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STATE ENVIRONMENTAL PERMIT FEES CHARGED TO FEDERAL FACILITIES: DISTINGUISHING LEGAL USER FEES FROM ILLEGAL TAXES

Samuel D. McVey*

Federal facilities are generally subject to state environmental regulations including requirements that pollution-related activities operate under state permits. States issue these permits for waste and pollution generating, handling, and disposal activities. State laws normally require that fees be paid before permits may be issued. These "permit fees" can be substantial. In fact, the fees can be so large or unrelated to the cost of the permits as to be unconstitutional state taxes when levied upon the national government.

At least one case is pending on this issue in federal district courts and one other has recently been decided. In addition, many claims or demands are being made administratively throughout the country between federal and state agencies. It is probable that some of the more significant disputes will also result in litigation. This article suggests an analysis for determining the constitutionality of state environmental permit fees imposed on federal instrumentalities. Application of the analysis is then illustrated through examination of a typical state permit statute. Finally, concerns for parties involved in settling fee disputes are outlined.

I. CONGRESSIONAL WAIVER OF FEDERAL IMMUNITY TO STATE ENVIRONMENTAL REGULATION

In recent years, Congress has waived federal immunity to state environmental programs which meet federal standards. Congress has mandated that federal facilities comply with state substantive and procedural requirements for control of air, water, and solid or haz-

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ardous waste pollution. The most sweeping example of a congressional waiver occurs in section 118 of the Clean Air Act.  

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility . . . 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 statement shall apply (A) to any requirement whether substantive or procedural (including any record keeping 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 and sanction, whether enforced in Federal, State, or local courts or in any other manner . . .  

Similar, but less broad, waivers can be found in the Resource Conservation and Recovery Act and in the Clean Water Act. Both of these acts subject federal entities to the "payment of reasonable service charges" to state environmental agencies. Waivers also exist in other statutes intended to regulate or prevent pollution of the nation’s resources.

In addition to making federal facilities subject to state environmental regulations, Congress has authorized the Environmental Protection Agency to delegate authority to the states authority which permits the implementation and enforcement of most environmental protection standards. As a result of this delegation of power, states are becoming the primary enforcers and implementers of environmental protection programs. State programs must, at a minimum,

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4. Id. § 6961. The Resource Conservation and Recovery Act deals with solid and hazardous waste handling and disposal.
produce environmental cleanliness at a level which complies with certain federal standards. Therefore, states cannot forego regulation of federal facilities. Absent compliance by federal installations, many states could not meet the pollution standards required under federal law.\(^{10}\)

The states must find sufficient resources to finance their environmental protection programs, including their regulation of federal installations. The national government is considered a reliable source of money. Consequently, state agencies attempt to extract money from federal installations in the form of "permit fees."\(^{11}\)


11. At least one effort to collect permit fees has made its way into federal court. Declaratory relief is being sought in another case. United States v. South Coast Air Quality Management Dist., No. 89-0548 (C.D. Cal. filed Jan. 30, 1989).

The permits for which these fees are charged are intended to license the operation of boilers, incinerators, landfills, storage tanks, and other waste producing and handling facilities. Additionally, the permits allow the states to monitor polluting activities. The fees for permitting any single operation can total thousands of dollars.

The national government obviously must pay user fees for services or goods it receives. However, as will be shown, there is a fundamental difference between these user fees and actual taxes. While in some instances Congress has required that federal facilities pay permit fees which are "reasonable service charges," Congress has not gone so far as to expressly waive general federal immunity to state taxes. If the "fees" imposed by the states are so large or unrelated to the permit process as to actually constitute a "tax," then federal facilities do not have statutory or constitutional authority to pay them.

II. Federal Environmental Statutes Do Not Allow State Agencies to Extract Taxes from the Federal Government; States May Only Collect Reasonable User Fees

A discussion of whether the national government must pay state taxes masquerading as permit fees must begin with an inquiry into whether Congress has rendered the federal government liable for such taxes. The national government is generally immune to payment of state taxes imposed upon national instrumentalities. The sovereign immunity of the federal government to state taxation is based on the Supremacy Clause of the United States Constitution. The Supremacy Clause requires that for Congress effectively to waive federal immunity with regard to state environmental taxes,
there must be an unequivocal congressional statement to that effect.\textsuperscript{15}

Although imposition of taxes raises constitutional concerns, sover
greigns may constitutionally impose reasonable "user fees" or "ser
vice charges" on one another for services rendered or received.\textsuperscript{16} Therefore, it is evident that the national government may be re
quired to pay for the value of services it receives from any source, including the states.

