal, State, or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law.

42 U.S.C. § 300j-6 (emphasis added).

The waiver language in the SDWA, unlike that in § 313 of the Clean Water Act (CWA) or § 6001 of the Resource Conservation and Recovery Act (RCRA), does not contain the following language concerning fees: "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, . . . including the payment of reasonable service charges."⁵ The waiver language in the SDWA is very similar to that in § 118 of the Clean Air Act (CAA), 42 U.S.C. § 7418.⁶ We could find only one

⁵ Section 1323 of the Federal Clean Water Act provides as follows:

(a) Each department, agency, or 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 runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, 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, including the payment of reasonable service charges.

33 U.S.C. § 1323(a) (emphasis added).

⁶ Section 118 of the Clean Air Act provides as follows:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government. . . 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

case that has addressed the question of whether a federal agency must pay fees charged by a state pursuant to the type of waiver language found in the SDWA. In that case, the court addressed the waiver language in the CAA and found that the waiver was expansive and that not including the state imposed fees in the waiver would frustrate the purpose of the CAA. U.S. v. South Coast Air Quality Management District, 748 F.Supp. 732 (C.D. Cal. 1990).

While the SDWA waiver section, unlike the waiver in the CWA, does not have an express direction for payment of fees, it contains a very broad waiver of immunity that in one court's opinion, includes the fees at issue. Id. This court found that such waiver language "contains a clear and unambiguous waiver of sovereign immunity, [such that] federal facilities are subject to the [] imposed fees." Id. at 739. This conclusion is supported by the legislative history of the 1977 amendments to the SDWA: Congress, by subjecting federal facilities to state and local safe drinking water requirements, explicitly waived the applicability of the doctrine of sovereign immunity to those sources. See State of Ohio v. U.S. Dept. of the Air Force, 17 Env'tl. L. Rep. 21,210 (S.D. Ohio 1987).

4. Fees Imposed By the County Health Departments Must Not Exceed the Actual Cost of Services Rendered.

requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law.

42 U.S.C. § 7418 (emphasis added).

⁷ The court in U.S. v. South Coast Air Quality Management District, declined to consider the federal agencies' argument that even if the CAA waived sovereign immunity for fees in general, the fees at issue were in actuality excessive or an impermissible tax. The court ruled that it did not need to consider these arguments because the waiver in the CAA was clear and unambiguous and that Congress had consented to the imposition of state assessed fees to properly implement the CAA. This same analysis should apply to the SDWA because the waiver language in the SDWA is the same as that in the CAA.

While CA. H&SC § 4019.10(c) states that the fee charged may not exceed the actual cost of the service provided, this has been interpreted broadly in favor of the state. In a dispute about the amount of a fee charged, the District Court for the Northern District of New York held that:

The mere fact that the dollar value of the specific services rendered to the subject facilities is less than the regulatory fees charged by the plaintiff is not dispositive of the issue of whether such fees are unreasonable. The federal entities also benefit . . . because such programs and services are available for the defendant's use in the future and provide benefits to all users statewide.

New York State Department of Environmental Conservation, et al. v. U.S. Dept. of Energy, et al., 772 F.Supp. 91, 102 (N.D.N.Y., 1991).

Thus, because of this broad interpretation of benefit from the fees charged by a state, we believe that BLM or other similarly situated federal agencies would have difficulty showing that the \$350.00 fee charged to each campground by the County Health Department was unreasonable or exceeded its actual cost to perform the inspections, monitoring and evaluation as required by the state act. Each campground or facility could probably demand a detailed invoice, which it did not receive, that sets forth the charge and cost for each service provided; however, in light of the above holding it is unlikely that the itemized costs would be found unreasonable.

5. The Fee as Tax Argument Will Not Sustain an Exemption in this Case.

While it is true that neither the federal nor state governments can tax one another without the other's unambiguous consent, it is unlikely the fee imposed under the California Safe Drinking Water Act would be found to be a tax. In New York State v. Dept. of Energy, 772 F.Supp. 91 (N.D.N.Y., 1991) the Court held that the test for determining whether a fee is a tax depends on the nature of the overall benefits which a facility receives rather than whether the fee charged by the state exceeds the actual cost of the service provided. Id. at 99. In citing this test, the District Court noted that it was developed by the United States Supreme Court in Massachusetts v. United States, 435 U.S. 444 (1978), where the Supreme Court noted:

So long as the charges do not discriminate against Federal functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the State Gov-

ernment of the benefits to be supplied, there can be no substantial basis for a claim that the State Government will be using its taxing powers to control, unduly interfere with, or destroy the United States' ability to perform essential services.

Id. at 466.

The State will most likely be able to show that all small water systems in the state have received invoices for relevant charges under § 4019.10. A claim that the federal agency is being discriminated against would probably not succeed, because all systems are being charged according to statutory guidelines which the State has the express authority to create. It would be unlikely that this fee would be considered a tax.

