REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES

Congressional Clarification Needed On Eligibility For Waivers Of Non-Federal Contributions For Dredged Material Confined Disposal Areas

The Army Corps of Engineers constructs facilities for containing contaminated dredged material on the Great Lakes and other waterways. Unless told otherwise by the Environmental Protection Agency, local sponsors of navigation projects must contribute 25 percent of the facilities' construction costs.

The Agency interprets its authority to waive construction costs one way, granting waivers in many cases involving millions of dollars, while GAO believes that the legislation can be interpreted another way--that might not have allowed so many waivers.

Under the circumstances, the waiver provisions should be clarified.

CED-77-135

OCTOBER 21, 1977

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

B-166506

The Honorable Harold T. Johnson
Chairman, Committee on Public Works
and Transportation
House of Representatives

The Honorable Jennings Randolph
Chairman, Committee on Environment
and Public Works
United States Senate

The Corps of Engineers dredges the Nation's channels and harbors in maintaining navigable waterways systems; this entails disposal of dredged material. At some disposals, the Corps is authorized to construct contained facilities for dredged material. Under legislation authorizing the construction of these facilities, the Federal Government pays 75 percent of construction costs and local interests pay 25 percent, unless they receive a waiver based on the Environmental Protection Agency's finding that certain conditions are being met, including a determination that applicable water standards are not being violated.

The Environmental Protection Agency interprets the legislation to mean that non-Federal interests are eligible for waivers if they are in compliance with a pollution discharge permit, since the legislation, read in conjunction with other relevant legislation, demonstrates that obtaining a discharge permit is the legal equivalent in these circumstances of not violating water quality standards. We believe that the legislation can also be interpreted to require the Agency to certify that applicable water quality standards (including water quality criteria) in fact are not being violated as a prerequisite to granting the waivers. Since the legislative histories of the waiver provisions do not clearly delineate which interpretation was intended by the Congress and a large amount of Federal funds is involved, we believe that additional congressional guidance should be provided on which interpretation was intended.

We made our review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67). Our review was made at the headquarters offices of the Corps of Engineers and the Environmental Protection Agency in Washington, D.C. We reviewed the legislation authorizing the construction of

confined-disposal areas and the waiver provision of that legislation, as well as related records and documents of both the Corps and the Environmental Protection Agency.

BACKGROUND

We have recently reviewed the environmental effects of the Corps of Engineers' dredging activities and issued a report to the Congress: "Dredging America's Waterways and Harbors--More Information Needed on Environmental and Economic Issues" (CED-77-74, June 28, 1977). As part of this review, we examined the Corps' confined-disposal dredged-material program on the Great Lakes. The program provides for facilities to contain polluted dredged material and prevent that material from reentering the lakes.

The confined-disposal program was authorized by section 123 of the River and Harbor Act of 1970 (33 U.S.C. 1165a). Section 123(a) of the act authorizes the Secretary of the Army (acting through the Chief of Engineers) to construct, operate, and maintain contained spoil-disposal facilities in the Great Lakes for the disposal of dredged material. Section 123(c) provides that, prior to construction of any such facility, the appropriate non-Federal interest is to agree, in writing, to provide the necessary lands, easements, and rights-of-way and to contribute to the United States 25 percent of the construction costs. The required non-Federal contribution may be waived under conditions set forth in section 123(d):

> "The requirement for appropriate non-Federal interest or interests to furnish an agreement to contribute 25 per centum of the construction costs as set forth in subsection (c) of this section shall be waived by the Secretary of the Army upon a finding by the Administrator of the Environmental Protection Agency that for the area to which such construction applies, the State or States involved, interstate agency, municipality, and other appropriate political subdivision of the State and industrial concerns are participating in and in compliance with an approved plan for the general geographical area of the dredging activity for construction, modification, expansion, or rehabilitation of waste treatment

facilities and the Administrator has found that applicable water quality standards are not being violated." (Underscoring supplied.)

Similar provisions providing for the waiver of local contributions on other navigation projects are as follows:

--Section 58(b) of the Water Resources Development Act of 1974 (Public Law 93-251, Mar. 7, 1974) for the Atchafalaya River and the Chene, Boeus, and Black bayous in Louisiana.

