NACWA
A Clear Commitment to America's Waters

September 10, 2010

Mr. Jonathan Cedarbaum
Acting Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: ***Request for meeting with OLC counsel regarding GSA determination that impervious area charges and stormwater charges to federal government facilities constitute a tax and not a fee for service***

Dear Mr. Cedarbaum:

I write on behalf of the National Association of Clean Water Agencies ("NACWA"), which represents nearly 300 publicly owned, municipal wastewater and stormwater utilities around the nation. As the leading national advocacy organization for municipal stormwater and wastewater utilities, NACWA requests a meeting to discuss an issue of great national concern that we understand has been presented to the Office of Legal Counsel ("OLC") for resolution --- whether impervious area charges ("IACs") and other fees to cover the costs of treating stormwater runoff may be assessed against federal government facilities as a "reasonable fee for service" under the Clean Water Act's ("CWA's") waiver of sovereign immunity, 33 USC 1323(a). Such fees are necessary to cover the costs of meeting the increasingly stringent requirements of the CWA as typified by municipal wet weather consent decrees, the Chesapeake Bay restoration program under President Obama's Executive Order 13508, and the stormwater requirements under President Obama's Executive Order 13514, Federal Leadership in Environmental, Energy and Economic Performance, signed on October 5, 2009 (74 *Fed. Reg.* 52115).

This issue is becoming more urgent yet has been unresolved for many years. For example, NACWA member King County, Washington, strongly objected to a 2006 decision by the General Accountability Office ("GAO") that the County could not assess an impervious area charge for stormwater services against federal facilities in that County on the basis that such a charge constituted an impermissible tax, and not a fee for service, that was barred by the principle of sovereign immunity.[1] This

[1] We attach as background (1) the June 5, 2006 Decision of the U.S. General Accountability Office (File B- 306666) related to King County Washington's assessment of Surface Water Management Fees on the Forest Service, and (2) a November 26, 2008 Memorandum from the King County Deputy Prosecuting Attorney to the Senior Staff Attorney, Office of General Counsel, GAO, responding to the 2006 GAO Decision.

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issue is of most immediate impact in the District of Columbia ("District") due to a recent decision by the General Services Administration ("GSA") that NACWA member the District of Columbia Water and Sewer Authority ("DC Water") may not assess an IAC fee against federal facilities in the District, despite the fact that the federal government owns a significant amount of the land in the city.[2] The fee is designed to recover the costs of DC Water's Long Term Control Plan ("LTCP") to reduce combined sewer overflows ("CSOs"), and the first payment from the federal government is due October 1, 2010. If federal facilities cannot be assessed their fair share of the costs related to stormwater runoff from their facilities, this void will place a disproportionate financial burden on other ratepayers in the District who will be forced to bear the brunt of the substantial cost of complying with DC Water's federally mandated consent decree obligations and the District's obligations to meet stringent stormwater requirements under its soon to be strengthened municipal separate storm sewer system ("MS4") permit—a burden that will be especially onerous in the current economic recession.

NACWA members around the nation need very clear guidance on how to structure Constitutionally-permissible IACs and stormwater fee programs, especially given the very substantial costs that are currently being imposed on NACWA members by the Environmental Protection Agency ("EPA") as part of the Agency's mandates to control and treat urban runoff from impervious surfaces and thereby meet increasingly more stringent water quality standards under the CWA. NACWA disagrees with GSA's decision that such IACs and stormwater charges constitute a tax and not a fee for service. We believe that DC Water's IAC program can serve as an excellent model for other municipalities in the United States in shaping IAC and stormwater fee programs that will allow reasonable fees to be assessed against federal facilities consistent with the Clean Water Act's waiver of sovereign immunity. We respectfully request that OLC issue a legal opinion providing clear guidance that a properly structured IAC or similar stormwater fee program will pass Constitutional muster. Such an opinion will provide critical guidance to municipalities around the country grappling with tremendous CWA compliance costs. NACWA requests a meeting with your office to discuss this important issue at your earliest convenience.

Our analysis and conclusions may be summarized as follows:

SUMMARY

- Section 313(a) of the Clean Water Act waives the federal government's sovereign immunity for complying with the Act's requirements "in the same manner, and to the same extent as any nongovernmental entity, *including the payment of reasonable service charges*." The legislative history makes clear that Congress intended the waiver to cover both substantive and procedural requirements but does not specify what "fees" are "reasonable service charges."

- Courts have applied two different tests in determining whether a charge is a permissible fee and not a constitutionally impermissible tax. Under the majority test, *Massachusetts v. United States*, 435 U.S. 444 (1978), a charge is permissible if it (1) does not discriminate against state functions, (2) is based on a fair approximation of the state's use of the facilities, and (3) is structured to produce revenues that will not exceed the total costs to the federal government of the benefits supplied. While the *Massachusetts* case dealt with a fee imposed by the federal government on the state, it has been relied on in justifying fees assessed against the federal government. *State of Maine v. Department of the Navy*, 973 F. 2d. 1007 (1st Cir. 1992). The minority test in *San Juan Cellular v. Public Service Comm.*, 967 F. 2d 683 (1st Cir. 1992), uses a more nuanced test that looks at the purpose of the charge. If the charge is for revenue raising purposes, it is a tax. If the charge is for regulatory purposes, it is a fee.

[2] Also attached as background is the April 26, 2010 letter from GSA to DC Water.

- The *City of Cincinnati v. the United States*, 2007 WL 956432 (S.D. Oh. 2007) case is one of the few federal cases to address the issue of stormwater charges applied to federal facilities. The court held that "the City's stormwater system charge falls squarely within the waiver of sovereign immunity" and thus the federal facility involved was not exempt from paying the charges. *Id.* at p. 5

- DC Water's IAC and other charges structured like it qualify as valid regulatory fees under either test. Under the *Massachusetts* test, an IAC qualifies as a fee if (1) the IAC charge does not discriminate as it is applied to all residential and commercial properties regardless of ownership, (2) the IAC, which is based on the amount of impervious surface on a subject property, is related to the property's contribution of runoff to a sewer system and is necessary to pay for the capital or treatment costs of meeting regulatory requirements for water quality improvement, and (3) the IAC is designed to produce revenues that will not exceed the total costs of the benefits supplied. Under the *San Juan Cellular* test, the DC Water IAC is imposed by the DC Water Board of Directors, an independent governmental body that is separate and distinct from the DC Council and which has no authority to raise revenues for general purposes in the District. The money that it raises go directly to cover the capital costs needed to comply with the utility's $2.2 billion LTCP over the next 20 years as mandated under the Clean Water Act.[3] DC Water is also exploring a program whereby ratepayers who incorporate low impact development ("LID") features into their buildings and surrounding areas, such as green roofs and pervious pavement, could receive a credit against the IAC charge for adopting LID features, because these properties will not contribute runoff to the same degree as properties with substantial amounts of impervious surfaces.[4] The federal government is actually required under Section 438 of the Energy Independence and Security Act ("EISA") of 2007 to maintain or restore the predevelopment hydrology at any development or redevelopment site with a footprint exceeding 5,000 square feet. To the extent these facilities do so, they could receive a "credit" on their otherwise applicable IAC fee. Finally, the direct purpose of the IAC is to cover the costs of meeting the utility's CWA mandates as required by federal law.

- The DC Water's IAC is distinguishable from the Clean Air Compliance ("CAC") Fee previously rejected by OLC as an impermissible tax.[5] OLC found that the CAC fee, which had been passed by the DC Council to be assessed against federal employees parking in the District to raise revenues exclusively for mass transit improvements, and to thereby help reduce air pollution, was intended to provide a general benefit to the public. Accordingly, OLC determined that this fee was more akin to a tax, and not a fee to defray the costs of providing the service. In contrast, DC Water's IAC has none of these attributes. It is designed to equitably cover the costs of wastewater and stormwater runoff under the LTCP and not to raise revenues to address larger water pollution problems. The revenues raised go exclusively to defray the capital costs incurred by DC Water under the LTCP.

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[3] Section 402(q)(1) of the CWA states that "each permit, order or consent decree issued …after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the combined sewer Overflow Control Policy singed by the Administrator on April 11, 1994." 33 USC 1342(q)(1). That policy directed municipalities operating combined systems to develop Long Term Control Plans. 59 Fed. Reg. 18688.

[4] DC Water has formulated a credit program but has not yet presented it to the DC Water Board for final approval.

[5] See generally, "Whether the District of Columbia's Clean Air Compliance Fee May be Collected from the Federal Government." Jan. 23, 1996 Memorandum for Emily C. Hewitt, General Counsel, General Services Administration. 20 Op. Off. Legal Counsel 12 (1996) available at http://www.justice.gov/olc/parking.op1.htm.

- Urban stormwater runoff is now recognized as a significant source of pollution that is impairing the nation's waterways. The need to reduce urban stormwater runoff and the pollutants contained therein is addressed in depth in the National Research Council's 2008 publication, *Urban Stormwater Management in the United States*, and in the EPA's 2010 *Guidance for Federal Land Management in the Chesapeake Bay Watershed, Chapter 3*.

- There are compelling policy reasons for resolving the fee versus tax issue now. Under EPA's recent *Clean Water Act Action Plan*, permittees will be required to comply with even more stringent requirements, especially addressing CSOs. EPA is also targeting stormwater dischargers responsible for high sediment and pollutant loads that impair water quality. The Chesapeake Bay Restoration Program under President Obama's Executive Order 13508 is a recent excellent example of the increased requirements and costs that will be imposed on sources of stormwater runoff. EPA will be setting pollution limits for sediment and other pollutants by December 2010 (known as Total Maximum Daily Loads, or "TMDLs") for the Bay and its tributaries that will require expensive controls. Similarly, EPA's recently proposed changes to the District's MS4 permit[6] will also impose more stringent stormwater controls and costs on property owners in the District. These costs will be in addition to DC Water's costs of complying with its LTCP under the 2005 consent decree. Given that the federal government owns a substantial amount of the land in the District, it would be unfair and inequitable to exempt these federal facilities from paying their fair share of the costs needed to meet these mandates. Finally, it would also be inconsistent with President Obama's Executive Order 13514 requiring federal agencies and facilities to exercise Federal Leadership in Environmental, Energy and Economic Performance. The federal government's refusal to pay the fees that others are required to bear to address the costs of stormwater runoff would fly in the face of Executive Order 13514.

I. Background

Section 313(a) of the Clean Water Act requires federal facilities to comply with the CWA's procedural and substantive requirements "*including the payment of reasonable service charges*" related to control and abatement of water pollution. 33 USC 1323(a). Presently, many federal entities around the country are refusing to pay "reasonable service charges" to municipalities, publicly-owned treatment works ("POTWs"), and local governments related to wastewater and stormwater services. Generally, the federal entities claim that municipalities are imposing an illegal "tax" on the federal government and trying to disguise it as a "fee" or service charge. The federal government's refusal to pay its fair share of these treatment fees is imposing a huge burden on municipalities that contain federal lands within their boundaries because private ratepayers and local governments must pay more than their fair share of the cost of the services required to meet federal CWA requirements.[7]

This issue is currently before the OLC in part due to the April 2010 GSA preliminary determination that federal facilities located in Washington, DC, are not required to pay "impervious area charges" imposed by DC Water, on the basis that these fees amount to a tax on the federal government, and thus are unconstitutional.[8] It is

[6] The MS4 permit that EPA issued in proposed form on April 21, 2010 would require new and redevelopment projects to retain 90 to 95% of all stormwater on-site, and would also require extensive retrofits of streets and sidewalks in the District to reduce impervious areas, imposing substantial additional costs on the city.

[7] The federal government owns 650 million acres of land, which compose approximately 30% of United States land. Federal Lands and Indian Reservations, www.nationalatlas.gov/printable/fedlands.html (last visited 7/13/10).