Generally, the language in federal environmental statutes makes
federal entities subject to "reasonable service charges," or to state substantive and procedural requirements in the same manner as pri
vate persons.\textsuperscript{17} However, this language does not constitute an express
waiver to state taxing authority. In the 1976 decision of Hancock \textit{v.} Train,\textsuperscript{18} the United States Supreme Court dealt with a Clean Air Act provision which stated that the federal government "shall comply with Federal, State, interstate, and local requirements respecting
control and abatement of air pollution to the same extent that any
person is subject to such requirements . . . ."\textsuperscript{19}

The Court in \textit{Hancock} held that the statutory provision did not
require that federal facilities comply with the state permit and re
porting requirements at issue because there was no provision that
federal installations must "comply with all federal, state, interstate,
and local requirements . . . ."\textsuperscript{20} While the statute required that fed-
eral entities comply to the "same extent as natural persons,"\textsuperscript{21} it
failed to enumerate specific requirements which necessitated com-
pliance. Thus, the Court reasoned, federal facilities were not subject to
state enforcement of the permit requirements because there was no
unambiguous waiver of federal immunity on the subject.\textsuperscript{22}

Following this decision, Congress amended the statute to subject

\textsuperscript{15} See Hancock \textit{v.} Train, 426 U.S. 167, 179-80 (1976); Tribe, \textit{Intergovernmental Im-
munities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Contro-
\textsuperscript{16} Massachusetts, 435 U.S. at 453.
\textsuperscript{17} See text accompanying notes 3-7.
\textsuperscript{18} 426 U.S. 167 (1976).
\textsuperscript{19} \textit{Id.} at 169-72; Pub. L. No. 91-604, 118, 84 Stat. 1989 (1970). The section was
§ 7418 (1982). The Court dealt during the same term with a similar provision in the Clean
Water Act. The Clean Water Act statute included the requirement that federal facilities pay
reasonable service charges. \textit{See} EPA \textit{v.} California \textit{ex rel.} State Water Resources Control
\textsuperscript{20} Hancock, 426 U.S. at 182 (emphasis added). \textit{See also} EPA \textit{v.} California, 426 U.S.
at 211.
\textsuperscript{21} Hancock, 426 U.S. at 182.
\textsuperscript{22} \textit{Id.} at 198.
federal entities to all state requirements, "both procedural and substantive." Congress did not, however, include language which expressly subjected the federal government to Clean Air 
taxes imposed by the states. This could have easily been achieved had Congress desired to make the change regardless of the fact that the decision which was overruled by the statute did not directly address the issue of taxes.

There have yet to be any federal pollution control statutes enacted regarding air, water, or waste that subject federal agencies to anything more than service charges or certain enforcement penalties. The conclusion which emerges from the current state of circumstances must be that Congress has not "unequivocally expressed" any waiver of federal immunity to state environmental taxes. Therefore, state environmental tax on a federal facility would run afoul of the Supremacy Clause. It follows that the next question


24. Nor were Clean Water taxes provided for.

25. The limited waivers of the Clean Air Act and similar statutes can be contrasted with an express waiver of immunity to taxes in a statute governing low-level radioactive waste:

Low level radioactive waste owned or generated by the Federal Government that is disposed of at a regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact shall be subject to the same conditions, regulations, requirements, fees, taxes, and surcharges imposed by the compact commission, and by the State in which such facility is located, in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government.


An analogous situation to permit fees exists in the case of civil or criminal state penalties for environmental violations. Federal facility liability for these penalties is limited to penalties specifically mentioned in federal statutes. California v. Walters, 751 F.2d 977, 978-79 (9th Cir. 1984); Meyer v. United States Coast Guard, 644 F. Supp. 221, 222-23 (E.D.N.C. 1986). "Congress could easily have stated that federal facilities would be liable not only to injunctive relief but also to civil or criminal penalties. It is easier written than said. It is not written." McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 605 (E.D. Cal. 1986).

26. See text accompanying note 6. One might argue that because Congress has expressly made federal facilities subject to reasonable service charges in some cases, it has negatively implied that there is no federal installation liability for taxes that exceed the amount of what would be a reasonable service charge. This argument is unnecessary for advocates of the view that there is no waiver of federal immunity to state taxes. It is enough for such advocates that there is a requirement that Congress unequivocally waive federal supremacy in the area of state taxation as well as other areas. See text accompanying note 22.

must be: How can one determine whether a state’s environmental permit fee is actually a tax?

III. WHEN IS A “FEE” REALLY A “TAX”?

A tax is an involuntary collection of funds which is not necessarily related to any benefit bestowed by a government upon a taxpayer. The tax extracted provides support for the general public good. However, a user fee or a service charge is a voluntary collection which a payer tenders in exchange for a benefit not shared by the general public. The fee is paid in exchange for something. In the case of a fee for an environmental permit, the permit itself is the benefit bestowed upon the fee-payer.

