No. 01-38

In the Supreme Court of the United States

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
GREER S. GOLDMAN
JOHN T. STAHR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Section 404(t) of the Clean Water Act of 1977, 33 U.S.C. 1344(t), which provides that federal agencies shall comply with state "requirements * * * to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements," waives the federal government's immunity from state-imposed annual dredging assessments.

2. Whether Section 313(a) of the Clean Water Act, 33 U.S.C. 1323(a), which provides that federal agencies shall comply with state "requirements * * * 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," waives the federal government's immunity from state-imposed annual dredging assessments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous: Page

In the Supreme Court of the United States

No. 01-38

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum order of the court of appeals (Pet. App. 1-2) is unreported. The opinion of the district court (Pet. App. 5-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2001 (Pet. App. 3-4). A petition for rehearing was denied on April 2, 2001 (Pet. App. 31-32). The petition for a writ of certiorari was filed on July 2, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States, through the Army Corps of Engineers, spends millions of dollars each year to maintain the navigability of California harbors through dredging. Notwithstanding the benefits of those federal dredging activities, petitioner has asserted that the activities subject the United States to payment of state-imposed annual fees that petitioner charges persons who discharge materials into navigable waters. The district court dismissed petitioner's suit for payment of those fees, concluding that the United States has not waived its immunity from those payments. Pet. App. 5-30. The court of appeals summarily affirmed for the reasons stated in the district court's decision. *Id.* at 1-2.

1. The United States Army Corps of Engineers performs dredging projects throughout the United States, including the State of California. Pet. App. 5-6; see *e.g.*, Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat. 3658. The purpose of those projects is to improve navigation in waterways and to provide "for water resources development and conservation and other purposes * * *." § 101(a), 110 Stat. 3662. Under the Water Resources Development Act of 1996, for example, Congress has authorized the Corps to spend millions of dollars in California on dredging Humboldt Harbor and Bay, Santa Barbara Harbor, Channel Islands Harbor, Los Angeles Harbor, Long Beach Harbor and the Port of Oakland. § 101(a)(3)-(7), 110 Stat. 3663. The Act establishes a cost-sharing arrangement pursuant to which the Corps

pays the majority of the dredging costs. §§ 101(a)(2), (4) and (6), 305, 307, 310, 110 Stat. 3663, 3712-3713.[1]

The Clean Water Act, which was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters, unless authorized by a permit. 33 U.S.C. 1311(a). Section 404 of the Act addresses discharges of dredged or fill material. 33 U.S.C. 1344. For discharges by federal agencies, Section 404(t), adopted in 1977, provides a limited waiver of federal immunity from state requirements. Clean Water Act of 1977, Pub. L. No. 95-217, § 67(b), 91 Stat. 1600. Section 404(t) states:

> Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

33 U.S.C. 1344(t).

At the same time that Congress added the specific, limited waiver of federal immunity in Section 404(t),

---

[1] With respect to navigation projects authorized for Humboldt Harbor and Bay, California, for example, the total project cost is $15,180,000, with a federal share of $10 million and a non-federal share of $5,180,000.

requiring federal agencies to comply with state requirements to control the discharge of dredged or fill material, Congress amended Section 313(a) to clarify the waiver of federal immunity for federal activities resulting in the discharge or runoff of pollutants. Section 313(a) states in relevant part:

> 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. 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 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.

33 U.S.C. 1323(a).

Under California law, the State Water Resources Control Board (Board) is authorized to collect annual

assessments for dredging activities in California. California Water Code Section 13260(a)(1) (West 1992 & Supp. 2001) requires "[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state" to file a report of the discharge with the appropriate Regional Water Quality Control Board. See Pet. App. 33. Section 13260(d)(1) requires that each person for whom waste discharge requirements (WDRs) have been prescribed shall pay an annual fee of up to $10,000, with fees calculated on the basis of total flow, volume, number of animals, or area involved. Cal. Water Code § 13260(d)(1) (West 1992). See Pet. App. 34. The Board calls these payments "WDR fees." Compl. para. 9; Pet. App. 135. The Board has set a fee schedule in its implementing regulations, based on the discharge's threat to water quality and other factors set out in the regulations. Cal. Code Regs. tit. 23, § 2200(a)(2) (2001). All payments are deposited in the Waste Discharge Permit Fund, which is available for expenditure by the State Board, upon appropriation by the Legislature, "for *inter alia*, programs to control the quality of all the waters of the state, and to protect water quality from degradation." Compl. para. 9; Pet. App. 135 (citing Cal. Water Code § 13000 (West 1992)). Failure to pay the assessments under Section 13260 constitutes a misdemeanor and can result in civil penalties of up to $5000 per day. Cal. Water Code § 13261 (West 1992).[2]

---

[2] The complaint also sought the payment of purportedly overdue dredging assessments under the Bay Protection and Toxic Cleanup Program (BPTCP), which required the State Board to "establish fees applicable to all point and nonpoint dischargers who discharge into enclosed bays, estuaries, or any adjacent waters in the contiguous zone or the ocean." See Compl. para. 11; Pet. App.