[8] In making its decision, the GSA cited to a previous federal General Accountability Office (GAO) legal opinion on this issue, *Matter of: Forest Service- Surface Water Management Fees*, Government Accountability Office B-306666 (June 6, 2006).

worth noting that the federal government did not previously object to paying this fee when it was calculated on the basis of the amount of water consumed at the facility. DC Water, however, recently changed the way it calculated this charge to more accurately reflect the contribution that each facility in the District was having on Blue Plains, DC Water's wastewater treatment facility, particularly the contribution from stormwater runoff to the combined sewer system during wet weather events. It did so by lowering the rate for sewer services and including a separate charge, the IAC, that is based upon the amount of impervious surface at a facility. All residential and non-residential customers will be billed an IAC, as well as owners of large areas of impervious surface. The IAC is necessary to recover the costs of the $2.2 billion, federally-mandated Combined Sewer Overflow Long-Term Control Plan ("CSO LTP") which was approved by EPA and the District in 2004 and made enforceable pursuant to a federal consent decree.[9] *Anacostia Watershed Society v. District of Columbia Water and Sewer Authority et al.* (C.A. 1:00 CV00183 TFH) (2005). The IAC underwent an extensive notice and comment period, and DC Water solicited input from various stakeholders and government agencies. The DC Water Board of Directors determined that the IAC was a more equitable way to recover the substantial costs of the CSO LTCP. The IAC aligned the utility's fees more closely with those entities contributing the most runoff and the associated regulatory costs to meet federal Clean Water Act requirements. Because the fee is based upon the amount of impervious surface on a site, rather than the amount of water consumed, properties such as surface parking lots, which previously paid minimal fees but contributed substantially to the urban stormwater and CSO problem, now bear a larger and fairer share of that cost. As the federal government owns a large portion of the property in the District, exempting federal facilities from the IAC would lead to an inequitable distribution of assessments in order to pay for the CSO LTCP.[10]

II. Sovereign Immunity

The doctrine of sovereign immunity and regulatory law allow local governments to charge reasonable "fees" to federal facilities if the federal government has waived its immunity. Under the relevant CWA section for wastewater and stormwater fee issues, Section 313(a),[11] Congress has waived sovereign immunity for these fees in certain circumstances.

A. The Doctrine of Sovereign Immunity

It is well established that under the doctrine of sovereign immunity, the federal government is immune from taxation by the states.[12] This concept is consistent with the Supremacy Clause.[13] However, whenever Congress declares that federal entities or federal property are subject to state regulation, a waiver of sovereign immunity must be unequivocally expressed in statutory text,[14] cannot be implied,[15] and cannot only be supplied by a

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[9] The LTCP is designed to increase sewer system capacity and reduce the number of CSO events. CSOs occur during wet weather when extra flow entering the combined sewer system from stormwater drains exceeds the system's capacity and causes overflows of untreated wastewater and stormwater into local waterways before reaching the treatment plant.

[10] This issue has generated concern in Congress as well. In July 2010, Rep. Eleanor Holmes Norton (D-DC) introduced H.R. 5724, seeking to clarify the federal government's responsibility to pay "reasonable service charges" for stormwater services provided by municipal utilities. This legislation is a companion bill to S. 3481, introduced in June 2010 by Senator Ben Cardin (D-MD). Both bills seek to clarify that fees charged for the control and abatement of water pollution, including stormwater management fees, shall not be considered a tax and, therefore, must be paid by federal agencies pursuant to their obligations under CWA Section 313(a).

[11] 33 U.S.C. §1323(a) (2006).

[12] *See McCullough v. Maryland*, 17 U.S. 316 (1819).

[13] U.S. Const., Art. VI, cl. 2.

[14] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

[15] *Irwin v. Department of Veterans Affairs*, 489 U.S. 89, 95 (1990).

statute's legislative history.[16] Further, a waiver of sovereign immunity is strictly construed in favor of the sovereign.[17] The specific provision must be scrutinized to determine if a blanket waiver exists or if certain criteria must be met in order for the waiver to be in effect.

B. CWA Section 313(a)

The relevant provision of the CWA, Section 313(a), states in part that:

> [E]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of *reasonable service charges*.[18]

House and Senate Reports reflect Congress' clear intent to waive the federal government's immunity for reasonable service charges under the CWA. In 1971, a Senate Report where § 313(a) was analyzed referenced evidence of "many incidents of flagrant violations of air and water pollution requirements by Federal facilities." The Report continued:

> Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.[19]

Following the 1972 Amendments to the CWA, several states brought suit against the federal government for not complying with the state permit system and other procedural matters pursuant to § 313(a). The Supreme Court in *EPA v. California*, 426 U.S. 200 (1976), then held that federal facilities must comply with local pollution standards at the level set by states. However, the Court found that there was no Congressional intention that federal facilities be subjected to every measure incorporated in a state plan designed to limit pollution. Moreover, the Court found that Congress intended to treat substantive state requirements different from procedural requirements.[20]

Congress clearly articulated its disapproval of the Court's decision. Senate Report 95-370 provides in relevant part:

> The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent. Since the substantive requirements of the act and of State and local law would be unenforceable unless procedural provisions were also met, Section 313 is amended to specify that, as in the case of air

[16] *Nordic Village, Inc.*, 503 U.S. at 37.
[17] *United States v. Williams*, 514 U.S. 527, 531 (1995).
[18] 33 U.S.C. § 1323(a) (2006) (emphasis added).
[19] S. REP. NO. 92-414 (1971) *reprinted* at 1976 U.S.C.C.A.N. 3733-44.
[20] H.R. REP. NO. 94-149(I), at 45 (1976), *reprinted* in 1976 U.S.C.C.A.N. 6238, 6283-84. *See generally EPA v. California*, 426 U.S. 200 (1976).

> pollution, a Federal facility is subject to any Federal, State, and local requirement respecting the control or abatement of water pollution, both substantive and procedural, to the same extent as any person is subject to these requirements. This includes, but is not limited to, requirements to obtain operating and construction permits...and the payment of reasonable service charges.[21]

These sections from the House and Senate Reports shed light on Congress' intent to waive the federal government's immunity for reasonable service charges under the CWA. Although Section 313(a) waives sovereign immunity from certain, but not all, state and local environmental fees, it does not waive immunity from taxation. Additionally, the section does not specify what "fees" fall under "reasonable service charges" – this is an issue which the courts continue to determine. However, it has been established that the federal government must pay reasonable user fees.[22]

III. Fee vs. Tax

There are two schools of thought regarding the proper evaluation of whether a charge is a "fee" or a "tax." The majority of federal jurisdictions follow the *Massachusetts* test, while the minority of jurisdictions follow a fact specific inquiry that was first used in the First Circuit Court of Appeals case of *San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico*.[23]

A. The Majority Test: *Massachusetts v. United States*

Since Section 313(a) of the CWA is not a blanket waiver subjecting the federal government to all fees and taxes, the determination of whether impervious area charges and stormwater fees are in fact a "fee" can be reviewed under the *Massachusetts* test. As one court stated, the "classic regulatory fee" is a levy "imposed by an agency upon those subject to its regulation" and used to raise money that is then placed into "a special fund to defray the agency's regulation-related expenses."[24]

As part of a comprehensive program to recoup the costs of federal aviation programs from those who used the national air system, Congress enacted the Airport and Airway Revenue Act of 1970, which imposed an annual "flat fee" registration tax on all civil aircraft, including those owned by the states and by the federal government, that fly in the navigable airspace of the United States. The Act also imposes a 7 cent per gallon tax on aircraft fuel, which, together with a 5 cent per pound aircraft tire and 10 cent per pound tube tax and the registration tax, was intended to reflect the cost of benefits from the programs to noncommercial general aircraft, but states were exempted from the fuel, tire, and tube taxes. After the registration tax was collected under protest from it with respect to a helicopter it used exclusively for police functions, the Commonwealth of Massachusetts instituted a refund lawsuit, contending that the United States may not constitutionally impose a tax that directly affects the essential and traditional state function of operating a police force. The District Court dismissed the complaint and held that the registration tax was a user fee which did not implicate the constitutional doctrine of implied immunity of state government from federal taxation. The Court of Appeals affirmed.

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[21] S. REP. NO. 95-370 , at 67-68 (1977), *reprinted* in 1977 U.S.C.C.A.N. 4326, 4392-93.
[22] *United States v. City of Huntington, West Virginia*, 999 F.2d 71, 74 (W.Va. 1993).
[23] 967 F.2d 683 (1st Cir. 1992).
[24] *Maine v. Department of Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992).

The U.S. Supreme Court affirmed and held that the registration tax did not violate the implied immunity of a state government from federal taxation. The Court stated that a State enjoys no constitutional immunity from a nondiscriminatory federal revenue measure which operates only to ensure that each member of a class of special beneficiaries of a federal program pays a reasonable approximation of its fair share of the cost of the program to the Federal Government. Also, the Court developed a three part test regarding immunity from taxation.[25] The Court held that even if it were feasible for the federal government to recover all costs of a program through charges for measurable amounts of use of its facilities, rather than by imposing a flat fee, so long as the federal taxes imposed (1) do not discriminate against state functions, (2) are based on a fair approximation of the state's use of the facilities, and (3) are structured to produce revenues that will not exceed the total cost to the federal government of the benefits supplied, there can be no substantial basis for a claim that the federal government may be using its taxing powers to control, unduly interfere with, or destroy a state's ability to perform essential services. While the *Massachusetts* case dealt with a fee imposed by the federal government on the state, it has been relied on in justifying fees assessed against the federal government. *State of Maine v. Department of the Navy*, 973 F. 2d. 1007 (1st Cir. 1992).

1. Discrimination Prong

Under *Massachusetts*, the federal government must not be treated differently in the enforcement of the fee requirement than other regulated entities.[26] This prong of the test is the easiest to analyze because the problem may be plain from the statutory text itself.[27] For example, a state that exempts itself from imposition of RCRA hazardous waste fees violates the nondiscrimination prong.[28] In the wastewater and stormwater fee context, in order to meet this prong, charges to federal facilities must be billed in the same manner and based on the same rate structure as charges billed to other municipal customers. We believe most municipal wastewater and stormwater fees, as well as impervious area charge programs, satisfy this requirement.

2. Fair Approximation of the Benefits Prong

Under the second prong of the test, in order for the charge to be considered a "fee," it must be a fair approximation of the benefits received. The Supreme Court stressed that a "governmental body has an obvious interest in making those who specifically benefit from its services pay the cost."[29] Indeed, the charges and benefits scrutinized are to be examined based on whom the charges are imposed, and not the public at large.[30] The *Massachusetts* court stated that a requirement of the second prong is that the charges "are based on a fair approximation of *use* of the system."[31] However, when applying the test to the facts of the case, it said the tax satisfied "the requirement that it be a fair approximation of the *cost* of the benefits civil aircraft receive from the federal activities."[32] While this might seem as though the court was applying two different criteria for the second prong, in its analysis the test tilts towards the consideration of *use*.[33] The tilt toward use, rather than cost, is also evident in the Commerce Clause case from which the *Massachusetts* test was taken from.[34]

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[25] *Massachusetts v. United States*, 435 U.S. 444 (1978).
[26] Major Cotell, and Lieutenant Colonel Jaynes, Regulatory Fees… or Taxes? Sorting Out the Difference, Army Lawyer (Oct. 1999).
[27] *Id.*
[28] *New York State Dep't of Envtl. Conservation v. United States Dep't of Energy*, 89-CV-194, 1997 WL 797523 (N.D.N.Y 1997).
[29] *Massachusetts 435 U.S.*, at 462.
[30] *United States v. Maine*, 542 F. Supp. 1056 (D. Me. 1981).
[31] *Massachusetts 435 U.S.*, at 466 (emphasis added).
[32] *Massachusetts 435 U.S.*, at 467 (emphasis added).
[33] *New York Dep't of Envtl. Conservation v. United States Dep't of Energy*, 218 F.3d 96, 102 (2000).
[34] *Id.; See Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972).

The *Massachusetts* court and recent courts noted that "the second prong of the *Massachusetts* test does not require exact correlation ... between costs of the overall services provided and the fees assessed for such services."[35] Additionally, it was found that whether the federal entity uses any state services currently is irrelevant, because there is a "benefit" as long as the United States could use the service in the future if needed.[36] Further, the state or municipality need only show "a rational relationship between the methods used to calculate the fees and the benefits available to those who pay them."[37] This line of reasoning was also used in a First Circuit RCRA "fee" case.[38]

3. Fee Structure Prong

This prong is straight forward and is addressed strictly in terms of total program revenues as compared to expenditures, and relief from payment of fees will be unlikely as long as there is a "rough relation between state regulatory costs and the fees charged."[39] In fact, the Supreme Court has found that as long as "charges fairly approximate use and thereby fairly approximate costs of available services, it does not matter whether or how a governmental entity segregates the money it collects."[40] This prong is most easily identified when states or municipalities fail to restrict the use of environmental fees to actual related environmental programs.[41]

B. The Minority View: *San Juan Cingular* Test

A minority of jurisdictions reject the *Massachusetts* test because the facts of that case dealt with federal taxation upon the states, not state or local taxation upon the federal government.