The determination of whether a permit fee is a reasonable user fee or an impermissible tax logically depends upon the constitutional analysis set forth by the Supreme Court in Massachusetts v. United States. In Massachusetts, the Court reviewed the Commonwealth of Massachusetts’ protest of the national government’s imposition of a federal registration fee upon a state police helicopter. This fee was imposed on all non-military aircraft at a “flat rate” adjusted upward for heavier aircraft and those with more powerful engines. The proceeds from the fee were used to provide certain benefits to all air traffic. These benefits included take-off and landing assistance, air traffic control, navigation assistance, and “miscellaneous” services.

The Massachusetts Court proceeded from the general rule that one sovereign may not tax another: only “taxes that operate as user

28. See National Cable Television Ass’n, Inc. v. United States, 415 U.S. 336, 340 (1974). The dissent in National Cable felt it unhelpful to attempt to draw a distinction between a “fee” and a “tax.” It was felt that the question should be simply whether the charges assessed were authorized by Congress. Id. at 352, 354 (Marshall, J., dissenting). After making this observation, however, the dissent proceeded to draw a distinction between permissible and impermissible charges. Id. (Marshall, J., dissenting). It is necessary to look behind the label of the charge in order to find its true nature. City of Detroit v. Murray Corp., 355 U.S. 489, 492 (1958). This inquiry is best handled by determining the fundamental differences between a fee and a tax. Cf. United States v. Maryland, 471 F. Supp. 1030, 1036 (C. Md. 1979) (analysis of legal incidence of tax).
32. Id. at 446.
33. Id. at 446 n.1.
34. The miscellaneous benefits included filing of flight plans, weather information, and rescue operations. Id. at 447 n.2.
fees may constitutionally be applied.\textsuperscript{35} The Court then applied a three-pronged test to distinguish permissible user fees from impermissible taxes. The test used by the Court in Massachusetts was originally set forth in Evansville-Vanderburgh Airport Authority v. Delta Airlines.\textsuperscript{36} In Massachusetts, the Court held that the aircraft registration charges were valid user fees rather than invalid taxes because "the charges [did] not discriminate against [the fee payer], [were] based on a fair approximation of use of the system, and [were] structured to produce revenues that [would] not exceed the total cost to the [government] of the benefits to be supplied . . . ."\textsuperscript{37}

Although the facts in Massachusetts concerned imposition of federal charges upon state entities, the test is equally applicable to cases involving state charges assessed against the national government. The Court reasoned broadly and set forth principles that govern taxation of any sovereign by another. This follows from the fact that the general characteristics of sovereignty are similar for both state and national governments, though they possess different roots.\textsuperscript{38}

There has been very little treatment, either by the courts or the commentaries, on the application of the three-pronged test in the case of one sovereign taxing another. However, a comparison of commerce clause principles with the use of the test in Massachusetts sets forth a framework of application for state-imposed permit fees.\textsuperscript{39} The first prong of the Massachusetts test is violated when a state program exempts some entities, particularly state and local agencies, from payment of the fees, but does not exempt other federal agencies. In such a case, the application of the fee would clearly discriminate against federal functions.\textsuperscript{40} The Massachusetts Court was careful to note the fact that federal aircraft, as well as the state's helicopter,
were subject to the registration fee made the likelihood of any a discrimination claims minimal.41

The case from which the Court in Massachusetts adopted its test is instructive on the application of this prong. In Evansville-Vanderburgh,42 the Court upheld the validity of a boarding fee charged to "enplaning" passengers for the purpose of supporting operation of an airport.43 A number of airlines asserted that the fee unconstitutionally taxed interstate commerce in violation of the commerce clause.44 The Supreme Court set forth the threepronged test and applied the discrimination prong to determine whether the fee payer had shown an inherent difference between application of the boarding fee to interstate and intrastate passenger flights. It was determined that the difference must be such that application of the same fee to both classes of flights would amount to discrimination against one or the other class.45 Thus, while applying this prong to permit fees imposed by states on federal facilities, one must examine whether similarly situated entities, particularly states and their instrumentalities, are charged the same fees.46

Analysis of the second prong involves answering the question of whether the fees are a fair approximation of the cost of the benefits provided.47 In Massachusetts, the Court examined whether the fee was geared to give weight to factors affecting the extent of use of the benefits.48 In Evansville-Vanderburgh, the Court examined whether the boarding fees "related somehow" to the payer's use of the airport facility.49 Thus, in order to be valid, the burden of the fee must be distributed among users in a manner that takes into account their proportionate use of the program for which the fee is collected. In other words, the fee must approximate the value of the benefit received.