--Section 124 of the Water Resources Development Act of 1976 (Public Law 94-587, Oct. 22, 1976) applicable to the Corpus Christi ship channel in Texas and section 187 of the same act applicable to the Red River Waterway in Louisiana, Texas, Arkansas, and Oklahoma.

As of June 30, 1977, the Corps' plans called for the construction of 48 confined-disposal facilities on the Great Lakes costing about $263 million. Local contribution waivers had been granted for 31 of the 48 facilities. The total estimated project cost for the Great Lakes facilities for which waivers had been granted is about $188 million. In recommending the waivers, the Environmental Protection Agency has not, as a matter of policy, determined whether applicable water quality criteria (part of the water quality standards) are being met.

As of September 1977 no waivers had been granted under either section 58 of the Water Resources Development Act of 1974 or sections 124 or 187 of the Water Resources Development Act of 1976.

ENVIRONMENTAL PROTECTION AGENCY'S INTERPRETATION OF THE LAW

The Environmental Protection Agency construes the law to allow waiver of the 25-percent non-Federal contribution when the local entity is in compliance with an approved waste treatment implementation plan or a National Pollutant Discharge Elimination System permit, even though the entity may not yet be in compliance with water quality criteria.

The Agency pointed out (see app. I) that applicable water quality standards consist of (1) water quality criteria (numerical criteria for limiting water pollutants) and (2) a plan for implementing, maintaining, and enforcing the water quality criteria. After explaining that the approved plan referred to in section 123(d) of the River and Harbor Act of 1970 "* * * must refer to the implementation plan required by section 10(c)(1) of the Federal Water Pollution Control Act (33 U.S.C. 1160(c)(1))," the Agency stated:

> "If numerical water quality criteria are being violated, such violations may be due to non-point source contributors or dischargers from other point sources. Thus, the major indicium of compliance with water quality standards under the FWPCA [Federal Water Pollution Control Act] is compliance with an implementation plan. This view was codified by Congress in the 1972 Amendments, which provide (in section 402(k)) that compliance with an NPDES [National Pollutant Discharge Elimination System] permit is 'deemed' to be compliance with, inter alia, water quality standards (which are applicable under section 301(b) (1) (C) of the FWPCA Amendments). EPA, accordingly, considers that compliance with an approved implementation plan under the FWPCA constitutes compliance with the water quality standards which include the plan."

Under Federal Water Pollution Control Act amendments, pollutant discharge permits are used to regulate pollutant discharge into navigable waters and encourage efforts to meet water quality standards. Section 402(k) of the Federal Water Pollution Control Act amendments provides that compliance with a pollutant discharge permit shall be deemed compliance with water quality standards for the purposes of the enforcement provisions of the Federal Water Pollution Control act amendments, thereby effectively suspending that act's enforcement provisions. The Environmental Protection Agency construes the law to mean that any permit holder in compliance with such permit necessarily is in compliance with applicable water quality standards for the purpose of obtaining 25-percent additional Federal financing under section 123(d) of the River and Harbor Act of 1970.

Finally, the Agency stated:

> "In conclusion, EPA's position on the section 123(d) waiver question is a direct reflection of clear statutory language and Congressional intent. A waiver can be granted following a finding by the Administrator that, for the subject area, the political and industrial entities involved are participating in and in compliance with a plan/schedule of implementation and enforcement, and that applicable water quality standards are not being violated by dischargers which have reached the end of their schedule and, thus, which have reached the point of having to comply with the water quality criteria. Moreover as discussed above, entities operating under NPDES permits for which water quality criteria have not been finalized, (and therefore which have no plan/schedule of compliance and enforcement) are, nevertheless, in compliance with section 402(k); it follows that they would then be in compliance with the mandates of the FWPCA Amendments for the purposes of section 123(d) of the River and Harbor Act."

AN ALTERNATIVE INTERPRETATION

While the Environmental Protection Agency's interpretation of the law may be reasonable, section 123(d) of the River and Harbor Act of 1970 may be construed to require that water quality standards (including water quality criteria) not be violated if a local entity is to obtain 100-percent Federal financing of a confined dredged-material disposal facility. In other words, a waiver of the requirement that local entities contribute 25 percent of costs must be denied, even though the Agency Administrator has found that the local entity is participating in and complying with an implementation plan, if water quality criteria established in the plan are not being met. Under this interpretation, the local entity's compliance with Federal water pollution control laws does not automatically satisfy the requirements of the section 123(d) waiver provision.