Under this reasoning, a "fee" charged by a state or municipality for service rendered or convenience provided is not a tax.[42] While taxation is a legislative function, a fee is "incident to a voluntary act."[43] In determining whether a charge is a fee or a tax, the general inquiry is to assess the purpose of the charge.[44] If the charge is for revenue raising purposes, it is a tax, or if the charge is for regulatory or punitive purposes, it is a fee.[45] The inquiry in the minority view is a fact specific analysis of the relevant charging scheme and its purposes.[46]

In *San Jaun Cellular*, the court set out the confines of the classic tax vs. fee.[47] The "classic tax" is imposed by the legislature on a large portion of society, and it is used in the benefit of the community at large.[48] The "classic fee" is imposed by an administrative agency upon only those subject to its jurisdiction under the regulation, for either purpose described under the regulation or to raise "money placed in a special fund to defray the agency's

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[35] *New York Dep't of Envtl. Conservation v. United States*, 850 F. Supp. 132, 142 (N.D. N.Y 1994).
[36] Major Cotell, *supra* note 26, at 34 (citing Massachusetts 435 U.S. at 468).
[37] *New York Dep't of Envtl. Conservation v. United States*, 850 F. Supp. 132, 143 (N.D. N.Y 1994).
[38] *See Maine* 973 F.2d at 1013.
[39] *Id.*
[40] *New York Dep't of Envtl. Conservation v. United States Dep't of Energy*, 218 F.3d 96, 105 (2000) (*See Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc*., 405 U.S. 707, 720 (1972)).
[41] Major Cotell, *supra* note 26, at 35.
[42] *Packet Co. v. Keokuk*, 95 U.S. 80, 84 (1877).
[43] *National Cable Ass'n v. United States*, 415 U.S. 336, 340 (1974).
[44] *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997).
[45] *Id.*
[46] *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000).
[47] *San Juan Cellular Telephone Co. v. Public Service Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992).
[48] *San Juan Cellular*, 967 F.2d at 685.

regulation-related expenses."[49] In circumstances where charges fall somewhere in the middle, the most important factor then becomes the purpose behind the statute or regulation which imposes the charge.[50] Thus, if the ultimate use of the revenue benefits the general public then the charge will qualify as a tax, while if the benefits are more narrowly tailored then the charge will more likely be a fee.[51]

Additionally, under this test, the fact that the revenue is placed into a special fund is not in and of itself enough a reason to warrant characterizing the charge as a "fee."[52] Thus the inquiry then becomes whether the money is used "to benefit regulated entities,... to defray the cost of regulation," which makes the charge a fee, or whether it benefits the general public, which makes it a tax.[53]

IV. Existing Federal Case Law

There is limited federal case law regarding the stormwater "fee" vs. "tax" issue; however, NACWA and its members have been involved in a number of litigated matters, including the *City of Cincinnati v. United States* case in federal District Court in Ohio.

The City of Cincinnati and the federal government reached an agreement November 15, 2007, to settle litigation over payment of stormwater fees.[54] The dispute arose when a federal Department of Health and Human Services (DHHS) facility within the City's service area refused to pay over $100,000 in past-due invoices for stormwater services, alleging the charges were a "tax" on the federal government and thus refused payment.[55] NACWA filed an amicus curiae brief in the Fall of 2004 arguing that CWA Section 313 gives local governments the authority to collect "fees" from the federal government to cover the cost of stormwater services at its facilities. The court found that "the City's stormwater system charge falls squarely within the waiver of sovereign immunity," and thus the DHHS facility is not exempt from paying the charges.[56] As a result of a settlement agreement, the DHHS facility will pay a negotiated portion of the past-due stormwater fees, and while the DHHS facility does not admit any liability as part of the settlement, the court's ruling stays in place.[57]

V. DC Water's Impervious Area Charge, and Others Structured Like It, Constitute Valid Regulatory Fees

DC Water's IAC meets both the majority and minority tests and therefore, should be construed as a valid regulatory fee and not a tax under federal law. To reiterate, the *Massachusetts* test asks whether the charge (1) discriminates against state functions; (2) is based on a fair approximation of use of the system; and (3) is structured to produce revenues that will not exceed the total cost of providing service.[58]

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[49] *Id.*
[50] *South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983).
[51] *San Juan Cellula* , 967 F.2d at 685.
[52] *Valero*, 205 F.3d at 135 (citing *San Juan Cellular* 967 F.2d at 800).
[53] *Collins Holding Corp*, 123 F.3d at 800.
[54] *See City of Cincinnati v. United States*, 2007 WL 956432 (S.D. OH. 2007).
[55] *Id.* at 1.
[56] *Cincinnati*, 2007 WL 956432 at 5.
[57] Press Release, U.S. Reaches Settlement With City of Cincinnati and Hamilton County Resolving Major Sewer System Violations, *available* at http://yosemite.epa.gov/opa/admpress.nsf/3dcd568e448fb35e852572a000658eed/034f183cf5c7c20085256df100766bb8!OpenDocument.
[58] *Massachusetts*, 435 U.S. at 466-67.

Applying these factors to DC Water's IAC, the assessment should be characterized as a regulatory fee. *First*, the charge does not discriminate as it is applied to *all* residential and non-residential property owners. *Second*, the IAC is based upon the amount of impervious surface on a subject property. Impervious surfaces are a major contributor to runoff in the District and the charge reflects a property's contribution to the problem and the associated costs for the utility to meet it federal Clean Water Act requirements. Indeed, this charge is likely the most equitable method of charging property owners for contributing to the problem of urban stormwater runoff and represents a "fair approximation" of use of the District's sewer system. *Finally*, the IAC is designed to produce revenues that will not exceed the total cost of the benefits to be supplied. In fact, the charge was implemented to *recover* the costs of the $2.2 billion federally mandated CSO LTCP and to ensure compliance with the 2005 Consent Decree entered into by the United States and DC Water.[59] The statutory authority granting DC Water the power to institute such a charge lends further support to the IAC's characterization as a regulatory fee. Section 34-2202.16 of the D.C. Code provides: "The water and sewer rates levied by the Authority shall only be a source of revenue for the maintenance of the District's supply of water and sewage systems, and shall constitute a fund exclusively to defray any cost of the Authority."[60]

A straightforward application of the *San Juan Cellular* test also supports construing DC Water's IAC as a regulatory fee and not a tax. The *San Juan Cellular* test first asks about the type of entity that imposes the charge. The DC Water Board of Directors decided to implement the new IAC. The Board of Directors is the independent governing body for DC Water which consists of 11 principal and 11 alternate members and has no authority to tax. The Mayor of the District of Columbia appoints, and the DC Council confirms, the DC Board members and alternates. All Board members participate in decisions directly affecting the management of joint-use facilities and DC Water may only take action on policy matters (including setting fees for various services) after it receives a favorable vote of no less than six members of the Board of Directors. So, unlike the assessment in *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) that was deemed a tax because it was imposed by the West Virginia legislature,[61] the IAC, being imposed by an independent authority governed by a Board of Directors separate and apart from the D.C. Council, suggests that this element falls under the "regulatory fee" category instead of a "tax."

San Juan Cellular next asks what population is subject to the assessment. Those assessments that benefit the population at large are most often associated with taxes. Under this prong, courts often look at whether the subject entity is being charged incident to a voluntary act.[62] As discussed in King County's response to the GAO opinion, the population at large is not subject to the IAC. Only those property owners containing parcels with impervious surfaces are subject to the charge. To that end, a federal park that does not contain any impervious surfaces would not have to pay the IAC. Only those federal facilities that are developed with impervious surfaces are subject to the charge. Further, while the decision whether and where to develop are voluntary, techniques do exist to minimize the use of impervious surface as a development tool and steps can be taken to reduce impervious surfaces in the course of developing or redeveloping a parcel. Indeed, DC Water is exploring incentives that could reduce the IAC for ratepayers that use low impact development ("LID") and other measures to reduce stormwater runoff.

Finally, the third (and most dispositive) inquiry asks what purposes are served by the ultimate use of monies collected. It cannot be denied that one of the purposes of the collection of the IAC is to improve the water

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[59] *See Anacostia Watershed Society v. District of Columbia Water & Sewer Authority and U.S. v. District of Columbia Water & Sewer Authority*, Consolidated Civil Action No. 1:00CV00183TFH (D.D.C. March 25, 2005).
[60] D.C. CODE § 34-2202.16 (2010). *See also* District of Columbia Water and Sewer Authority Notice of Proposed Rulemaking, 56 D.C. Reg. 001852-53 (Feb. 27, 2009).
[61] *Valero Terrestrial Corporation v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000).
[62] *See National Cable Television v. United States*, 415 U.S. 336, 340.

quality in the District which will undoubtedly benefit the general public. However, the most direct purposes of the IAC are to recover the costs associated with complying with federal law[63] under a court enforced consent decree and resolve the urban water quality problem towards which the federal facilities contribute. Any other benefits related to public health or environmental conditions are merely ancillary. The ultimate purpose of all environmental statutes (e.g., Clean Air Act, Safe Drinking Water Act) is to benefit the health & safety of the general population. To argue that the IAC is a tax because its benefits are too broad would effectively eliminate all charges authorized or imposed on federal agencies under environmental statutes as impermissible taxes.

As a final point, we must distinguish DC Water's IAC from the District of Columbia Clean Air Compliance Fee previously analyzed by OLC.[64] A January 23, 1996 OLC memorandum to the GSA General Counsel addressed whether a DC Council passed Clean Air compliance fee may be assessed against federal employees parking in the District. The Act required the owner of real property in the District containing parking spaces used for commuting more than two days a week and for which the District's parking sales and use tax is not collected to register and pay a Clean Air Fee calculated at a rate of $20 per month per space, D.C. Act 10- 387 , reprinted in 42 D.C. Reg. 86 (Jan 6, 1995) at sec. 3-5. The proceeds of the fee would be used exclusively to subsidize mass transit.[65] The OLC opinion rejected the District's argument that "[I]nasmuch as the primary purpose of this exaction is the control and abatement of air pollution, we conclude that this exaction is a "fee" and not a "tax" on several grounds." *First*, "the fact that the proceeds of the Fee are to be allocated entirely to support mass transit system strongly suggests that the primary purpose of the Fee is to raise revenue to support government operations." (p.5). *Second*, "even assuming that the Clean Air fee falls in the middle of the fee-tax spectrum, following Judge (now Justice) Breyer's focus on the revenue's ultimate use (in San Juan Cellular) leads to the conclusion that this exaction is a tax... The subsidization of mass transit is not a regulatory costs, but rather a general government expenses typically defrayed by taxes: subsidization of mass transit 'provides a general benefit to the public, of the sort often financed by a general tax' San Juan Cellular Telephone, 967 F. 2d. 685." *Third*, OLC noted that the existence of a bona fide regulatory purpose "does not mean, of course, that every charge with a regulatory purpose that raises revenue beyond what would defray regulatory costs must be viewed as a fee rather than a tax."

In contrast, the DC Water's IAC has none of these attributes. The charges are assessed to equitably cover the costs necessary to defray the tremendous costs of complying with the LTCP under the federal consent decree and not to raise revenues to address larger water pollution problems --- unlike the Clean Air fee that was designed to help subsidize mass transit. The IAC is assessed on the extent of impervious surface and thus is an equitable way to require that those contributing the most urban stormwater runoff will pay the most -- unlike the Clean Air fee that was assessed based on the number of parking spaces, not the extent to which commuters contribute to the air pollution in the District. Finally, the IAC will be used specifically to defray DC Water's costs of constructing massive projects required under the LTCP and consent decree, and not to generally raise revenues for the District to address larger water pollution problems affecting District residents -- unlike the Clean Air Fee that was not intended to equitably defray the costs of projects necessary to comply with the Clean Air Act. Indeed, just because the IAC provides environmental benefits does not mean that is it a tax and not a "fee for service."

For all of these reasons, we believe that DC Water's IAC, and similar programs like it instituted by other utilities like it across the country that seek to recover the federally mandated costs of managing urban stormwater

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[63] DC Water's Long Term Control Plan mandated by the CWA and the consent decree in *Anacostia Watershed Society v. District of Columbia Water and Sewer Agency*; supra at p. 6

[64] *See generally* Whether the District of Columbia's Clean Air Compliance Fee May Be Collected From the Federal Government, January 23, 1996 Memorandum for Emily C. Hewitt General Counsel General Services Administration. 20 Op. Off. Legal Counsel 12 (1996), *available* at http://www.justice.gov/olc/parking.op1.htm.

[65] Id at 1.

runoff that enters combined sewer systems and/or stormwater systems, qualify as fees related to the control and abatement of water pollution as outlined under CWA Section 313 and that federal facilities must pay.

VI. There are Strong Policy Reasons For Requiring Federal Facilities to Comply with Properly Structured Fee Assessment Regulations

The Obama Administration's recent Clean Water Act enforcement initiatives aimed at controlling stormwater runoff from developed sites, which will greatly increase the costs to local government and the private sector, provide a strong policy reason for ensuring that federal facilities share the costs of compliance equitably. Nowhere is this need more urgent than under the Administration's CWA enforcement plan, ongoing stormwater rulemaking effort, and Chesapeake Bay Restoration Program.