Given the close attention that must be directed to issues affecting federal sovereignty, it would appear that the state fee must be more than merely "related somehow" to the federal agency's use of the benefit or service provided.50 Nevertheless, the state need not take

41. Massachusetts, 435 U.S. at 467.
42. 405 U.S. 707 (1972).
43. Id.
44. Id. at 711.
45. Id. at 717.
46. See id. See also Massachusetts, 435 U.S. at 467.
47. Id. at 466-67.
48. Id. at 468-69.
50. See California v. EPA, 511 F.2d 963, 967-68, 971 (9th Cir. 1975). The immunity of
into account every factor affecting the cost of the benefit to the federal entity. Such a requirement would be unduly burdensome and would only increase the cost of services as a result of greater administrative expenses.\textsuperscript{61}

The analysis of the third prong does not appear to be entirely distinct from that of the second prong, especially as applied by the Court in \textit{Massachusetts}.\textsuperscript{62} This part of the test measures whether the charge is structured to produce revenues that will not exceed the regulating government's total cost of the benefits supplied. The question then is whether the charge actually imposed is excessive in relation to the cost of the government benefit conferred upon the user.\textsuperscript{63}

Upholding the fee before it, the \textit{Massachusetts} Court merely noted that Congress had contemplated that the user fee would not be sufficient to finance the federal expenditures on civil aviation in any one year.\textsuperscript{64} Therefore, the amount of the fee did not exceed the cost of the program. In \textit{Evansville-Vanderburgh}, the Court compared the precise dollar amounts collected to the amount required to run the airport.\textsuperscript{55} This approach of comparing revenues to costs could certainly be applied to state permit fee systems.

Another approach to this part of the analysis is to examine the permit fee system's basic statutory and regulatory structure to determine whether it is highly likely to produce windfall profits for the state's general fund. It is unclear whether this approach would be within the analysis of the second or the third prongs of the test because, as noted above, the two prongs are not entirely distinct from one another.\textsuperscript{66}

The Court in \textit{Massachusetts} analyzed the structure of the registration fee before it within its discussion of the second part of the

the national government from state taxation is based upon the supremacy clause. Attempts to invade this immunity must therefore be inspected closely. The immunity of the states from federal taxation, on the other hand, has been judicially implied from the states' role in the constitutional scheme. \textit{Massachusetts}, 435 U.S. at 455. \textit{See Constitutional Law, supra} note 14, at 405-06.

51. \textit{Massachusetts}, 435 U.S. at 463-64.

52. \textit{See id.} at 472-73 (Rehnquist, J., dissenting) (calling the test "vague" and "convoluted").

53. \textit{Id.} at 466-67, 469. "The requirement that total revenues not exceed expenditures places a natural ceiling on the total amount that such charges may generate . . . ." \textit{Id.} at 467. The Court looked to the legislative history of the aviation fee statute to determine what Congress considered to be a benefit. \textit{Id.} at 467-68.

54. \textit{Id.} at 469.


56. \textit{See text accompanying note 52}.
 Nonetheless, the terms of the test indicate that an examination of the fee's structure would be more appropriate under the third prong: whether the charge is "structured to produce revenues that will not exceed the total cost to the [collecting government] of the benefits to be supplied."  

It is probably unimportant under which part of the test the principles of this approach are discussed, as long as they are fairly covered at some point. In any event, the charge must be structured so that the fees collected do not exceed the state agency's cost of providing the particular benefits to the user. The possibility of a slight overcharge, however, especially in the case of flat fees, is not offensive to constitutional values. Any requirement of an exact match between funds collected, and those actually spent on the program for which they are collected, would be unduly burdensome to any regulatory program.

Application of this three-part test to state environmental permit programs would resolve the question of whether the fees charged by states are unlawful taxes. For the most part, application of the test would center on the state statutory and regulatory permit structure. However, examination of actual budget items might be necessary to determine whether the statutes and regulations, as applied, are merely financing a state bureaucratic structure.

IV. A CASE STUDY: CALIFORNIA CLEAN AIR PERMIT FEES

The federal Clean Air Act requires states to prepare and submit implementation plans for attainment of clean air. All states have implemented statutory and regulatory apparatus to assist in achieving national standards of air quality. As part of these apparatus, the states require operators to pay fees and obtain permits for those operations that pollute the air.

The State of California's program is no exception to this practice. California's scheme allows local Air Pollution Management...
Districts to issue permits to "stationary" air pollution sources, such as boilers and incinerators. The permits both allow the owner of a stationary source to operate it and are a means of providing the air management districts with information regarding pollution sources.

In order to finance district programs, the local districts are authorized to charge "fees" when issuing a permit. California Health and Safety Code section 42311 states that local districts may adopt a schedule of annual permit fees

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\text{[T]o cover the cost of district programs related to permitted stationary sources. . . . The fees assessed . . . shall not exceed, for any fiscal year, the actual cost for district programs for the immediately preceding fiscal year with an adjustment of not greater than the change in the annual California Consumer price index. . . . Any revenues received by the district pursuant to the fees, which exceed the cost of the programs, shall be carried over for expenditure in the subsequent fiscal year, and the schedule of fees shall be changed to reflect that carryover. Every person applying for a permit, [including federal, state, and local agencies] shall pay the fees required by the schedule. Nothing in this subdivision precludes the district from recovering, through its schedule of annual fees, the estimated reasonable costs of district programs related to permitted stationary sources.}\]

The national government has numerous installations in California. These installations are regulated by the air quality management districts and are considered financially able to pay permit fees. Consequently, they are charged permit fees for the operation of boilers, incinerators, fuel pumps, paint booths, and other polluting activities. Their potential liability for these fees provides an illustration of the constitutional test set forth above.