The rationale underlying this position is that section 123(d) requires a finding of both compliance with a

plan and no violation of water quality standards. Water quality standards include numerical water quality criteria; therefore, a failure to fully comply with numerical water quality criteria constitutes a failure to meet water quality standards, and a local entity would not be eligible for the section 123(d) waiver of the non-Federal contribution if the area involved did not yet comply with water quality criteria. The fact that the local entity either was in compliance with a plan or that it had a pollutant discharge permit to discharge pollutants would not, for purposes of a waiver under section 123(d), negate the requirement that it had to comply with standards such as water quality criteria. Under this view, the waiver can be construed to be an incentive (reward) for achieving compliance with applicable water quality criteria. Those that have managed to reach the goals, including numerical criteria established in their implementation plans, are entitled to the reward.

LEGISLATIVE HISTORY

The waiver provision of section 123(d) originally appeared as section 111(e) of H.R. 19877, 91st Congress, 2d session (1970). Section 111(e) provided for waiver where the non-Federal entity was

> "* * * participating in an approved plan for the general geographical area of the dredging activity for construction, modification, expansion, or rehabilitation of waste treatment facilities and is making progress satisfactory to the Administrator."

This original version, however, was changed in conference to the form in which enacted; it does not refer to "making progress satisfactory to the Administrator."

The Conference report (H.R. 91-1782 (1970)), on pages 25 and 26, explains the modification to the waiver provision as follows:

> "The provision relating to waiver of the 25 per centum cost of construction is modified to require that prior to waiver that the Administrator of EPA must make a finding that applicable water quality standards are not being violated."

Environmental Agency officials said that this change was a mere language clarification and that "making progress satisfactory to the Administrator" is conceptually consistent with participating in and being in compliance with an approved plan to implement water quality criteria. Under the alternative interpretation, however, this change would not be viewed as a mere language change. The progress requirement was rejected, and the requirement that the Administrator find that applicable water quality standards are not being violated was added to the waiver provision. Thus it could be argued that a more quantifiable and potentially more stringent requirement was being imposed, particularly if it was intended that water quality criteria (a measurable part of water quality standards) be met prior to waiver.

We reviewed the legislative histories of section 58 of the Water Resources Development Act of 1974 and sections 124 and 187 of the Water Resources Development Act of 1976 (which provide for waivers similar to the section 123(d) waivers). We did not identify any additional clarification of the Congress intent as to how these waiver provisions should be implemented.

CONCLUSION

Section 123(d), 58, 124, and 187 provisions for waiver of the 25-percent non-Federal contribution are subject to two interpretations.

The first, held by the Environmental Protection Agency, is that compliance with a pollutant discharge permit constitutes compliance with applicable water quality standards for purposes of the section 123(d) waiver provision.

The second interpretation would require Agency certification that there is compliance with applicable water quality criteria as a prerequisite to eligibility for a waiver.

The waiver provision of section 123 was changed in conference from requiring progress satisfactory to the Administrator as a prerequisite to waiver to requiring that applicable water quality standards not be violated. Because there is no legislative record clarifying the conferees' intent on the change in the waiver provision, it remains unclear which of the two interpretations was intended by the Congress.

RECOMMENDATION

Because it is unclear which of two possible interpretations of the waiver provisions was intended by the Congress and because a substantial amount of Federal funds is involved, we recommend that the Senate Committee on Environment and Public Works and the House Committee on Public Works and Transportation initiate action to provide additional guidance as to which interpretation of the waiver provisions was intended.

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We are sending copies of this report to the Director, Office of Management and Budget; the Secretaries of Defense and the Army; the Chief of Engineers, Corps of Engineers; and the Administrator, Environmental Protection Agency.