EPA's 2009 *Clean Water Act Enforcement Action Plan* targets stormwater and combined sewer overflows among its top enforcement priorities.[66] EPA has also been moving ahead with its initiative to develop a national rule making process regarding stormwater discharges. As part of this effort, EPA is considering requiring MS4s to address stormwater discharges in areas of existing development through retrofitting the sewer systems of drainage areas with improved storm water control measures. As a result of this initiative, municipalities around the country will be facing increased regulatory costs that will likely be passed on to users of the storm sewer system. If federal facilities are exempt from their fair share of these costs, the burden will fall unfairly on non federal landowners to cover the costs of treating run off from federal facilities.

The Chesapeake Bay Restoration program under President Obama's Executive Order 13508, issued May 12, 2009, provides a compelling example for why federal facilities must pay their fair share of the cost for treating stormwater runoff. The Executive Order launched a series of studies and actions to quickly improve the conditions of the Bay by setting TMDLs for the Bay and its tributaries by December 31, 2010, *including limits on sediment caused by uncontrolled stormwater runoff.* Maryland, Virginia and the District of Columbia, jurisdictions which all contain many federal facilities, will have to develop action plans to achieve these new limits. In fact, EPA recently proposed a very stringent and expensive MS4 permit for the District to achieve similar and related goals. Indeed, DC Water is already implementing a very expensive LTCP, under court order, which will require $2.2 billion in infrastructure improvements (including 12 miles of underground tunnels) to be built over the next 20 years to address CSOs resulting, at least in part, from uncontrolled stormwater runoff. The enormous costs of the LTCP, in addition to the likely costs of meeting the new TMDL requirements for the Chesapeake Bay, will only increase the financial burden on property owners in the District if federal facilities are found to be exempt from paying these fees. Such a result would also be inconsistent with President Obama's Executive Order 13514 requiring Federal Leadership in Environmental, Energy and Economic Performance.

CONCLUSION

In conclusion, NACWA is asking that the Office of Legal Counsel resolve this conflict by issuing a legal opinion clearly stating that wastewater and stormwater fees levied by municipalities to pay for federally-mandated water quality programs, particularly those based on impervious surface discharges, are reasonable service charges that must be paid by federal facilities under Clean Water Act Section 313. NACWA believes that the DC Water impervious area charge (IAC) program discussed in detail above

[66] Clean Water Act Enforcement Action Plan, available at http://www.epa.gov/compliance/civil/cwa/actionplan101409.pdf.

provides a good model of a fee for service program that will pass Constitutional muster. NACWA requests a meeting with OLC at your earliest convenience to discuss this request.

Sincerely Yours,

Ken Kirk,
Executive Director

Cc: John Brownlee, Holland & Knight LLP
Lawrence R. Liebesman, Holland & Knight LLP
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Nathan Gardner-Andrews, NACWA

G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Forest Service—Surface Water Management Fees

File: B-306666

Date: June 5, 2006

DIGEST

Appropriated funds are not available to pay surface water management fees assessed by King County, Washington, against national forest lands and other Forest Service properties because those fees constitute a tax. The federal government is constitutionally immune from state and local taxation. Although section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), waives sovereign immunity from certain state and local environmental regulations and fees, it does not waive immunity from taxation. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

DECISION

The Chief Financial Officer of the Forest Service, United States Department of Agriculture, has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying surface water management fees assessed by King County, Washington, against federal lands located within its jurisdiction. Letter from Jesse L. King, Associate Deputy Chief for Business Operations/Chief Financial Officer, Forest Service, to David M. Walker, Comptroller General, GAO, Oct. 11, 2005 (King Letter). The Forest Service believes that it is constitutionally immune from paying the fee, which the agency considers a tax. As we explain below, we agree that the United States is constitutionally immune from surface water management fees assessed by King County and find that appropriated funds are not available to pay such assessments. Furthermore, although section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), requires federal agencies to comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges, that provision does not waive the federal government's sovereign immunity from taxation by state and local government. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

BACKGROUND

The National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States, including rivers, lakes, and streams. 33 U.S.C. § 1342.[1] Under the NPDES program, the U.S. Environmental Protection Agency (EPA) and EPA-authorized states issue and enforce permits to regulate pollution from specific entities, including, for example, industrial dischargers and municipal wastewater treatment facilities, known as "point sources." *Id. See, e.g.,* GAO, *Clean Water Act: Improved Resource Planning Would Help EPA Better Respond to Changing Needs and Fiscal Constraints,* GAO-05-721 (Washington, D.C.: July 22, 2005), at 5--6. Section 319 of the CWA also requires states to implement management programs for controlling pollution from diffuse or "nonpoint" sources, such as agricultural runoff. 33 U.S.C. § 1329. *See, e.g.,* State of Washington, Department of Ecology, *Washington's Water Quality Management Plan to Control Nonpoint Source Pollution,* Publ'n No. 99-26 (April 2000); Vol. 1, *Water Quality Summaries for Watersheds in Washington State,* Publ'n No. 04-10-063 (August 2004).[2]

Federal facilities are required under section 313(a) of the CWA to comply with all federal, state, interstate and local regulations respecting the control and abatement of water pollution, including the payment of reasonable service charges. 33 U.S.C. § 1323, quoted, in relevant part, *infra* p. 10. Accordingly, the Forest Service and the State of Washington have entered into an agreement whereby the Service agrees, among other things, to implement site specific "best management practices" on national forests in Washington to meet or exceed applicable state surface water quality laws and regulations. *Memorandum of Agreement between the USDA Forest Service, Region 6 and the Washington State Department of Ecology for Meeting Responsibilities under Federal and State Water Quality Laws,* Nov. 21, 2000.[3]

To implement the CWA, King County has also established a surface water management (SWM) program to fulfill its requirements under its NPDES municipal stormwater permit and to regulate nonpoint source pollution. *See generally* King

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[1] The Clean Water Act is codified, as amended, in scattered sections of 33 U.S.C. §§ 1251–1387.

[2] *Available at* www.ecy.wa.gov/pubs.shtm (last visited Apr. 12, 2006).

[3] *See also* State of Washington, Department of Ecology, *Washington State and U.S. Forest Service's Forest Management Agreement,* Publ'n No. 00-10-048 (November 2000), *available at* www.ecy.wa.gov/biblio/0010048.html (last visited Apr. 12, 2006).

County, Wash., Code (hereafter K.C.C.) title 9 (2005); *see also* K.C.C. § 9.08.060(R) (findings of the county council regarding the county's implementation of the CWA).[4] Counties in the state of Washington are authorized to raise revenues through rates and charges assessed against those served by, or receiving benefits from, any storm water control facility or contributing to an increase of surface water runoff. Wash. Rev. Code § 36.89.080(1) (2005). Under this authority, King County imposes an annual service charge, or "surface water management fee" (hereinafter "SWM fee"), on all developed parcels in unincorporated areas of the county, for surface and storm water management services provided by the SWM program. K.C.C. §§ 9.08.050(A), 9.08.070(C) (2005). These services include, but are not limited to:

> "basin planning, facilities maintenance, regulation, financial administration, public involvement, drainage investigation and enforcement, aquatic resource restoration, surface and storm water quality and environmental monitoring, natural surface water drainage system planning, intergovernmental relations, and facility design and construction."

K.C.C. § 9.08.010(Y).[5]

According to the county ordinance, SWM fees are necessary for various reasons: (1) to promote the public health, safety, and welfare by minimizing uncontrolled surface and storm water, erosion, and water pollution; (2) to preserve and utilize the many values of the county's natural drainage system including water quality, open space, fish and wildlife habitat, recreation, education, urban separation and drainage facilities; and (3) to provide for the comprehensive management and administration of surface and storm water. K.C.C. § 9.08.040.

SWM fees must be based on the relative contribution of increased surface and storm water runoff from a given parcel to the surface and storm water management system.[6] K.C.C. § 9.08.070(A). The SWM fee structure consists of seven classes of

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[4] *Available at* www.metrokc.gov/mkcc/Code/index.htm (last visited Apr. 12, 2006). *See further* King County, Water and Land Resources Division, *Stormwater Management Program, 1996–2000* (Mar. 28, 1997), *available at* www.dnr.metrokc.gov/wlr/stormwater/SWMPDocument.htm (last visited Apr. 12, 2006).

[5] *See also* King County, Water and Land Resources Division, *King County's Surface Water Management Fee—Services We Provide, available at* www.dnr.metrokc.gov/wlr/surface-water-mgt-fee/ (last visited Apr. 12, 2006) (additional information and history of the SWM program).

[6] "Surface and storm water management system" means constructed drainage facilities and any natural surface water drainage features that do any combination of

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developed parcels based on the parcel's relative percentage of impervious surfaces:[7] (1) residential, (2) very light, (3) light, (4) moderate, (5) moderately heavy, (6) heavy, and (7) very heavy. K.C.C. § 9.08.070(C). Residential and very lightly developed properties are assessed a flat annual fee of $102 per parcel, while light to very heavily developed parcels are assessed various per acre rates ranging from $255.01 per acre for lightly developed parcels to $1,598.06 per acre for very heavily developed parcels. *Id.* *See also* King County, Washington, *SWM Fee Protocols* (January 2004), at 3.[8]

The Forest Service maintains approximately 363,543 acres of federal land within the jurisdictional boundary of King County, including the Mount Baker-Snoqualmie National Forest (MBS), roads, campgrounds, trailheads, and picnic areas. King Letter, Attachment. In 2001, the King County Treasury Division began assessing SWM fees against several parcels of Forest Service land. *Id.* The MBS Supervisor's Office questioned the applicability of the fee because no services were provided to the Forest Service and requested that the King County Treasury Division remove Forest Service properties from its tax rolls. Letter from Larry Donovan, Recreation Special Uses Coordinator, MBS National Forest Supervisor's Office, to King County Treasury, Mar. 28, 2001. The county treasury division informed the MBS financial manager that the SWM fee is not a tax assessment, but a fee, and that the U.S. government was not exempt from paying fees. King Letter, Attachment. Despite informing the King County Treasury Division on several occasions that the Forest Service believes it is exempt from the SWM fee, the MBS financial manager continues to receive "official property value notices" and "delinquent real estate tax statements" from King County. Letter from Mary E. Wells, Financial Manager, MBS National Forest Supervisor's Office, to King County Treasury Division, Oct. 15, 2001.

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collection, storing, controlling, treating, or conveying surface and storm water. K.C.C. § 9.08.010(BB).

[7] An impervious surface is a hard surface area which either prevents or retards the entry of water into the soil causing water to run off the surface in greater quantities than under natural conditions prior to development. Common impervious surfaces include roofs, walkways, patios, driveways, parking lots, storage areas, areas which are paved, graveled, or made of packed or oiled earthen materials, or other surfaces which similarly impede the natural infiltration of surface and storm water. *See* K.C.C. § 9.08.010(K).

[8] *Available at* www.dnr.metrokc.gov/wlr/surface-water-mgt-fee/pdf/swm-fee-protocols.pdf (last visited Apr. 12, 2006).

DISCUSSION

The issue before us is whether the Forest Service is constitutionally immune from paying the King County surface water management fee or whether the Forest Service may pay that fee as a "reasonable service charge" under the Clean Water Act's sovereign immunity waiver, 33 U.S.C. § 1323(a).

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments. *See McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). The Supreme Court has described a tax as "an enforced contribution to provide for the support of government." *United States v. La Franca,* 282 U.S. 568, 572 (1931). A fee charged by a state or political subdivision for a service rendered or convenience provided, however, is not a tax. *See Packet Co. v. Keokuk,* 95 U.S. 80, 84 (1877) (wharf fee levied only on those using the wharf is not a tax); 73 Comp. Gen. 1 (1993) (federal agencies receive a tangible benefit from use of city sewer and may pay sewer service charges so long as they reflect the fair and reasonable value of service received by United States); 70 Comp. Gen. 687 (1991) (county landfill user fee is a reasonable, nondiscriminatory service charge based on level of service provided). *See also* 50 Comp. Gen. 343 (1970) (county per-ton incinerator service charge not a tax against United States but a reasonable charge based on the *quantum* of direct service furnished). Taxation is a legislative function while a fee "is incident to a voluntary act, *e.g.,* a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." *National Cable Television Ass'n v. United States,* 415 U.S. 336, 340 (1974).