The air quality management districts' billing to federal facilities

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66. Id. §§ 42300-42311. Domestic and agricultural activities are exempt from the permit requirement. Id. § 42310.
69. See supra note 68 and accompanying text.
70. See supra note 68 and accompanying text.
71. See supra note 10, at 4283-85. See Federal Facilities Docket, supra note 68.
for permit fees does not appear to run afoul of the first prong of the Massachusetts test which prohibits discriminatory treatment.\(^\text{72}\) The fees are applied to all entities, private and governmental, engaged in stationary air polluting activities.\(^\text{73}\) Each of these entities must obtain a permit and pay the required fees.\(^\text{74}\)

Neither is there any apparent inherent difference between the activities of federal facility polluters and other polluters that would make application of the fees discriminatory.\(^\text{75}\) The fact that state instrumentalities also pay the fees minimizes, if not eliminates, any argument that imposition of the permit fees on federal facilities is an abuse of the taxing power for reasons of discrimination.\(^\text{76}\)

Proper application of the next two prongs to the permit fees indicates a problem in the framework of the California statute and accompanying regulations. The second prong requires an inquiry into whether the fees are allocated among users of the benefit provided by the state according to "some fair approximation of use."\(^\text{77}\)

The first step necessary in order to answer this inquiry consists of identifying the "benefit" provided to the fee payer. The benefit provided in exchange for the payment of the permit fee is the actual permit which allows the payer to operate a stationary air polluting device. The benefit received must be one that accrues specifically to

\(^{72}\) If a state permit scheme fails this prong of the test, then the inquiry is over. There is no need to proceed to analysis of the other prongs since a state statute that imposes burdens on the national government not shared by other entities is invalid. United States v. County of Cook, 725 F.2d 1128, 1131 (7th Cir. 1984). If the scheme violates the other two prongs, however, there may be room for negotiation to agree upon a reasonable fee. See infra text accompanying notes 105-10.

\(^{73}\) A contrast may be made to underground storage tank fees which California seeks to impose upon federal agencies under authority of the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1982). The California Health & Safety Code allows state and local instrumentalities to obtain waivers for underground storage tank fees. Id. § 25287 (West Supp. 1988).

A fruitful area of inquiry may exist in the case of California "subvention funds." California Constitutional and Government Code provisions mandate that the state provide subvention funds to local governments for certain state program costs. Cal. Const. art. XIIIIB, § 6; Cal. Gov't Code §§ 17514, 17550 (West Supp. 1989). See also Cal. Rev. & Tax. Code §§ 2207, 2207.5 (West 1987). If these funds actually reimburse local agencies for permit fees they have paid to state environmental agencies, in addition to merely reimbursing them for cost of running state programs, then the permit program would discriminate against the national government, which is not reimbursed. A factual inquiry would be necessary to see how the subvention funds are distributed since it is not apparent from the face of the different laws.

\(^{74}\) See supra text accompanying note 43.

\(^{75}\) See supra text accompanying note 43.

\(^{76}\) See supra text accompanying note 42.

\(^{77}\) See supra text accompanying note 47.
the payer of the fee and not to the public at large. Thus, the prevention or study of air pollution in the vicinity of the federal installation is not included as a benefit accruing to the fee payer. This type of activity benefits the public at large. Only the grant of the permit in exchange for payment of the charge bestows a benefit not shared by other citizens.

The legislative history of the federal Clean Air Act Amendments supports the conclusion that the benefit bestowed is limited to the permit itself and related services. The legislative history identifies the types of benefits Congress envisioned in allowing state agencies to regulate installations of the national government.

Although service charges are not mentioned specifically in the statute, they are discussed in the committee reports. These reports note that a permit fee paid by a federal facility must be in exchange for and commensurate with a benefit received. In the case of Clean Air Act service charges, the "benefit" is intended to be the value of the permitting authority's services, including the review and approval of the permit application, and the assurance that the permittee is meeting the requirements which allow the continuance of the use of a scarce public natural resource—clean air.

In light of the above, the California Air Quality Management Districts' permit fees must be related to the value of the state services rendered in regard to the issuing of permits and must be fairly allocated among all recipients of the permits in order to be truly valid user fees. Answering the question of whether the fees are related to the value of the permits requires a study of the cost of processing and monitoring the permits. Whether the burden of the fees is fairly allocated among users of the permits, however, could be determined from an examination of the regulatory structure of the fees, as well as from a study of permit costs.