2. Petitioner brought this action in federal district court, asserting that the Corps is required to pay annual assessments for dredging the State's harbors and bays, pursuant to the California Water Code. Pet. App. 130-140. Pursuant to stipulation of the parties, petitioner re-filed the case in California Superior Court on January 30, 1998, and the United States removed the case to federal court. See *id.* at 127-129. The complaint alleged that petitioner had lawfully assessed WDR fees based on the Corps' dredging operations in the State, and it sought a declaratory judgment that such assessments are in compliance with applicable laws and regulations, including the Supremacy Clause of the United States Constitution. *Id.* at 138-139. The complaint asserted that the United States waived its immunity from those assessments through Sections 404(t) and 313(a) of the Clean Water Act. *Id.* at 133-134.

3. The United States moved to dismiss on the ground that it has not waived federal immunity for the state-imposed dredging assessments. The district court granted the motion, finding that "[t]he United States has not waived sovereign immunity for the types of assessments at issue here." Pet. App. 8. The court concluded that petitioner had not satisfied "the stringent requirements necessary to establish a waiver of federal sovereignty." *Id.* at 9.

136-137; Cal. Water Code § 13396.5(a) (West 1992). Until January 1, 1998, when the BPTCP program was repealed by its own terms, *id.* § 13396.5 (Supp. 2001), dischargers were to pay up to $30,000 annually, in addition to WDR fees owed under Cal. Water Code § 13260 (West 1992 & Supp. 2001). *Id.* § 13396.5(d) (1992). On appeal, petitioner withdrew its claim for BPTCP fees. See Pet. App. 72-73.

The court first found that federal immunity is not waived through Section 404(t) because the "requirements" language of that provision does not encompass the dredging assessment that petitioner seeks to impose here. The district court relied on this Court's decision in *United States Department of Energy (DOE)* v. *Ohio*, 503 U.S. 607 (1992), which interpreted similar language in the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* The Court concluded that a RCRA provision subjecting federal facilities to "all requirements" of state law, 42 U.S.C. 6961, subjected those facilities to "substantive standards and the means for implementing those standards, but excluding punitive measures." 503 U.S. at 627-628. The district court similarly reasoned that Section 404(t) subjected the federal government to state discharge control requirements, but not to monetary assessments for lawful dredging activities. Pet. App. 9-14.

The district court also held that petitioner failed to demonstrate a waiver of federal immunity under Section 313(a). The court found that Section 404(t), rather than Section 313(a), governs federal immunity with respect to the dredging assessments at issue here, because Section 404(t) specifically addresses the scope of the government's immunity respecting dredging activities, while Section 313(a) addresses pollution discharges generally. Pet. App. 15-16. The court further concluded that, even if Section 313(a) applied, it would not waive federal immunity for the dredging assessments. The court found that, as with Section 404(t), "the 'requirements' language of [Section 313(a)] is insufficient to effect a waiver of federal sovereign immunity." *Id.* at 16. In addition, the dredging assessments at issue here would not qualify as "reasonable service charges" under Section 313(a) because the

assessments are not "service charges" at all. *Id.* at 17-28. Petitioner provides "[n]o services or benefits * * * to the federal United States whatsoever" in return for those assessments; rather, petitioner imposes the assessments to "fund compliance efforts and to encourage less dredging." *Id.* at 25.

4. The court of appeals unanimously affirmed by unpublished memorandum opinion, relying on "the district court's well-reasoned opinion." Pet. App. 1-2. The court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc. *Id.* at 31-32.

ARGUMENT

The court of appeals correctly concluded that Congress has not waived the United States' immunity from petitioner's assessment of dredging fees. That decision is consistent with this Court's decision in *DOE* v. *Ohio*, *supra*, and does not conflict with any decision of this Court or of another court of appeals. The court's determination is factbound and does not present any question warranting this Court's review.

1. This Court has consistently adhered to the "common rule, with which we presume congressional familiarity, that any waiver of the National Government's sovereign immunity must be unequivocal." *DOE*, 503 U.S. at 615 (citation omitted). "Waivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not 'enlarge[d] . . . beyond what the language requires.' *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983) (quoted in *DOE*, 503 U.S. at 615); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986). See *e.g.*, *United States* v. *Williams*, 514 U.S.