Distinguishing a tax from a fee requires careful analysis because the line between "tax" and "fee" can be a blurry one. *Collins Holding Corp. v. Jasper County, South Carolina,* 123 F.3d 797, 800 (4th Cir. 1997). In determining whether a charge is a "tax" or "fee," the nomenclature is not determinative, and the inquiry must focus on explicit factual circumstances. *Valero Terrestrial Corp. v. Caffrey,* 205 F.3d 130, 134 (4th Cir. 2000). *See also United States v. Columbia, Missouri,* 914 F.2d 151, 154 (8th Cir. 1990) (applying a "facts and circumstances" test rather than "reduc[ing the] case to a question of pure semantics" in finding that city utility rate was not a tax). One court has described a "classic" tax as one meeting a three-part inquiry—an assessment that (1) is imposed by a legislature upon many, or all, citizens, (2) raises money, and (3) is spent for the benefit of the entire community.[9] *San Juan Cellular*

[9] In two cases, courts have applied a test based on *Massachusetts v. United States,* 435 U.S. 444, 466–67 (1978), to determine whether certain state environmental regulatory assessments were "taxes" or "fees." *See New York State Department of Environmental Conservation v. United States Department of Energy,* 772 F. Supp. 91, 98–99 (N.D.N.Y. 1991), *aff'd* 218 F.3d 96 (2nd Cir. 2000) (applying *Massachusetts* test to determine whether New York's water regulatory charge was an impermissible tax or a permissible fee or regulatory charge under the CWA); *Maine v. Department of*

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Tel. Co. v. Public Service Comm'n of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992). On the other hand, a classic "regulatory fee" is imposed by an agency upon those subject to its regulation, may serve regulatory purposes, and may raise money to be placed in a special fund to help defray the agency's regulation-related expenses. *Id. See also* B-288161, Apr. 8, 2002, n.1 at 4, *and cases cited therein, aff'd on reconsideration,* B-302230, Dec. 30, 2003 (applying *Valero* and *San Juan Cellular* in tax *versus* fee analysis).

When the three-part inquiry yields a result that places the charge somewhere in the middle of the *San Juan Cellular* descriptions, that is, when assessments have characteristics of both "taxes" and "fees," the most important factor becomes the purpose behind the statute or regulation that imposes the charge. *See Valero,* 205 F.3d at 134 *(citing South Carolina v. Block,* 717 F.2d 874, 887 (4th Cir. 1983)). In those circumstances, if the ultimate use of the revenue benefits the general public, then the

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Navy, 973 F.2d 1007 (1st Cir. 1992) (applying *Massachusetts* test in analyzing state waste regulatory fee *vis-à-vis* the Resource Conservation and Recovery Act's sovereign immunity waiver provision). We view the *Massachusetts* test as factually and conceptually inapposite, and accordingly we do not apply it to analyze the constitutionality of King County's SWM fee as assessed against the federal government. The Supreme Court articulated the *Massachusetts* test in the situation where the United States was assessing a federal aircraft registration tax *against* a state. The test asks whether the charges (1) discriminate against *state* functions, (2) are based on a fair approximation of use of the system, and (3) are structured to produce revenues that will not exceed the total cost to the *federal* government of the benefits to be supplied. *Massachusetts,* 435 U.S. at 466–67 (emphasis added). The Supreme Court declined to apply the *Massachusetts* test in *United States v. United States Shoe Corporation,* 523 U.S. 360, 367–68 (1998) (Harbor Maintenance Tax is unconstitutional as applied to exported goods under the Export Clause of the U.S. Constitution, art. I, § 9, cl. 5). It explained that the test involved a different constitutional provision than the Export Clause. *Id.* The Fourth and Eighth Circuits used the same logic to reject the *Massachusetts* test in the context of *federal* immunity from *state* taxation. *United States v. Huntington, West Virginia,* 999 F.2d 71, 73 (4th Cir. 1993), *cert. denied,* 510 U.S. 1109 (1994) ("Inasmuch as the states' immunity from federal taxation is more limited than the federal government's immunity from state taxation, and is based on a different constitutional source . . . the [*Massachusetts*] test is inapplicable here."), *citing Columbia, Missouri,* 914 F.2d at 153–54 (Eighth Circuit refusing to adopt the *Massachusetts* test in holding that a Veterans Administration Hospital is not constitutionally immune from Columbia, Missouri's "payment in lieu of taxes" assessment). *See also Massachusetts,* 435 U.S. at 455 (plurality opinion) ("The immunity of the Federal Government from state taxation is bottomed on the Supremacy Clause [art. VI, cl. 2], but the States' immunity from federal taxes was judicially implied from the States' role in the constitutional scheme.").

charge will qualify as a "tax," while if the benefits are more narrowly circumscribed, then the charge will more likely qualify as a "fee." *Id.* (citing *San Juan Cellular,* 967 F.2d at 685).

In *United States v. Huntington, West Virginia,* the Fourth Circuit considered whether a "municipal service fee" was indeed a fee or a tax, and whether the federal government (in this case, the General Services Administration and the U.S. Postal Service) was immune from its assessment. *United States v. Huntington, West Virginia,* 999 F.2d 71 (4th Cir. 1993), *cert. denied,* 510 U.S. 1109 (1994). A provision of the West Virginia Code authorizes any city furnishing an essential or a special municipal service to impose upon the users of such service reasonable rates, fees, and charges. W. Va. Code § 8-13-13 (2005). The city of Huntington, West Virginia, imposed a "municipal service fee" for fire and flood protection and street maintenance based on the square footage of buildings owned in the city. *Huntington,* 999 F.2d 71. The court found that liability for Huntington's municipal service fee arose not from any use of city services but from the federal government's status as property owner. *Id.* at 74.

Further, rejecting the city's argument that any assessment tied to some state-provided benefit is a user fee, the court added: "Under the theory advanced by the City, virtually all of what now are considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a 'police fee.'" *Id.* at 74. The court concluded that an assessment for such core government services is in fact a "thinly disguised tax" from which the General Services Administration and the U.S. Postal Service were constitutionally immune. *Id. See also* 20 Op. Off. Legal Counsel 12 (1996) (applying *Huntington* to conclude that District of Columbia clean air fee is not a user or service fee because revenue from the fee is used to provide an undifferentiated benefit to the entire public).

King County's Surface Water Management Fee

When subjected to the three-part inquiry of *San Juan Cellular*, King County's SWM fee has the classic attributes of a tax. The SWM fee is (1) imposed by the county council, under authority granted by the Washington State legislature, on all owners of developed parcels in unincorporated areas of the county (2) to raise money that is (3) spent to benefit the entire community. *See Valero,* 205 F.3d at 134*; San Juan Cellular,* 967 F.2d at 685. Though denominated a "service charge" or "fee," the facts and circumstances surrounding King County's assessment of SWM fees, *Columbia, Missouri,* 914 F.2d at 154, disclose that the county provides no direct, tangible

service or convenience in exchange for payment of the SWM fee.[10] *See Packet Co.,* 95 U.S. at 87--88; 73 Comp. Gen. 1; 50 Comp. Gen. 343. *Cf. Teter v. Clark,* 104 Wash. 2d 227, 233--34 (Wash. 1985) (fees imposed under Wash. Rev. Code § 36.89.080 are an exercise of general police power and valid under state constitution even though no specific service received). Unlike a fee to use a city wharf or sewer or a county incinerator or landfill, the benefits paid for by King County's SWM fee—basin planning, facilities maintenance, regulation, drainage investigation, resource restoration, environmental monitoring, *etc.*—are not narrowly circumscribed but benefit the general population at large. *See Valero,* 205 F.3d at 134. Such broad benefits are more in the nature of core government services comparable to the provision of fire and flood protection and street maintenance financed through *Huntington*'s "municipal service fee," 999 F.2d at 73, than a fee for a direct, tangible service or convenience provided.[11] 73 Comp. Gen. 1; 50 Comp. Gen. 343. Nor is assessment of the SWM fee incident to a voluntary act such as a request for a permit, *see National Cable Television,* 415 U.S. at 340; the assessment, rather, supports the provision of undifferentiated benefits to the entire public. *See* 20 Op. Off. Legal Counsel 12.

King County's SWM fee, however, also shares some characteristics of a classic "regulatory fee." *See San Juan Cellular,* 967 F.2d at 685. The assessment, for example, serves regulatory purposes under the county's implementation of its municipal NPDES permit under the CWA. *See* K.C.C. § 9.08.060(R). Ascribing a regulatory purpose to a tax, however, does not convert it into a "fee." 20 Op. Off. Legal Counsel 12. Taxes, like fees or service charges, may also serve regulatory purposes. *See Massachusetts v. United States,* 435 U.S. 444, 455--56 (1978) ("[A] tax is a powerful regulatory device; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise"). SWM fees must also be deposited in a special fund to be used only for maintaining and operating storm water control facilities; planning, designing, establishing, acquiring, developing, constructing, and improving such facilities; or to

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[10] The assessment is variously called a "service charge" or "surface water management fee." *Compare* K.C.C. § 9.08.070 *with SWM Fee Protocols.* The terms "service charge" and "fee," however, are synonymous. *See* B-301126, Oct. 22, 2003, n.4 (citing *Black's Law Dictionary* 629 (7th ed. 1999) (defining "fee" as a charge for labor or services)).

[11] Further, the SWM fee structure, based on a parcel's relative percentage of impervious surfaces, is also similar to *Huntington*'s square footage-based "municipal service fee." 999 F.2d at 72. *See also* 49 Comp. Gen. 72 (1969) (a claim for an amount representing the fair and reasonable value of services provided in rehabilitation of a drainage ditch is payable, while an invoice assessing the government a fee for the drainage ditch calculated in the manner that taxes are assessed is a tax and may not be paid).

pay or secure the payment of general obligation or revenue bonds issued for such purpose. Wash. Rev. Code § 36.89.080(4); K.C.C. § 9.08.110. That fact, however, "is not enough reason on its own to warrant characterizing a charge as a 'fee.'" *Valero,* 205 F.3d at 135 (internal citation omitted). "If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial." *Id.* at 135.

When tax assessments also have some attributes of "fees," an important factor in determining whether it is a tax or a fee is the purpose behind the assessments. *See Valero,* 205 F.3d at 134. Broadly stated in the county ordinance, SWM fees are assessed: (1) to promote the public health, safety, and welfare; (2) to preserve and utilize the county's natural drainage system; and (3) to provide for the comprehensive management and administration of surface and storm water. K.C.C. § 9.08.040. As we discuss above, such broad purposes are more like core government services providing undifferentiated benefits to the entire public than narrowly circumscribed benefits incident to a voluntary act or a service or convenience provided. *See discussion supra pp. 7–8.*

Like *Huntington's* "municipal service fee," we conclude that the SWM fee is a "thinly disguised tax" for which liability arises from the United States' status as a property owner and not from the United States' use of any King County service. *See Huntington,* 999 F.2d at 73–74.[12]

[12] Were we to have found the opposite—that SWM assessments were "fees" or "service charges" and not "taxes"—we would still conclude that appropriated funds are not available to pay SWM fees. To be payable, such fees must not be manifestly unjust, unreasonable, or discriminatory. 70 Comp. Gen. 687 (1991) (county landfill user fee payable as a reasonable, nondiscriminatory service charge based on level of service provided); 67 Comp. Gen. 220 (1988) (rates charged for utility services are payable by federal agencies unless they are manifestly unjust, unreasonable, or discriminatory); 27 Comp. Gen. 580, 582–83 (1948). Examining the SWM fee, we find its assessment discriminatory. The Washington State Department of Transportation is only liable for 30 percent of fees imposed under section 36.89 of the Revised Code of Washington, the provision that authorizes counties to impose assessments such as King County's SWM fee. Wash. Rev. Code § 90.03.525(1). *See also* K.C.C. § 9.08.060(O) (rate charged to county roads and state highways shall be calculated in accordance with Wash. Rev. Code § 90.03.525). No similar discount is afforded to federal agencies despite, for example, the federal facilities compliance mandate in section 313(a) of the CWA, 33 U.S.C. § 1323(a), and the Forest Service's nonpoint source pollution mitigation efforts under its memorandum of agreement with the state of Washington (*supra* p. 2).

Clean Water Act and Federal Sovereign Immunity

The state of Washington has explicitly exempted the federal government from taxation, except as permitted by federal law. Wash. Rev. Code §§ 84.36.010(a); 84.40.315. In some instances Congress has waived sovereign immunity and permitted state and local taxation and/or regulation of certain federal activities, particularly in the field of environmental regulation. *See, e.g.,* 42 U.S.C. § 2021d(b)(1)(B) (federal low-level radioactive waste disposal at nonfederal disposal facilities subject to "fees, taxes, and surcharges"). *See also* 42 U.S.C. § 7418 (Clean Air Act provision waiving federal sovereign immunity from state, interstate, and local air pollution regulation, including requirements to pay fees or charges imposed to defray costs of air pollution regulatory programs). Section 313(a) of the Clean Water Act, commonly known as the "federal facilities provision," subjects federal agencies to state, local, and interstate regulation of water pollution, including the payment of reasonable service charges. 33 U.S.C. § 1323(a). The question arises whether section 313(a) also waives federal immunity from state and local taxation and permits the Forest Service to use appropriated funds to pay the King County SWM fee.

Section 313(a) of the Clean Water Act provides, in pertinent part, that:

> "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."