Comptroller General
of the United States

APPENDIX I

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 17 1976

Richard R. Pierson, Esquire
Assistant General Counsel
United States General Accounting Office
Washington, D.C. 20548

OFFICE OF
GENERAL COUNSEL

Dear Mr. Pierson:

You have requested that we furnish you with EPA's official position regarding our interpretation and implementation of section 123(d) of the River and Harbor Act of 1970, 33 U.S.C. §1165a(d). Specifically, you have asked, (1) whether it is "EPA's position that, for purposes of section 123(d), local government is complying with an implementation plan, despite its current failure to meet water quality criteria", and if so what is our legal basis for this view; (2) what type of plan is referred to by the term "approved plan" as used in section 123(d), and who approves the plan; (3) why the legislative decision was made to use the present wording of section 123(d), establishing the standard for granting a waiver as "participating in and in compliance with an approved plan...and...that applicable water quality standards are not being violated."

Section 123(d) of the River and Harbor Act of 1970, P.L. 91-611 (the Act) provides for a waiver by the Secretary of the Army of the 25 percent non-federal contribution towards costs for construction of contained dredged spoil disposal facilities in the Great Lakes and connecting channels. The standard for such a waiver is that the particular area or political entity to which construction applies be "in compliance with an approved plan for the general geographical area of the dredging activity for construction, modification, expansion, or rehabilitation of waste treatment facilities", and also that "the Administrator has found that applicable water quality standards are not being violated." Section 123(d) of the Act. (emphasis added).

Before establishing any such contained dredged spoil facility, however, section 123(a) of the Act first requires the Secretary of the Army to comply with the

requirements of section 21 of the Federal Water Pollution Control Act, P.L. 84-660, July 9, 1956, as amended through April 3, 1970 ("FWPCA", as compared with the FWPCA Amendments of 1972, or "FWPCA Amendments"). Section 21(a) of the FWPCA required that each Federal agency "having jurisdiction over any real property or facility, or engaged in any Federal public works activity" shall "insure compliance with applicable water quality standards and the purpose of the Act." (emphasis added).

The term "applicable water quality standards" as used in the Act and the FWPCA, and cross-referenced, in the 1970 Act to the FWPCA is a term of art. The meaning of the term is supplied in section 10(c)(1) of the FWPCA:

> "If the Governor of a State or a State water pollution control agency files, within one year after the date of enactment of this sub-section, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Secretary determine that such State criteria and plan are consistent with paragraph (3) of this sub-section, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof." (emphasis added)

In other words, "applicable water quality standards", for the purposes of the FWPCA and also the River and Harbor Act, includes both State water quality criteria and a plan for the implementation and enforcement of such criteria.

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It is important to note that under section 10(c)(1) the Secretary of the Interior first must determine that the criteria and the plan are consistent with paragraph (3) of section 10(c), which sets forth "standards of quality" to "protect the public health or welfare, enhance the quality of the water, and serve the purposes of the [FWPCA]." Thus, before such "criteria" and "plan" can become the applicable water quality standards, they must be so approved by the Secretary of the Interior (whose functions were transferred to the Administrator by Reorganization Plan No. 3 of 1970). The term "approved plan" as used in section 123(d) must refer to the implementation plan required by section 10(c)(1) of the FWPCA, since no other "plan" under that Act arguably meeting the requirements of section 123(d) of the River and Harbor Act requires Federal approval.

If numerical water quality criteria are being violated, such violations may be due to non-point source contributors or dischargers from other point sources. Thus, the major indicium of compliance with water quality standards under the FWPCA is compliance with an implementation plan. This view was codified by Congress in the 1972 Amendments, which provide (in section 402(k)) that compliance with an NPDES permit is "deemed" to be compliance with, inter alia, water quality standards (which are applicable under section 301(b)(1)(C) of the FWPCA Amendments). EPA, accordingly, considers that compliance with an approved implementation plan under the FWPCA constitutes compliance with the water quality standards which include the plan.

It is significant that the Department of the Interior, EPA, and the State governments involved in administering the provisions of section 123(d) of the Act gave them uniform interpretation. See e.g., the applicable water quality standards of Illinois, for interstate waters (Appendix A), which show that both criteria and a plan were necessary elements of applicable water quality standards, and which show one manner in which delayed schedules of compliance were set for the listed municipal and industrial dischargers. Such uniform administrative interpretation of statutory provisions must be given great weight. Cf., Rosetti Contracting Co., Inc. v. Brennan, 508 F.2d 1039, 1042 (7th Cir. 1975)(citing Udall

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v. Tallman, 380 U.S. 1, 16 (1965); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971)).