527, 531 (1995). The "'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text," and may not be manifested through legislative history. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992).

2. The lower courts correctly held that Section 404(t) of the Clean Water Act fails to provide the required clear and unequivocal waiver of federal immunity for the dredging assessments at issue here. Congress has directed the Corps of Engineers to provide dredging services to States and localities, and it has also provided the majority of the funding for the dredging projects. Congress has further directed the Corps to comply with "State or interstate requirements" to control discharges of dredged or fill material, § 404(t), 33 U.S.C. 1344(t), but that direction does not require the Corps to pay state dredging assessments. As the district court correctly recognized, those dredging assessments are not "requirements" to control pollution, but instead are fees that petitioner imposes to generate revenue for state programs. See Pet. App. 12-13.

Petitioner is wrong in asserting that Section 404(t) of the Clean Water Act grants the States carte blanche to impose fees on federal dredging activities. As this Court's decision in *DOE* indicates, the term "requirements," when used in the context of federal pollution control laws, "can reasonably be interpreted as including substantive standards and the means for implementing those standards." 503 U.S. at 627. That term can also include "coercive fines" imposed to induce compliance "with injunctions or other judicial orders designed to modify behavior prospectively." *Id.* at 613, 626-627. But the term "requirements" cannot be stretched to subject the United States to punitive

measures, such as civil penalties. *Id.* at 627. Similarly, the term does not subject the United States to general fee assessments that "are not directly related to compliance mechanisms to implement substantive state dredging or discharge requirements." Pet. App. 12.

Petitioner argues that the fee assessments are permissible under this Court's decision in *DOE* because they are not "punitive." Pet. 11. The *DOE* decision does not, however, allow a State to subject the United States to any sort of non-punitive financial burden. Rather, petitioner must demonstrate that the congressionally enacted statutory text unambiguously subjects the United States to the dredging assessments at issue here. The court of appeals and the district court correctly recognized that petitioner had failed to carry that burden. The dredging assessments "do not fit within [Section 404(t)'s] narrow waiver of immunity discussed in *DOE*." Pet. App. 13. That decision by the district court and the court of appeals' summary affirmance of it do not conflict with any decision of this Court or of another court of appeals.[3]

---

[3] Petitioner attempts "to bolster" its construction of Section 404(t) by reference to legislative history. Pet. 13-14 & n.5, 16 n.8. This Court, however, has squarely rejected the practice of inferring a waiver of sovereign immunity from such materials. As the Court has stated, the "'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text," and "[i]f clarity does not exist there, it cannot be supplied by a committee report." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). Moreover, the cited history does not support petitioner's position. It makes no reference to the payment of any dredging or other fees or service charges, but states only that the Corps of Engineers "may be required by the States in some instances to expend additional funds to protect water quality." See Pet. 14.

3. The courts below also correctly held that Section 313(a) of the Clean Water Act, 33 U.S.C. 1323(a), does not waive federal immunity. They properly recognized that Section 404(t)—and not Section 313(a)—determines whether the federal government is subject to state dredging assessments. Section 404(t) explicitly addresses the obligations of federal agencies respecting dredging activities. See 33 U.S.C. 1344(t) ("[n]othing in this section shall preclude or deny the right of any State or interstate agency *to control the discharge of dredged or fill material* * * * including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural *to control the discharge of dredged or fill material* to the same extent that any person is subject to such requirements" (emphasis added)). As petitioner acknowledges, "section 404(t)'s waiver specifically addresses dredge/fill activities." Pet. 13. By contrast, Section 313(a) states more generally that federal agencies shall comply with state requirements "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).

Under well-established principles of statutory construction, where two statutory provisions, one general and one specific, potentially apply, the more specific provision controls. *Edmond* v. *United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *Busic* v. *United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence."); *Trustees of the Amalgamated Ins. Fund* v.

Geltman Indus., Inc., 784 F.2d 926, 930 (9th Cir.) ("Fundamental maxims of statutory construction require that a specific statutory section qualifies a more general section and will govern, even though the general provisions, standing alone, would encompass the same subject."), cert. denied, 479 U.S. 822 (1986); 1A Norman Singer, *Sutherland Statutory Construction* § 23.15, at 365-376 (5th ed. 1992). Here, Section 404(t) explicitly addresses dredge and fill activities, and it governs the dredging assessments at issue, rather than the more broadly applicable terms of Section 313(a) which are pertinent to the discharge, control and abatement of all other materials. See Pet. App. 15-16.