Id. (Emphasis added). Laws such as the section 313(a) federal facilities provision must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. *See Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685 (1983) (holding that absent some degree of success on the merits by a claimant, a federal court may not award attorneys fees under section 307(f) of the Clean Air Act). A

waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *United States v. Mitchell,* 445 U.S. 535, 538 (1980). While section 313 subjects federal agencies to state and local regulation of water pollution, state and local taxation is not one of the governmental powers to which federal agencies are subjected under section 313(a). *See United States Department of Energy v. Ohio,* 503 U.S. 607, 623 (1992). Nothing less than an act of Congress clearly and explicitly conferring the privilege of taxing the federal government will suffice. *Domenech v. National City Bank of New York,* 294 U.S. 199, 205 (1935). Section 313 does not expressly provide that federal agencies must pay state and local environmental taxes. *See id.* The provision "never even [mentions] the word 'taxes' when referring to the obligations of the United States." *New York State Department of Environmental Conservation v. United States Department of Energy,* 772 F. Supp. at 98, *comparing* 42 U.S.C. § 2021d(b)(1)(B) (federal low-level radioactive waste disposal at nonfederal disposal facilities subject to "fees, taxes, and surcharges") *with* 33 U.S.C. § 1323(a).

Moreover, we cannot imply a waiver of federal sovereign immunity from state and local taxation, despite legislative history suggesting the CWA's federal facilities provision intended, "unequivocally," to subject federal agencies to "*all* of the provisions of State and local pollution laws," S. Rep. No. 95-370 at 67 (1977) (emphasis added). *Mitchell,* 445 U.S. at 538; *Lane v. Peña,* 518 U.S. 187, 192 (1996). The waiver of sovereign immunity must be expressed in the statutory text; a statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text. *Lane,* 518 U.S. at 192, *citing United States v. Nordic Village,* 503 U.S. 30, 37 (1992).

The Supreme Court has consistently viewed section 313, and its predecessors, narrowly. In 1976 the Supreme Court found that a prior, similar version of section 313 was not sufficiently clear and unambiguous as to require federal dischargers to obtain state NPDES permits.[13] *EPA v. California,* 426 U.S. 200, 211--12 (1976). Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, that is, specific congressional action that makes this authorization of state regulation clear and unambiguous. *Id.* at 211, *citing Hancock v. Train,* 426 U.S. 167, 178 (1976).[14] The Court held that section 313 did not expressly provide that federal

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[13] Then-section 313 provided, in relevant part, that federal agencies "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. . . ." 33 U.S.C. § 1323 (Supp. IV 1970).

[14] *Hancock v. Train* and *EPA v. California* were companion cases decided on the same day. *Hancock* concerned the extent of the sovereign immunity waiver in the

(continued...)

dischargers must obtain state NPDES permits. *EPA v. California,* 426 U.S. at 212. Nor did the provision expressly state that obtaining a state NPDES permit was a "requirement respecting control and abatement of pollution," as the language of then-section 313 provided. *Id.* at 212--13. In response to the Supreme Court's holding in *EPA v. California,* Congress amended section 313 "to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws." S. Rep. No. 95-370, at 67.

Despite such statements of congressional intent, the Supreme Court again narrowly construed the CWA's waiver provision, holding that Congress had not waived the federal government's sovereign immunity from liability for civil fines imposed by the state of Ohio for past CWA violations. *United States Department of Energy v. Ohio,* 503 U.S. 607 (1992). Rejecting a broad reading of current section 313's "all . . . requirements" language, the Court found that the language "can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures." *Id.* at 627--28, *quoting Mitzelfelt v. Department of the Air Force,* 903 F.2d 1293, 1295 (10th Cir. 1990). Section 313(a)'s waiver provision, rather, only recognizes "three manifestations of governmental power to which the United States is subjected: substantive and procedural requirements; administrative authority; and 'process and sanctions,' whether 'enforced' in courts or otherwise." *Id.* at 623.

Other federal courts also have construed the CWA's section 313(a) waiver provision narrowly. *New York State Department of Environmental Conservation v. United States Department of Energy,* 772 F. Supp. at 98 (section 313 "not blanket [waiver] of the United States' sovereign immunity from the imposition and assessment of taxes by a State"). *See also In re: Operation of the Missouri River System Litigation,* 418 F.3d 915 (8th Cir. 2005) (section 313 a limited waiver of sovereign immunity); *Sierra Club v. Lujan,* 972 F.2d 312 (10th Cir. 1992) (section 313 does not waive federal sovereign immunity from liability for punitive civil penalties).

CONCLUSION

The Forest Service is constitutionally immune from surface water management fees assessed by King County, and appropriated funds are not available to pay for such assessments. Notwithstanding the fact that King County labels these assessments "service fees," the assessments, actually, are taxes. Furthermore, though section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), requires federal agencies to

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(...continued)
Clean Air Act's federal facilities provision, 42 U.S.C. § 7418. For a more detailed discussion of these cases and the legislative histories of the federal facilities provisions in the Clean Water Act, Clean Air Act, and Safe Drinking Water Act, see B-286951, Jan. 10, 2002.

comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges, that provision does not waive the federal government's sovereign immunity from taxation by state and local government. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

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26 November 2008

MEMORANDUM

TO: Pedro E. Briones, Senior Staff Attorney, Office of the General Counsel, United States Government Accountability Office
Thomas Armstrong, Assistant General Counsel for Appropriations Law, Office of the General Counsel, United States Government Accountability Office

FROM: Joseph B. Rochelle, Senior Deputy Prosecuting Attorney, King County, Washington

SUBJECT: GAO B-306666, June 5, 2006, Forest Service -Surface Water Management Fees Decision: King County Response

INTRODUCTION

The purpose of this memorandum is to request that the United States Government Accountability Office ("GAO") reconsider its "Decision on Matter of: Forest Service -- Surface Water Management Fees," dated June 5, 2006 ("Decision"). Slightly more than two years have elapsed since the GAO issued the Decision on whether lands held by the U.S. Forest Service were subject to and should pay the King County Surface Water Management ("SWM") fee. The Decision reached the conclusion that while federal agencies are required under the federal Clean Water Act, Section 313(a), to comply with all federal, state, interstate and local regulations respecting the control and abatement of water pollution, including the payment of reasonable service charges, nevertheless for the purposes of federal law, the SWM fee is more akin to a tax and may not be imposed on federal lands due to the federal government's constitutional immunity from state and local taxation.

We agree with the Decision's acknowledgment that even under federal law the line between tax and fee at times can be a blurry one. (Decision, p. 5 - hereinafter, for ease of reference "D. p._"). However, when the Decision was issued,[1] we had serious reservations about the Decision's application of the test for "regulatory fee" vs. "tax" under federal law to the facts surrounding King County's imposition and collection of its SWM fee. Two recent events only serve to strengthen these concerns.

[1] We wish to thank you somewhat belatedly for providing our office a courtesy copy of the Decision on June 5, 2006. We also wish to thank you for the opportunity, before issuance of the Decision, to discuss with you via conference call the body of Washington state law that has developed on the issue of what distinguishes a tax from a regulatory fee or service charge, particularly as this has been applied and would be applied to the surface water management charge of King County.

First, a lawsuit under the Clean Water Act, which our office was monitoring and which involved the City of Cincinnati's pursuing collection of its SWM fee from the federal government in U.S. District Court, settled in late June of this year.[2] The Consent Decree in that matter provided for the federal government to pay the City the sum of $17,000 for past fees and allowed the City to continue to pursue collection of future fees. It is our understanding that the federal government has agreed to pay the surface water fees charged by the City from the date of entry of the Consent Decree forward.

Second, King County's involvement in, and the rulings arising out of, a lengthy appeal of the National Pollutant Discharge Elimination System ("NPDES") and State Waste Discharge General Permit ("Permit") that was issued by the State of Washington Department of Ecology[3] to Phase I jurisdictions, including King County, on January 17, 2007, [4] underscored the need for municipal jurisdictions, including King County, to have comprehensive stormwater management programs as a requirement under the federal Clean Water Act.[5] Establishing and implementing such programs requires significant levels of funding and it is for this purpose that the King County SWM fee is collected. Federal agencies should not be able to evade their responsibility for paying into this fund, charged on the basis of contribution to the problem, by mischaracterizing the fee as a "tax".

STRUCTURE OF MEMORANDUM

In terms of structure, this memorandum will first briefly describe three important outcomes contained in the rulings of the Pollution Control Hearings Board on the NPDES Phase I

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[2] City of Cincinnati v, United States of America, Case No. C-1-03-731 in the U.S. District Court, Southern District of Ohio. See Consent Decree, filed November 15, 2007, Notice of Dismissal With Prejudice of Claims to Past Alleged Stormwater Fees, filed January 14, 2008, and Notice of Dismissal Without Prejudice of Claims to Future Alleged Stormwater Fees, dated June 23, 2008. Courtesy copies are provided herein.

[3] The State of Washington is an authorized state for the purposes of administering the federal Clean Water Act NPDES Permit program. The Department of Ecology is the state agency charged with administering the program.

[4] The final rulings on the appeal came out in August of 2008. Participating in the appeal were all 6 municipal permittees subject to the general Permit along with two secondary permittees. The entity hearing the appeals was the Washington State Pollution Control Hearings Board, the administrative board charged under Washington State law with hearing appeals of environmental permits, including NPDES permits.
The terms "Phase I" and "Phase II" are used in U.S.E.P.A. ("EPA") regulations and generally are distinguished by the size of the municipality. Phase I jurisdictions, being the larger in terms of population (based on the 1990 census), were the first to be required to have municipal stormwater NPDES permits pursuant to EPA regulations issued in November, 1990. See 55 Federal Register 47990. Washington, as an authorized state by EPA, issued the first Phase I municipal stormwater NPDES permits in 1995. King County was subject to these permits. In January of 2007, the Department of Ecology issued the second Phase I municipal stormwater general permit. On the same date, well over 100 municipal jurisdictions became subject to the Phase II municipal stormwater NPDES general permit. The latter permit has many similarities to the Phase I permit, but takes into account the fact that this is the first stormwater permit under which these jurisdictions will be operating their municipal separate storm sewer systems.

[5] In the BACKGROUND portion of the Decision, it is acknowledged that the SWM program of King County has been established to fulfill the County's requirements under its NPDES municipal stormwater permit and to regulate nonpoint source pollution.

Municipal Stormwater Permit.[6] These outcomes have direct relevance to mandates under the federal NPDES Clean Water Act Permitting Program and thus have implications for the tax vs. regulatory fee analysis under federal law. We will then identify those portions of the Decision that King County accepts or at least does not disagree with. Following that we will provide a brief context to the collection of the SWM fee, and then discuss how the SWM fee fits within the definition of "regulatory fee" and not "tax" under Washington State law. Finally, we will conclude with an analysis that demonstrates under tests based on federal law, that the better conclusion is that the SWM fee constitutes a permissible service charge whose payment is clearly allowed, if not mandated, under §313(a) of the federal Clean Water Act.

KING COUNTY'S NPDES PHASE I MUNICIPAL STORMWATER PERMIT: POLLUTION CONTROL HEARINGS BOARD HEARINGS AND RULINGS

King County's NPDES Phase 1 municipal stormwater permit requires the County to implement a comprehensive stormwater program whose goal is to meet state water quality standards.

The Washington State Pollution Control Hearings Board ("PCHB" or "Board") issued its final rulings on the Phase I Municipal Stormwater General Permit on August 7, 2008.[7] A copy of the Phase I Permit and copies of the two rulings issued out of those hearings are enclosed for your consideration and convenience, as Attachments A, B, and C, respectively. In its rulings, the Board largely upheld the Phase I Permit, while requiring language revisions in a relatively small number of provisions to either clarify permit requirements or to strengthen them. In its Finding of Fact No. 5 and Conclusion of Law No. 3 under the S4.F ruling (Attachment B, pp. 9 and 31, respectively), the Board identified the core of the Permit as being a set of required elements that each municipality must include in its stormwater program in order to meet the requirements of the Permit.[8] The constitutive elements of this mandated program are found in Permit Condition

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[6] The ruling by the Pollution Control Hearings Board that allowed an "adaptive management" approach by the permittees in addressing known excedences of state water quality standards has recently been appealed to Superior Court in King County by Puget Sound Energy. This appeal seeks even more stringency in requiring permittees to meet state water quality standards in the near term.