Many dischargers were unable to comply with the plans of implementation to the point of being in compliance with the numerical water quality criteria. Thus, when the FWPCA Amendments were passed, Congress provided for additional, albeit limited, deferral. Section 301(b)(1)(C) of the FWPCA Amendments provides that:

> "In order to carry out the objectives of this Act there shall be achieved -
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>
> (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules or compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act."

By establishing this termination date for any schedules of compliance, Congress gave continuing validity to the dual nature of "applicable water quality standards": criteria and a schedule/plan of implementation.

The mechanism established to carry forward such "applicable water quality standards" under the FWPCA Amendments is the National Pollution Discharge Elimination System (NPDES), section 402. Section 402(a)(1) provides that a Federally issued NPDES permit shall contain conditions requiring the discharges to meet "applicable requirements" under sections 301, 302, 306, 307, 308, and 403. Section 402(a)(3) provides for a parallel program as operated by the States pursuant to the State NPDES program approval provisions of section 402(b). These requirements, or criteria, are implemented through EPA regulations. 40 C.F.R. 124.42, 124.43; Cf. 40 C.F.R. 124.44 (schedules of compliance in issued NPDES permits); 40 C.F.R. 125.22(b), 125.24(a); Cf. 40 C.F.R. 125.23 (Schedules of compliance in permits). Section 402(k) states that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309, and 505, with sections 301 [including section 301(b)(1)(C), relating to water quality standards], 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health." Thus, any NPDES permit holder in compliance with such permit is, by law, in compliance with the law's "applicable water quality standards" requirements.

Finally, reference is made to the legislative history of section 123(d) of the River and Harbor Act and the change in language from "making progress satisfactory to the Administrator", to the requirement that the Administrator of EPA make a finding that "applicable water quality standards are not being violated". From this change GAO has ascribed to Congress the intent to eliminate the time within which a discharger must come into compliance with the numerical water quality criteria (the plan/schedule of implementation aspect of "applicable water quality standards").

First, we question the validity of such an interpretation in light of clear statutory language and consistent administrative interpretation of that language. But second, and most important, the legislative history does not support GAO's contention. Rather, it is evident that Congress was struggling to clearly define the grounds for granting a waiver. "Making progress satisfactory to the Administrator" is conceptually consistent with "participating in and being in compliance with an approved plan to implement water quality criteria"; moreover, the Chairman of the Subcommittee on Rivers and Harbors apparently considered them to be the same. After the Conference changes were made, Chariman Blatnik stated that the requirements for a waiver would be met

> "where the Administrator of the Environmental Protection Agency finds that the local interests are participation (sic) in an approved plan for the construction, modification, expansion, or rehabilitation of waste treatment facilities and are making progress satisfactory to the Administrator." 116 Cong. Rec. 42509, 91st Cong. 2d Sess., Dec. 18, 1970. (emphasis added).

Without specific legislative history on the changed wording itself, no other conclusion can be drawn from what appears to be a mere language clarification. Such a change in policy as suggested by GAO surely would have generated some discussion in the legislative history. But Chairman Baltnik, during the same conversation, further confirmed that the principle justifying a waiver was participation in a continuing plan to reach the ultimate goal of compliance with water quality criteria:

> "...the Corps of Engineers, with proper justification, can waive the local contribution because the local interests are in compliance with an ongoing program of sewage treatment facility construction. id. (emphasis added).

In conclusion, EPA's position on the section 123(d) waiver question is a direct reflection of clear statutory language and Congressional intent. A waiver can be granted following a finding by the Administrator that, for the subject area, the political and industrial entities involved are participating in and in compliance with a plan/schedule of implementation and enforcement, and that applicable water quality standards are not being violated by dischargers which have reached the end of their schedule and, thus, which have reached the point of having to comply with the water quality criteria. Moreover, as discussed above, entities operating under NPDES permits for which water quality criteria have not been finalized, (and therefore which have no plan/schedule of compliance and enforcement) are, nevertheless, in compliance with section 402(k); it follows that they would then be in compliance with the mandates of the FWPCA Amendments for the purposes of section 123(d) of the River and Harbor Act.

Very truly yours,

for Robert V. Zener
General Counsel (A-130)

cc:
Acting Director
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James L. Teare
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(08098)

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