The regulatory fee structure provides that the fees are commonly assessed according to a sliding scale. Heatproducing equipment is assessed according to the amount of heat generated, as mea-

80. H.R. REP. No. 294, 95th Cong., 1st Sess. III (1977), reprinted in 1977 U.S. CODE, CONG. & ADMIN. NEWS 1077, 1298. The reports indicated that the permits were the intended benefits. See supra note 29 and accompanying text.
81. See supra note 29 and accompanying text.
82. See supra note 29 and accompanying text.
83. See, e.g., San Bernardino County Air Pollution Control District Rules, Rule 301(n) (1988).
sured in British Thermal Units. However, spray painting booths and fuel pumps are assessed according to a flat rate. The difference in permit fee costs for these different types of equipment can be nearly two thousand dollars.

In Massachusetts, the registration fee was imposed on a sliding scale based on aircraft weight and engine type. The Court did not object to this structure, noting that legislative history behind Congress' adoption of the registration fee indicated that heavier and faster aircraft were generally more responsible for the need for sophisticated control, approach and landing facilities.

In Evansville-Vanderburgh, only commercial flights on large aircraft were subject to the boarding fee as opposed to light and non-commercial aircraft. The Court addressed distinctions in fees based on aircraft weight or commercial versus private use. The Court noted that these distinctions did not render the charges wholly irrational as a measure of relative use of airport facilities by those who benefited from the use.

In both of these cases, the scaled nature of the charges was found reasonable or, the basis that the users of larger aircraft were the primary beneficiaries of the benefits purchased by the user fees. This reasoning can be distinguished from the case of permit fees. The cost of the benefits purchased with the permit fee—the review of a permit application, issuance of a permit, and monitoring of the permittee—is not greatly affected by the size or nature of the equipment licensed. Certainly, the nature and size of the equipment would not have any substantial monetary affect. Thus, the allocation of the fee under California regulations is not sufficiently related to the fee payer's proportionate use of the permit system.

The federal facility may very well profit from the differential in

84. Id.
85. Id.
86. Id. This method of assessment appears to be common.
88. Id. at 451 n.9.
90. Id. at 719.
91. See supra text accompanying notes 59-60. A state seeking to have its fee structure approved either through negotiations or the judicial process would want to argue that the benefit bestowed upon the fee payer goes beyond the mere administrative value of the permit and includes the market value of the right to operate a piece of equipment or a certain production activity. This market value would seem to increase with the size of the equipment. This argument could be rebutted with the fact that the permit is a pollution control and monitoring device rather than a marketing or business license.
fees if the kind of equipment it operates is assessed on the lower end of the fee scale. Nonetheless, it is only logical that, in such a case, the Court would find the charge is structured as a tax. Accordingly, the fee would fail the second prong of the Massachusetts test because it is not fairly allocated among all users. The mere fact that the payer complaining of the tax could somehow profit from it would not appear to transform the tax into a permissible user’s fee. However, the Supreme Court in Massachusetts held that the likelihood of a finding that the registration fee is valid is enhanced by the fact that the state is required to pay less under an imperfectly allocated fee structure than it would under a perfect user fee system.\textsuperscript{92}

Analysis of the third prong of the test is less cryptic than that of the second and should indicate more clearly the legality of the charge. Whether the charge is structured to produce revenue that will exceed the cost to the state of supplying the permit may depend upon a comparison of total fees collected with the total cost of the permit program. This approach was taken by the Supreme Court in Evansville-Vanderburgh.\textsuperscript{93}

If the state is reaping a surplus of funds that is not being expended to produce the permits, especially those granted to federal agencies, then the charge is characterized as a tax.\textsuperscript{94} As indicated above, the cost of a permit program is generally limited to the expenses of permit application review, administrative issuance of the permit, and inspection of the operation to ensure that the permit conditions are being complied with.\textsuperscript{95} In other words, a time and materials basis for the value of the permit is the proper measure.

The California air pollution permit fee system emerges from evaluation under the third prong more easily characterized as a tax than a fee. Federal facilities are assessed the fees based on the type of equipment being operated rather than on the time and material value of the permit itself.\textsuperscript{96} The large amounts assessed to certain types of equipment may not be related, directly or indirectly, to the value of the permit and are apparently structured to exceed the permit’s actual value.

The Evansville-Vanderburgh approach of comparing the total fees collected to the total costs of the benefit to all fee payers must be

\textsuperscript{92} Massachusetts, 435 U.S. at 465-66.

\textsuperscript{93} Evansville-Vanderburgh, 405 U.S. at 719-20.

\textsuperscript{94} The value of this approach is considerable in light of its past use by the Supreme Court. See Massachusetts, 435 U.S. at 450 n.8, 470 & n.24.