[7] The PCHB issued two rulings. One ruling followed up on an earlier summary judgment ruling that upheld the Permit's requirement in Section S4 that discharges from municipal stormwater systems *not* violate state water quality standards. As this requirement was included in both the Phase I and the Phase II jurisdictions permit, this issue was consolidated for motions and hearing for the Phase I and Phase II jurisdictions, and so the summary judgment ruling applied to both Phase I and Phase II permits. The first most recent ruling of the PCHB ("S4.F Permit Ruling") followed up on this earlier ruling and upheld the Department of Ecology's discretion, subject to some clarifying revisions to permit language, to allow permittees to engage in an iterative process to address discharges that exceeded water quality standards. If permittees engage in this iterative process in a timely manner, they will not be deemed as in violation of the permit, even though water quality standards may be exceeded at an identified outfall. The second recent ruling by the PCHB addressed the remaining Phase I issues ("Phase 1 Permit Ruling"), including most significantly, whether Low Impact Development ("LID") techniques should be mandated, as opposed to merely allowed, in the municipal stormwater programs of the Phase I jurisdictions. The PCHB remanded the permit to the Department of Ecology and required that LID techniques be included in municipal stormwater programs, mandating that local jurisdictions require their use where feasible.

[8] The Board in its Findings of Fact in the Phase I Permit ruling similarly stated: "The heart of the Phase I Permit requires that permittees implement a Stormwater Management Program (SWMP). . . . The required elements of the SWMP track closely with EPA's Part II Application rules but contain much more detailed minimum performance

S5, and reflect the requirements contained in EPA's regulations regarding permit requirements for Phase I municipal stormwater systems.[9] This core of the Phase I NPDES Permit, imposed under the authority of the federal Clean Water Act, involves the very kinds of activities, processes and indeed purposes that the Decision equates with "general benefits," in arguing that the SWM charge is not a regulatory fee, but a tax. See Decision at p. 8.

A second major point that needs to be made with regard to the Phase I Permit is its emphasis that permittees actively work to improve the water quality of municipal stormwater discharges, so that state water quality standards can eventually be met. This emphasis on pollution prevention and control as a vital component of municipalities' management of their stormwater marks something of a departure from the early concerns of municipal stormwater programs, which focused on flood prevention and water quantity control.[10] In its summary judgment ruling on Permit Conditions S4.A, S4.B, S4.C, and S4.D, dated April 2, 2008 (attached hereto as Attachment D), the Board ruled that as a matter of state law the municipal discharges must meet state water quality standards (Conditions A and B), the state standard of AKART[11] (Condition D), and under federal law the federal Clean Water Act requirement that permittees reduce the discharge of pollutants to the maximum extent practicable ("MEP")[12] (Condition C). At the subsequent hearing on whether immediate compliance with all state water quality standards at all times and in all places was legally mandated or even possible, the Board considered and ultimately approved[13] the legitimacy of Permit Condition S.4.F, which provides for an adaptive management or iterative approach to addressing municipal discharges that exceed water quality standards. Taking into account that allowance, the overall emphasis of the Phase I Permit is to push all Phase I permittees, including King County, towards meeting mandated water quality standards under the state AKART and federal MEP standard through development and implementation of their Stormwater Management Programs.

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standards for the municipalities' programs. Ecology views these SWMP requirements, in the aggregate, to represent the MEP [maximum extent practicable] standard." (Findings of Fact Nos. 7 and 8, p. 10 of Attachment C).

[9] Condition S5 of the Phase I permit mandates that each municipality implement a Stormwater Management Program ("SWMP") that includes the following components: 1) Demonstrate legal authority to control discharges to and from municipal storm sewers; 2) include an ongoing program for mapping and documenting the municipal storm system; 3) coordinate within the jurisdiction's departments mechanisms to eliminate barriers to compliance with the terms of the permit; 4) provide for public involvement and participation in its programs; 5) include program for controlling runoff from new development, redevelopment and construction sites; 6) contain a program to construct structural stormwater controls to reduce impacts to waters of the state; 7) contain a source control program for existing development; 8) include a program to detect, remove and prevent illicit connections and illicit discharges; 9) include a program to regulate maintenance activities and to conduct maintenance activities that prevent or reduce stormwater impacts; and 10) include an education program aimed at residents, businesses, policy makers and staff in order to reduce or eliminate behaviors or practices that cause or contribute to adverse stormwater impacts. (pp. 6-25 of Permit, Attachment A).

[10] See Finding of Fact No. 27: Most existing Municipal Separate Stormwater Sewer Systems (MS4s) were not built with water quality protection in mind, but instead were built for the purpose of draining water as efficiently as possible, managing peak flows, and protecting the public from flooding and disease. (Attachment B, p. 23).

[11] Under Condition S4.D. of the Permit, a Permittee is required to use "all known, available, and reasonable methods of prevention, control and treatment (AKART) to prevent and control pollution of water of the State."

[12] Based on Clean Water Act, 33 U.S.C. § 1342 (p) (3).

[13] The Board mandated some changes to the language of Condition S4.F, which the Department of Ecology is required to perform upon remand, but the basic adaptive management framework was affirmed.

A third major point regarding the Phase I Permit that arose out of the PCHB Hearings and that ultimately required a change in Permit language is the mandate to apply Low Impact Development ("LID") techniques[14] to new development and redevelopment where feasible. The Permit originally provided that the SWMP of a Phase I permittee had to *allow* non-structural preventive actions and source reduction approaches such as LID techniques, to minimize the creation of impervious surfaces, and measures to minimize the disturbance of soils and vegetation. Permit Condition S5.C.5.b.iii. (p.10 of Permit, Attachment A). An issue brought before the Board was whether "allowing" the use of LID techniques was sufficient to meet the state AKART standard and the federal MEP standard, or whether more was required.

On the basis of the hearing, the Board made a number of findings on the LID issue, including that a) LID techniques emphasize protection of the natural vegetative state, relying on the natural properties of soil and vegetation to remove pollutants; b) LID techniques seek to mimic natural hydraulic conditions, reducing pollutants that go into stormwater in the first instance, by reducing the amount of stormwater that reaches surface waters; and c) LID techniques store, infiltrate and evaporate stormwater where it falls rather than collect and convey it to surface waters off site, and can be implemented at an individual development site, as well as part of a broader strategy employed at a basin or watershed level.[15]

Key to the Board's findings is a recognition that the creation of impervious surface on land areas carries with it a corresponding production of stormwater, and when such stormwater is channeled offsite, it carries with it the pollutants that have been generated on the site. LID techniques are desirable because, as noted above in the Findings, LID techniques utilize natural drainage features and processes in the first instance, thereby minimizing impervious surfaces that produce offsite flows. This led the Board to conclude that the Permit's reliance on a [engineered] flow control standard as the primary method to control stormwater runoff from the Municipal Separate Stormwater Sewer Systems (MS4s) failed to reduce pollutants to the federal MEP standard, and without greater reliance on LID, does not represent AKART under state law. It further concluded that the removal of obstacles and actions to allow use of LID is insufficient to meet these federal and state pollution control standards. Rather, the Permit must require the application of LID, where feasible, and conventional engineered stormwater management techniques to remove pollutants from stormwater to the maximum extent practicable in order to comply with federal law.[16]

To summarize, the NPDES Phase I Municipal Stormwater Permit that King County is currently subject to mandates a broad range of program elements to meet the requirements of EPA's regulations issued under the authority of the federal Clean Water Act. King County is at this time actively engaged in ensuring that these required elements are in place and are being implemented. Further, the Permit mandates that permittees take active and aggressive steps to

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[14] The Permit defines "Low Impact Development "as "stormwater management and land development strategy applied at the parcel and subdivision scale that emphasizes conservation and use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely mimic predevelopment hydrologic functions." See Definitions and Acronyms, p. 62 of Permit, Attachment A.

[15] Findings of Fact Nos. 42 and 43, p. 31 of Attachment C.

[16] Conclusion No. 16, p. 58 of Attachment C.

address those outfalls that fail to meet water quality standards, as meeting such standards is a mandate under the Permit. Finally, the Permit as amended clearly recognizes that the placement of impervious surfaces on land in order to develop or redevelop that land is an action that has serious consequences for the quantity of stormwater generated at the site and for the resultant pollutant load that is carried by such stormwater. In response, the Permit mandates the minimization of impervious surface through the application of LID techniques, where use of these techniques is feasible.

PARTS OF DECISION WITH WHICH KING COUNTY DOES NOT DISAGREE

As a general matter, the "BACKGROUND" section of the Decision represents a fairly balanced approach to the context in which the U.S. Forest Service asked its question about the permissibility of paying the SWM fee. In its discussion of the federal Clean Water Act requirements, there is one important omission. The Decision fails to mention that from the adoption by Congress of the 1987 amendments to the Clean Water Act, federal law has regulated discharges from municipal separate stormwater systems as point sources that require an NPDES permit for these discharges. In the Context section of this memorandum, we will provide a brief supplement on this point to the BACKGROUND section of the Decision.

As to the legal analysis contained in the "DISCUSSION" section of the Decision, we do not dispute the conclusion that if the surface water management charge were to constitute a tax, it could not constitutionally be imposed on the lands owned by federal agencies. Indeed under both the Washington State Constitution and the U.S. Constitution, the tax would be unlawful. As to the latter, the Decision cites ample authority for the proposition that states and their subdivisions cannot tax the U.S. government unless Congress clearly, specifically and explicitly waives sovereign immunity as to that tax. We acknowledge that the Decision identifies persuasive authority, even as to the Clean Water Act waiver of sovereign immunity for regulation of federal lands, that federal lands are not taxable unless Congress so provides.

If the SWM fee were to be a tax under State of Washington law, it would be an impermissible imposition as well. The Washington State Constitution, Article 7, Section 1 provides that all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax. "...All real estate shall constitute one class..." Washington courts have interpreted this to mean that tax uniformity requires both an equal tax rate and equality in valuing the property taxed. The King County SWM charge, if it were a tax, would be unlawful as it would fail the uniformity requirement, as it is not imposed in a uniform manner based on the value of the property, but rather on the percentage of impervious surface on a parcel and on the parcel's size.

We understand the Decision to proceed under the premise that were a state or county agency to elect to pursue collection of the surface water management charge from a federal agency through a court action, the court ruling on such a cause of action would be a federal court and that such court would base its decision on the existing body of federal law. Thus the Decision focuses on federal law and performs its analysis for what constitutes a tax vs. regulatory fee under a test developed under federal case law. The Decision does not attempt to analyze the regulatory fee

vs. tax issue under the body of Washington State law, presumably because a federal court would not be bound by the state's characterization of the charge for the purposes of applying federal law.[17]

CONTEXT:

The SWM fee represents a targeted charge and regulatory measure that is based on the contribution to the problem of managing stormwater runoff.

Chapter 9.08 of the King County Code (K.C.C. or "Code") establishes the rationale for, and authorizes the imposition of, the King County Surface Water Management fee. We are furnishing a copy of this Chapter as Attachment E. County agencies are not free on their own to initiate the imposition of fees, as it is the King County Council, under the provisions of Washington State Constitution Article 11, §4, and the King County Home Rule Charter, that approves the county budget and authorizes county agencies to spend money, including fees, through the Council-approved appropriation process.[18]

The SWM fees are not collected on every parcel in unincorporated King County; parcels that are undeveloped are not charged. This is an important threshold, as the science demonstrates that undeveloped parcels generate virtually negligible amounts of stormwater runoff, while developed parcels do generate stormwater runoff.[19] Generally, the amount of stormwater runoff corresponds to the amount of impervious surface on the parcel. Under the Code, parcels, once developed, are charged on the basis of the percentage of impervious surface on the parcel and the size of the parcel. The basic theory, based on the uncontradicted science that has developed in this area, is that the more impervious surface a site has, the more stormwater runoff it will produce. The more stormwater that is produced, the greater the service level is required to manage the increased flow and the increased pollution.[20] Under the Code establishing the fee

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[17] The SWM charge does not meet the criteria of a tax under the three-part test used in Washington, as set forth by the Washington State Supreme Court in *Covell v. City of Seattle*, 127 Wn.2d 874 (1995). In developing its three-part test, the *Covell* court relied on its earlier decision in *Teter v. Clark County*, 104 Wn.2d 227 (1985), which upheld a surface water management fee imposed by Clark County as a regulatory fee and not a tax. The fee at issue was based on a methodology (amount of impervious surface) very similar to the one used by King County for its SWM fee. See infra pp. 8-9.

[18] For more detail on this point, see infra, pp. 12-13 and footnotes 29 and 30.

[19] The hearings before the PCHB and the rulings arising out of those hearings demonstrates, however, that those who develop parcels can apply "low impact development" techniques to minimize stormwater runoff, in some instances to even a zero runoff standard. See supra, p. 5.