Because, as noted above, the "actual cost" requirement has been broadly interpreted in favor of the states, it will most likely be difficult, if not impossible, to prove that the \$350.00 fee exceeds the costs and benefits conferred by the State. Indeed, as noted by the New York District Court, the Supreme Court noted in the Massachusetts case that this part of the "test" does not fail ". . . even when a particular entity receives no specific service at all." NYS v. Dept. of Energy, 772 F.Supp. at 99-100, quoting Massachusetts v. U.S. at 468.

Finally, because case law holds, in interpreting the Federal Acts as discussed above, that states have been granted the authority to regulate public water systems, and that federal entities must comply with such state and local regulations, the federal agencies probably will be unable to argue that its "ability to perform essential services" has been interfered with by California's Safe Drinking Water Act, or by its imposition of the \$350.00 fee for testing ground water in federal noncommunity water systems.

CONCLUSION

The Federal Safe Drinking Water Act contains a waiver of sovereign immunity that requires federal agencies to pay the fees as imposed by the local county health departments pursuant to the California Safe Drinking Water Act. A challenge to the fee that it is excessive, unreasonable or a tax would most likely fail. Thus, federal agencies must pay the fee being charged by the State of California, through the local county health departments, on small public water systems unless the system can obtain a

variance or meet the requirements of an exemption under the Act.



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cc: Ralph Mihan, Field Solicitor, San Francisco, CA
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⁸ In a related area, the Department of the Interior, Departmental Manual, Part 518, Waste Management, states that it is the policy of the Department to comply with Federal, State, interstate and local waste management requirements (including those contained in the SDWA) in "Departmentally-managed lands and facilities" and to pay registration and permit fees. 518 DM 2.4 (6/30/94).

ATTACHMENT A

Available Exemptions/Variations Under the California Safe Drinking Water Act

If the federal agency can show that its system meets the elements stated in § 4010.3 of the California Safe Drinking Water Act, the Act would not apply, and the fee could not be collected. This section states that:

This chapter does not apply to a public water system which meets all of the following conditions:

(a) Consists only of distribution and storage facilities and does not have any collection and treatment facilities.

(b) Obtains all of its water from, but is not owned or operated by, a public water system to which this chapter applies.

(c) Does not sell water to any person or user, except for the sale of water to users pursuant to § 2705.5 of the Public Utilities Code through a submetered service system if the water supply is obtained from a public water system to which this chapter applies.

CA. H&SC § 4010.3 (1993).

Although we did not have sufficient information to determine whether or not either of the campgrounds in question meet these requirements, it would appear that the facilities in question would not meet requirement (b). Therefore, the facilities would not meet these requirements and would not be exempt from the fee.

Section 4010.8 provides an exemption for "state" small water systems. A state small water system is defined as "a system for the provision of piped water to the public for human consumption that serves at least five, but not more than 14, service connections and does not regularly serve more than an average of 25 individuals daily for more than 60 days out of the year." CA. H&SC § 4010.1(k). This definition does not restrict these systems to only those of the State of California and thus if federal facilities meet the requirements of this exemption they would be exempt from the fee. This section is as follows:

This chapter does not apply to state small water systems except as provided under this section:

(a) The department shall adopt regulations

specifying minimum requirements for operation of a state small water system. The requirements may be less stringent than the requirements for public water systems as set forth in this chapter.

(b) The minimum requirements for state small water systems adopted by the department pursuant to subdivision (a) shall be enforced by the local health officer or a local health agency designated by the local health officer. In counties which do not have a local health officer, the requirements shall be enforced by the department. Local health agencies may adopt more stringent requirements for state small water systems than those specified in the state regulations.

(c) The reasonable cost of the local health officer in carrying out the requirements of this section may be recovered through the imposition of fees on state small water system by the local governing body in accordance with § 510.

CA. H&SC § 4010.8.

Section 4010.5 also provides an exemption for systems that are used primarily for agricultural purposes. Under this section, any domestic service provided by the system in question must be only incidental to the agricultural purposes. If it could be shown that a facility meets this, an argument could be made that it would be exempt from the fee.

Article 4 of the Act discusses exemptions and variances from meeting the requirements and standards of the Act. It gives the "department" (California Department of Health Services) discretion to exempt any public water system from "any maximum contaminant level or treatment technique" if, for example, the system can show it is unable to comply with standards or treatment techniques due to "compelling factors" (H&SC § 4027(a)(2)). It seems unlikely this section could be used to exempt either BLM facility from the payment of the current fee because it would have to go through some process to establish its inability to comply, and then any exemption or variance granted is from the required standards, not from the fees, and is completely discretionary on the part of the State.