In any event, Section 313(a) would not provide a waiver of the federal government's immunity from the dredging assessments. Section 313(a)'s statement that the United States is subject to state "requirements" respecting the "control and abatement of water pollution" goes no further than Section 404(t) and is therefore ineffective to subject the federal government to the dredging assessments. See Pet. App. 16-17. And Section 313(a)'s further statement that the United States is subject to "reasonable service charges," 33 U.S.C. 1323(a), is also ineffective to subject the federal government to those assessments. The dredging assessments at issue here plainly are not "service charges" for the straightforward reason that the federal government does not receive any meaningful services from the State in exchange for the assessments. The district court expressly found that "[n]o services or benefits are provided to the * * * United States whatsoever." Pet. App. 25. That fact, by itself, is sufficient to establish that the dredging assessments "do not qualify as 'service charges' for which the United States has

waived its sovereign immunity under [Section 313(a)] of the CWA." *Ibid.*[4]

4. Petitioner contends (Pet. 20-28) that the district court's determination that the dredging assessments at issue here are not "service charges" conflicts in principle with *Jorling* v. *United States Department of Energy*, 218 F.3d 96 (2d Cir. 2000), and *Maine* v. *Department of Navy*, 973 F.2d 1007 (1st Cir. 1992). That contention is incorrect.

In *Jorling*, the State of New York sought payment of certain charges pursuant to provisions of RCRA that direct that federal agencies shall comply with state requirements respecting the control of solid waste or hazardous waste disposal, including "the payment of

---

[4] In evaluating whether the dredging assessments are service charges, the district court employed the three-part test that this Court utilized in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), to distinguish between user fees and taxes for purposes of state immunity from federal taxation. See Pet. App. 18-24. See also *Jorling* v. *United States Dep't of Energy*, 218 F.3d 96 (2d Cir. 2000) (following that approach); *Maine* v. *Department of Navy*, 973 F.2d 1007, 1013-1014 (1st Cir. 1992) (same). Petitioner does not challenge the court's reliance on the *Massachusetts* test, which inquires specifically whether the charges at issue (1) discriminate against governmental functions; (2) are based on a fair approximation of use of the system or services provided; and (3) are structured to produce revenues that will not exceed the total cost of the benefits to be supplied. See 435 U.S. at 466-467. In any event, the same result would follow under the alternative approach that the district court considered, under which a court evaluates the character of the assessment under "all the facts and circumstances" of the proposed assessment. See Pet. App. 22-24. See also *United States* v. *City of Huntington*, 999 F.2d 71, 73 (4th Cir. 1993) (applying that test), cert. denied, 510 U.S. 1109 (1994); *United States* v. *City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990) (same). The decisive fact in this case is that "no services are in fact provided in return for payment." Pet. App. 25.

reasonable service charges" (42 U.S.C. 6961(a)). See 218 F.3d at 98. The United States did not contest that the charges at issue in that case were "service charges," but instead challenged them as unreasonably high. See *id.* at 99. Accordingly, the court of appeals addressed only whether the charges were "reasonable" and concluded that the "method for assessing waste regulatory charges has not been shown to be unreasonable as applied." *Id.* at 106.

The *Maine* decision also arose under RCRA, and the sole issue in that case, as in *Jorling*, was whether the particular licensing and generator fees at issue were unreasonably high. 973 F.2d at 1011-1012. The parties did not raise, nor did the court address, whether the contested fees were "service charges," but only whether they were "unreasonable." *Ibid.* The court of appeals did not definitively resolve the issue. It held that the record was insufficient to support a grant of summary judgment to the Navy on its assertion that the fees were unreasonably high. *Id.* at 1014.

Accordingly, *Jorling* and *Maine* present no conflict with the decision here, which addresses the different question of whether the dredging assessments at issue in this case are "service charges." Indeed, petitioner acknowledges that *Jorling* does "not address[] the precise issue" here because the United States "only challenged the reasonableness of those service charges." Pet. 25. Similarly, petitioner acknowledges that "the United States did not argue in *Maine* that the challenged fees were not 'service charges,' but instead challenged their reasonableness." Pet. 26. Thus, the court of appeals' summary affirmance of the district court's decision concededly gives rise to no conflict with those cases. And petitioner's fact-specific challenge to the district court's determination that petitioner's

dredging assessments reflect no meaningful services or benefits provided by petitioner to the United States (Pet. 26-28) plainly does not present a federal question of general importance that should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
GREER S. GOLDMAN
JOHN T. STAHR
Attorneys

DECEMBER 2001