\textsuperscript{95} See supra text accompanying note 91.

\textsuperscript{96} See supra note 83 and accompanying text.
applied strictly in the case of permit fees demanded from federal installations. Principles of national sovereignty require that state revenues be compared to the cost of the specific permit issued to the federal entity rather than to the cost of all permits issued to all operators of air polluting equipment.\textsuperscript{97} It is unclear whether it would be easier to attach a value to the specific permits issued to federal installations than to all permits issued to all fee payers. This would depend upon whether a particular type of formula had been used to set the fees in the first place. Regardless, if the fees levied are very high, then the charges will be interpreted as being structured with the intention to produce general revenue rather than to cover the cost of issuing and monitoring the particular permit.

The California statute itself indicates that the intent behind the fee structure was not merely to cover the cost of the permits.\textsuperscript{98} The statute allows the air pollution districts to recoup all air pollution regulatory costs under the guise of “permit fees.”\textsuperscript{99} While it does set fees for “evaluation, issuance, and renewal” of permits to cover the cost of district programs related to permitted stationary “sources . . . not otherwise funded,” the statute also allows the fees to finance “the actual cost of district programs.”\textsuperscript{100} The cost of the permit should not include the value of those programs that are not related to the permit process.

Therefore, it appears from the statute’s language that the fee payer is not only paying for permit overhead costs. The payer is also supporting the district pollution program for all “stationary sources.” Notice, rule-making, general air quality testing, public education, meetings, site mitigation, and other measures could be subsidized from the fees. These items are outside of the permit process. The general benefits they produce are clean air, education, and democratic participation for the public at large, rather than a specific benefit to the fee payer.\textsuperscript{101} Factual investigation may be necessary to establish the validity of these points, but it is likely that the points

\textsuperscript{97} See Massachusetts, 435 U.S. at 455. In Evansville-Vanderburgh, the Court determined that the actual funds collected by the state did not have to be earmarked for application to the airport facilities for which use they were collected. It was permissible for the funds to go into a general fund “so long as the funds received by local authorities under the statute are not shown to exceed their airport costs . . . .” 405 U.S. at 720.


\textsuperscript{99} Id.

\textsuperscript{100} Id.

\textsuperscript{101} Cf United States v. Maine, 524 F. Supp. 1056, 1059-60 (D. Me. 1981). (Benefits furnished to public generally in the form of consumer protection measures were not benefits running specifically to fee payers.).
will be validated.\(^{102}\)

Air quality management districts may also redistribute the fee revenues to cities or counties as consideration for issuing permits for activities within their jurisdictions.\(^{103}\) In such cases, the amount redistributed should be examined closely to determine whether it approximates the city or county permit overhead costs. If it does not, or if the amount given to the city or county is only a fraction of the total fees collected, then the fee would appear to be supporting general, unrelated programs and would, accordingly, be impermissible.\(^{104}\)

V. THE CONSTITUTIONAL VALIDITY OF A NEGOTIATED SETTLEMENT

In cases in which a federal installation disputes the constitutionality of a state permit fee, the first step should be negotiations to reach a settlement. The goal of negotiations should be to arrive at a fee level that will do no more than compensate the state agency for its costs of providing the permit services to the specific federal facility.

The potential rewards of such negotiations in terms of avoiding litigation are clear. There are, however, legal concerns which may leave the validity of any settlement in doubt. One concern is the principle set forth above that if a tax on the national government is deemed discriminatory, then the tax cannot be exacted at all.\(^{105}\)

This principle should apply not only to taxes that fail the first,\(^{102}\) It is conceivable that the language in the statute allowing districts to collect fees “to cover the cost of district programs related to permitted stationary sources” could be read restrictively or could be vigorously exercised to produce the result that the fees are meant to cover only district permit programs. Any broader reading would render the fees invalid when applied to federal facilities. \(\text{CAL. HEALTH \\& SAFETY CODE} \S\ 42311(a) \text{ (West 1986).}\)

103. \(\text{Id.} \S\ 42312.\)

104. Air pollution control districts could be providing inspection services or technical advice to permit recipients in order to facilitate issuance and monitoring of the permit. In such a case, the fee should be evaluated to see whether it is a fair evaluation of these services. In any case, if the facts show that the fee runs into thousands of dollars, it would seem that the fee should be presumed a tax. It is improbable that such a high cost could be justified as a “reasonable user fee” given the amount of “benefits” states normally provide to the permit holder.

If a judicial enforcement action is undertaken to collect the fees, it is probable that the issue will be resolved on a motion for summary judgment or partial summary judgment. A state would want to produce facts showing for what the fees are used and how they are calculated in order to demonstrate disputed facts. \(\text{See FED. R. CIV.} \ P. 56.\) This tactic may save the statutory and regulated framework of the fee from being declared facially invalid.

