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DECISION

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

FILE: B-191747

DATE: JUN 6 1978

MATTER OF: National Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards

DIGEST:

1. National Oceanic and Atmospheric Administration must comply with local air quality standards and is subject to administratively imposed sanctions levied by local air pollution control authority since in section 118 of the Clean Air Act, as amended, 42 U.S.C. § 7418, Congress waived the defense of sovereign immunity in order to insure full Federal compliance with State and local air quality regulations.

2. Civil penalty administratively imposed by local air pollution control authority, levied pursuant to clear statutory authority, may be paid from Federal agency's appropriation for "necessary expenses" if incurred in the course of activities necessary and proper or incidental to fulfilling the purposes for which the appropriation was made.

By letter of March 10, 1978, Mr. C. J. Terry, Certifying Officer, Northwest Administrative Service Office, National Oceanic and Atmospheric Administration (NOAA), United States Department of Commerce, requested our advance decision as to the propriety of charging NOAA appropriated funds with payment of a fine levied by the Puget Sound Air Pollution Control Agency (PSAPCA) for NOAA's violation of local air quality standards.

Section 109 of Clean Air Act, 42 U.S.C. § 7409, gives the Administrator of the Environmental Protection Agency (EPA) responsibility for promulgating ambient air quality standards. However, responsibility for implementing these standards is assigned to the States which are in turn, required to develop and adopt "implementation plans" and submit them to EPA for approval. 42 U.S.C. § 7410. The record shows that the PSAPCA operates under the authority of the State of Washington's Clean Air Act implementation plan which has been approved by EPA. Section 118 of the Act (42 U.S.C. § 7418), subjects Federal facilities to these State and local air pollution control requirements. (Until recently, the Clean Air Act, as amended, was located in the United States Code at 42 U.S.C. § 1857-1858. After enactment of the Clean Air Act Amendments of 1977, infra, the Act is now located at 42 U.S.C. § 7401 et seq., and we will use the new designations hereafter.)

As amended by section 118 of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 711 (to be codified in 42 U.S.C. § 7418), section 118 provides that:

"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 of air pollutants, and each officer, agent, and 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 non-governmental entity. The preceding sentence shall apply * * * (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable."

Further, Congress specifically provided for the liability of Federal agencies to pay civil penalties administratively imposed by the States when it enacted section 303 of Pub. L. No. 95-95, supra, which amended section 304(e) of the Clean Air Act, 42 U.S.C. § 7604(e), to provide in pertinent part that:

"* * * Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--

*   *   *   *   *

"(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring

> compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 118."

With respect to the liability of Federal agencies for civil penalties, H.R. Rep. No. 95-294, supra 200, states that:

> "The amendment is also intended to resolve any question about the sanctions to which noncomplying Federal agencies, facilities, officers, employees, or agents may be subject. The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources and for the owners or operators thereof. This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), to civil or criminal penalties, and to delayed compliance penalties."

Acting under authority of the above-quoted provisions, the PSAPCA cited the Department of Commerce, NOAA Ship OCEANOGRAPHER for violation of local air quality standards on September 21, 1977. On September 28, 1977, the PSAPCA issued a "Notice and Order of Civil Penalty" to NOAA's Pacific Marine Center, assessing a fine of $250 for the violation.

The violation occurred when the vessel's diesel engines were started, causing smoke to be emitted into the atmosphere for a short period until the engines had warmed up. NOAA officials have informally advised us that the citation and fine could have been avoided had NOAA personnel notified the PSAPCA prior to starting the engines and obtained permission to exceed emission standards. However, the Pacific Marine Center had not yet issued written directives to that effect and the Center's practice at that time was to notify PSAPCA only prior to starting steam powered engines which emit considerably more smoke than do diesel engines. We assume that the vessel's actions are covered by the State implementation plan and are subject to the sanctions therein since the Certifying Officer states that NOAA does not contest the facts of the violation and desires to pay the assessed fine.

Unless specifically waived by statute, Federal instrumentalities are not liable for State imposed sanctions or compliance with State regulations by reason of the Supremacy Clause of the Constitution (U.S. Const. Art. VI, cl. 2) and the doctrine of sovereign immunity. See Hancock v. Train, 426 U.S. 167 at 178 (1976). Adoption of section 118 of the Clean Air Act, supra, removed the legal barriers to

full Federal compliance with State air quality regulations, except for those exceptions expressly provided in that section. In other words, the provisions of section 118 constitute a waiver of sovereign immunity, so Federal facilities and the persons operating them must comply with all State and local air pollution requirements. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 196 (1977).

Accordingly, based on the law and facts discussed heretofore, NOAA is liable for payment of the fine imposed on it by the PEAPCA. The next issue raised by the Certifying Officer is whether NOAA's appropriations are available to pay the fine.

The appropriation "National Oceanic and Atmospheric Administration, Operations, Research, and Facilities," contained in the Department of State, Justice, and Commerce and the Judiciary, and Related Agencies Appropriation Act, 1978, Pub. L. No. 95-86, 91 Stat. 419, 431 (1977), provides, among other things, "For expenses necessary for the National Oceanic and Atmospheric Administration * * *."

The fine here in question is an administratively imposed civil penalty rather than a judgment of a court and it cannot be paid from the permanent appropriation provided for under 31 U.S.C. § 724a (1970 and Supp. V, 1975). Payment would have to be made from agency appropriations, if it is to be paid at all. It is a well settled rule that where an appropriation is made for a particular object, purpose or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 53 Comp. Gen. 351 (1973); 50 id. 534 (1971); 44 id. 312 (1964).

The expense here involved, although possibly avoidable, appears to have arisen from the normal operations of NOAA. Assuming that the proper NOAA officials confirm that assumption, and that the amount of the fine is otherwise proper, i.e., that federally owned facilities are treated in the same manner as non-federally owned facilities, we see no legal objection to the use of its appropriations to pay the fine.

R.F.KELLER

Acting Comptroller General
of the United States