105. \(\text{Moses Lake Homes v. Grant County, 365 U.S. 744, 751-52 (1961). See supra note 72.}\)
discriminatory, prong of the Massachusetts test, but also to taxes
that do not pass the requirements of the second and third prongs.
The same constitutional concerns apply to an illegal tax of a federal
entity regardless of why the tax is illegal. The tax burdens essential
functions of government and, consequently, must be prohibited.106

Another principle concern is that the Anti-Deficiency Act for-
bids an employee of the federal government from obligating funds for
purposes other than those for which Congress has appropriated.107
Congress does not appropriate funds for the purpose of paying ille-
gal taxes. Any use of operation and maintenance funds for the pay-
mant of the tax, therefore, could theoretically leave the authorizing
employee open to prosecution.108 Such use would also cause the facili-
ty to reduce operational programs and maintenance of property,
thus, interfering with the facility's accomplishment of its mission.

In light of these concerns, the federal permit holder may refuse
to negotiate the amount of the fee until the state amends its statutes
and rules to the point where it only seeks to exact a service charge
that meets constitutional criteria. However, a federal installation's
refusal to pay or negotiate would carry the risk of the state's revoca-
tion of the permit.109 The federal entity would then be forced into
the position of having to operate without a permit or face state en-
forcement measures. The state would be in the equally awkward sit-
uation of attempting to enforce action against the federal
government.

The best resolution of the above no-win situation either re-
quires that: 1) states amend their permit fees to constitute reasonable
user fees; or 2) Congress enact legislation authorizing federal instru-
mentalities' payment of state environmental user fees and taxes.

The first solution may be technically difficult to achieve. As
noted previously, complex budgetary adjustments and fund-tracking
mechanisms may be necessary to ensure that charges collected from
federal activities are placed in fund accounts devoted to servicing
only those activities. These mechanisms would be more costly and

108. Id. § 1350. Cf. Hanash, Effects of the Anti-Deficiency Act on Federal Facilities'
Compliance with Hazardous Waste Laws, 18 ENVTL. L. REP. (ENVTL. L. INST.) 10541,
109. The installation would then have to operate its stationary source of air pollution
without a permit, or cease operating thereby endangering the performance of its mission. If
operation continued, the state environmental agency could then issue an administrative cease
and desist order. Litigation would ensue. If this problem is likely to arise, then either party
may wish to seek declaratory relief.
more difficult to control than the use of simple rate structures and
general funds in which all fees are placed. There are, however, com-
puter budgeting programs that can help states keep track of services
rendered to federal facilities on a time and materials basis.\textsuperscript{110} A re-
fund system may also be required to ensure that money collected
from a federal facility which is not used to provide benefits to the
facility is returned.

The second solution would require a congressional waiver of
federal immunity to state environmental taxes. The waiver would
have to be placed in each federal environmental act to ensure suffi-
cient specificity of the waiver. The language for such a waiver could
be borrowed from the express waiver that occurs in an existing stat-
ute governing radioactive waste disposal. Congress would have to
add the term “taxes” to the statutes which already allow user fees.\textsuperscript{111}
It would then be necessary to appropriate funds to pay the taxes.
However, since Congress intends to place the primary burden of en-
forcing pollution-control laws upon state governments, it should be
willing to institute the waiver and appropriate the funds.\textsuperscript{112}

VI. CONCLUSION

When a state seeks to impose an environmental permit fee upon
a federal installation, it may be exceeding its authority under the
Federal Constitution if the fee is in fact a tax. Before such a fee is
paid, it should be evaluated with the three-pronged test set forth in
\textit{Massachusetts v. United States} to determine whether the permit fee
is a lawful “user fee” or an unconstitutional tax.

Thus, the charge should be examined to determine whether: 1)
it's application discriminates against the federal government; 2) it is
based on a fair approximation of use of the system it supports; and
3) it is structured to produce revenues that will not exceed the total
cost to the state of the benefits supplied. If application of the charge
fails any prong, then it should not be paid by the federal installation.

In response, the state should conform the fee structure to the
requirements of the three-pronged test. Finally, the state should ac-

\textsuperscript{110} One such program is the “CALSTARS” system currently used by the California
State Water Resource Board. CALSTARS is a cost and time allocation system which permits
the board to bill according to hours and expenses spent on each individual installation.

\textsuperscript{111} \textit{See supra} text accompanying note 24.

\textsuperscript{112} \textit{See supra} text accompanying notes 7-9. Because the problem could exist nation-
wide, federal legislation would go far toward putting an end to ad hoc attempts to resolve the
issue. The legislation could set up a schedule of how fees may be calculated, or it could ex-
pressly make federal governments subject to state environmental taxes.
tively seek congressional approval to impose environmental taxes on federal facilities within its boundaries. Both of these courses of responsive action by concerned states are preferable to the litigation and administrative disputes currently developing throughout the country.