[20] These concepts are clearly expressed in a series of interconnected findings by the King County Council in K.C.C. 9.08.060.D. First is the finding that developed parcels contribute to an increase in surface water runoff to the surface and storm water management system. Second, this increase in surface and storm water runoff results in the need to establish rates and charges to finance the county's activities in surface and storm water management. Third, developed parcels are therefore subject to rates and charges of the surface water management program based on their contribution to increased runoff. The factors to be applied to specific developed parcels shall be the percentage of impervious surface coverage on the parcel, the total acreage of the parcel and any mitigating factors as determined by the County. K.C.C. 9.08.060.D. Fourth and finally, undeveloped parcels do not contribute as much as the developed parcels to an increase in surface and storm water runoff into the surface and storm water management system and therefore are exempt. K.C.C. 9.08.060.E.

system, "The service charges shall be based on the relative contribution of increased surface and storm water runoff from a given parcel to the surface and storm water management system." K.C.C. 9.08.070.A.

The *purpose* of the collection of the fees is to pay for the surface water management program that King County is required to have under the terms of its NPDES Permit.[21] There are indeed broad indirect general benefits to having such a program, and the Code recognizes these and articulates some of them.[22] However, in terms of its immediate nexus to the activity it regulates, the Code in its rate structure simply reflects the maxim behind so many charges under environmental statutes that the "polluters should pay" for the harmful impacts that their activities cause. Here, impervious surfaces on individual parcels produce stormwater that carries pollutants off of the site into the municipal stormwater system. Owners of developed parcels are charged for their proportionate share of the problem they help create.

As to Forest Service Lands, the Decision notes that the Forest Service maintains approximately 363,543 acres within King County. The vast majority of these lands is undeveloped or contains only trails or forest roadways, for which the Forest Service has *not* been assessed a SWM fee. Of this vast acreage, King County has 229 actual accounts for 50,487 acres of these lands. Only 9 of these accounts are actually charged a fee, and the amount billed for all 9 accounts is in **total** $1,032.00 annually, because they alone are developed.

STATE CASE LAW

State law supports the proposition that the SWM fee is a reasonable service charge.

The Washington State Supreme Court has developed a three-part test for determining whether a charge by local governments is a legitimate regulatory charge or an impermissible tax. *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995). The three-part test includes:

1) the primary purpose of the charge is to regulate as opposed to accomplishing desired public benefits which cost money;
2) the money collected must be allocated only to the authorized regulatory purpose; and
3) there should be a direct relationship between fee charged and service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.

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[21] K.C.C. 9.08.040 states that the purpose of the fee is "to provide a method for payment of all or any part of the cost and expense of surface and storm water management services or to pay or secure the payment of all or any portion of any issue of general obligation or revenue bonds issued for such services."

[22] Thus the Code states that such rates and charges are necessary to "promote the public health, safety and welfare by minimizing uncontrolled surface and storm water, erosion, and water pollution; to preserve and utilize the many values of the county's natural drainage system, including water quality, open space, fish and wildlife habitat, recreation, education, urban separation and drainage facilities; and to provide for the comprehensive management and administration of surface and storm water." K.C.C. 9.08.040.

Covell at 879.

In 1996 the SWM charge of King County was challenged by an entity that had significant impervious surface (the fundamental basis and sliding scale upon which the SWM charge is calculated), based on the allegation that it functioned as a tax and was thus unconstitutional under Washington state law. In its Findings of Fact and Conclusions of Law, the Superior Court applied the *Covell* factors to the King County SWM charge and specifically ruled that the charge was not a tax:

> (4) The King County SWM service charge is a valid regulatory fee, and not a tax in consideration of the following: (a) the primary purpose of the King County SWM is regulatory, (b) all SWM service charges collected are allocated to the valid regulatory purposes of the program, and (c) there is a direct relationship between the amount of the SWM service charges and both the benefits received by plaintiff SIR [Seattle International Raceways] and the burdens produced by plaintiff SIR on the surface water management system in the service area.
> (5) The adoption of the modified impervious surface method as a basis for calculating the SWM service charge and applying the rate structure in King County Chapter 9.08 was not arbitrary or capricious, or the result of willful unreasoning by the County.
> (6) The King County SWM program and rate structure is constitutionally valid, and Plaintiff's claim for refund of SIR's SWM service water management fees it paid is denied.

Conclusions of Law entered by the Superior Court on April 24, 1996, in *Seattle International Raceways v. King County*, No. 94-2-18827-5.

The conclusions of the Superior Court stated above are not binding precedent on other courts considering the tax vs. regulatory fee nature of the King County SWM charge; nonetheless, its holding is entirely consistent with decades old Washington appellate law, and further demonstrates that the SWM charge of King County has been upheld by a court of competent jurisdiction as a valid regulatory fee and not a tax under the applicable test established by the Washington State Supreme Court.

The principle that SWM charges can constitute valid regulatory fees (and not taxes) under Washington State law has been around for at least two decades in Washington. In a case much cited in the *Covell* opinion, *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985), the Washington State Supreme Court upheld as a fee and not a tax a surface water management charge that Clark County, Washington, imposed on properties within a basin under an ordinance that was based on the contribution of various classes of property to surface water runoff. In reaching its holding, the court found that the rate schedule bore a reasonable relation to the contribution of each lot to surface runoff. The court also found that the ordinance was within the valid exercise of police power, its primary purpose was regulatory, and thus it was more properly a tool of regulation rather than a tax. Clark County's ordinance was very similar in concept and application to the King County SWM Code, whose rate structure is based on parcel size and percentage of impervious surface.

FEDERAL LAW

Two First Circuit Court of Appeals opinions, authored by the same Chief Judge, support construing King County's SWM fee as a valid regulatory charge and not a tax under federal law.

Some preliminary remarks regarding the Decision's methodology in choosing the appropriate federal test for "regulatory fee" vs. "tax" are in order. In conducting its analysis on whether the King County SWM fee constitutes a regulatory fee or a tax, the Decision utilizes a three-part test that finds its origin in the First Circuit Court of Appeals case of *San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992). (Decision, pp. 5-9). Indeed, the *San Juan Cellular* opinion, authored by then Court of Appeals Chief Judge Breyer, is the test relied upon by the Decision in reaching its conclusion that the SWM fee is a tax.[23] In utilizing this test, the Decision consciously rejects another test that has been used by courts in analyzing whether state environmental regulatory assessments were taxes or fees. This test finds its origin in *Massachusetts v. United States*, 435 U.S. 444 (1978), in which the U.S. Supreme Court addressed whether or not the federal government could impose a tax, which was tantamount to a user fee, on a state. In affirming that the federal government could constitutionally impose such a charge on states, the Supreme Court applied the following test: "So long as the charges do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied, there can be no substantial basis for a claim that the National Government will be using its taxing powers to ... destroy a State's ability to perform essential services." *Massachusetts*, at 466-467.

The Decision rejected the use of the above *Massachusetts* test on the basis that the Massachusetts test is factually and conceptually "inapposite". We respectfully disagree. While the federal government's immunity from taxation is broader than the state's immunity from taxation and is based on different constitutional considerations (Decision, pp. 5-6), this does not refute the logic or the rationale behind the test, or preclude its use on the converse issue of state charges on the federal government. Indeed, the very Court that issued the *San Juan Cellular* opinion, in fact the very Chief Judge who authored the *San Juan Cellular* opinion and who now sits on the U.S. Supreme Court, did not hesitate three months after *San Juan Cellular* was decided, to use the *Massachusetts* test in analyzing whether a state hazardous waste fee, imposed on federal agencies generating hazardous waste on a per pound basis, amounted to an impermissible tax on a federal agency, or constituted a reasonable service charge.

In *State of Maine v. Department of the Navy,* 973 F.2d 1007 (1st Cir. 1992), Chief Judge Breyer, the author of the *San Juan Cellular* opinion issued three months earlier, upheld the hazardous waste fee imposed by the state of Maine on the basis that it constituted a reasonable and permissible fee, and not an impermissible "tax" on a federal installation. In reaching this

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[23] The Decision's frequent citations to *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130 (4th Cir. 2000) are largely either applications or distillations of the *San Juan Cellular* three-part test.

conclusion, the court used the *Massachusetts* test[24] and found that the "rough relation" between state regulatory costs and the fees charged was sufficient to uphold the charge on the U.S. Navy's generation of hazardous waste. *Id* at 1014. The judge, who authored the *San Juan Cellular* opinion so heavily relied upon and key to the Decision's analysis, did not hesitate a short time later to use the *Massachusetts* test, rejected by the Decision, to address a fact pattern extremely similar in concept to the one at issue.

A second point worth making regarding the Decision's selection of test methodology, is that the Decision fails to acknowledge that both *San Juan Cellular* and *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130 (4th Cir. 2000), the other "test" case heavily cited in the Decision, are both cases decided under the Tax Injunction Act (TIA), 28 U.S.C.A. § 1341. The TIA limits the jurisdiction of federal courts to review issues of taxation under state law where a plain, speedy and efficient remedy may be had in the courts of such start. The TIA represents a recognition that states are best situated to administer their own fiscal operations. *Valero* at 133. As such, the term "tax" is subject to a "broader" interpretation when reviewed under the aegis of the TIA. *Id* at 134. (emphasis added) See also *DirecTV, Inc v. Tolson,* 513 F.3d 119, 125 (4th Cir. 2008) ("we interpret the term "tax" broadly for purpose of our jurisdictional inquiry"). So rather than rely on a test that was applied to a fact pattern closely resembling the instant one, i.e. the *Massachusetts* test, the Decision relies upon and utilizes a test that from the outset is weighted towards a broad interpretation of what constitutes a tax.

If one straightforwardly applies the *Massachusetts* test to the King County SWM fee, the "tax" characterization reached by the Decision is shown to be incorrect. The SWM fee, like the per pound charge on the generation of hazardous waste[25] at issue in *State of Maine*, is charged on the basis of a parcel's generation of stormwater, which is tied in a constant and direct correlation to the amount of impervious surface on the parcel.[26] All SWM funds that are collected are placed in a special fund to support King County's stormwater management program, the fundamental elements of which are mandated by EPA's regulations adopted under the authority of the federal Clean Water Act., as implemented through the NPDES Phase I Municipal Stormwater Permit.

The legitimacy of the SWM fee as a reasonable "service charge" meets foursquare the test outlined in *Massachusetts,* as applied by then Chief Judge Breyer in *State of Maine*: so long as the charges do not discriminate [King County's do not],[27] are based on a fair approximation of use of the system [based on amount of impervious surface, which generates stormwater and its pollutants] and are structured to produce revenues that will not exceed the total cost of the

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[24] The Court paraphrased the test from *Massachusetts* as follows: "[s]o long as the charges do not discriminate ..., are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost ... of the benefits to be supplied...." *State of Maine*, at 1013.

[25] Hazardous waste is regulated under the federal Resource Conservation and Recovery Act, 42 U.S.C. §§6901-69992k, which allows for state authorization to administer the federal program.

[26] The Decision does not appear to suggest that parcels of land that are developed and are owned by a federal agency do *not* generate stormwater and pollutants that travel offsite and into the King County municipal stormwater system.

[27] See this memorandum's response at pp. 15-16 infra, to Decision Footnote 12, wherein the Decision attempts to make an argument based on discrimination against the Forest Service. This argument has absolutely no factual validity.

benefits to be supplied [King County's program, subject to the federally mandated NPDES Phase I Municipal Stormwater Permit, is funded with the funds collected].

Careful application of the *San Juan Cellular* Test supports construing the SWM fee as a valid regulatory charge and not a tax.

Even if one were to apply the less exact and more weighted test[28] that the Decision relies upon, King County is confident that a careful and thoughtful application of this test, particularly as fully set forth in the *San Juan Cellular* decision itself, leads to the conclusion that the SWM fee is more aptly characterized a legitimate regulatory fee rather than an impermissible tax.

The Court in *San Juan Cellular* begins its analysis by contrasting a classic tax with a classic regulatory fee. A classic tax "is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *San Juan Cellular*, at 685. The classic regulatory fee "is imposed by an agency upon those subject to its regulation. [citations omitted] It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. [citations omitted] Or it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses." *Id.* at 685. When cases lie somewhere in the middle of this spectrum, courts have tended to emphasize "the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's cost of regulation." [citations omitted] *Id.*

Some courts have distilled this nuanced test into a condensed three-part form: 1) What entity imposes the charge; 2) what population is subject to the charge; and 3) what purposes are served by the use of the monies obtained by the charge. *DirecTV, Inc.* at 125, citing *Valero*, which in turn cites *San Juan Cellular*. In our application of the *San Juan Cellular* test to the King County SWM fee, we will start with the articulation of the condensed form, but not ignore the nuances provided by the *San Juan Cellular* opinion.

First Element: Who imposes the charge?

As to the entity imposing the charge, at first blush it appears that this element falls on the tax side of the ledger, as it is the legislative body, the King County Council, that sets the rate structure and imposes the fees, and not a county agency. However, under the Washington State Constitution, Article 11, §4,[29] and the King County Home Rule Charter,[30] King County agencies are not free to establish charges in the first instance, or to decide on their own the amounts of fees they will charge, as it is the King County Council that evaluates revenue needs and approves

[28] See discussion of origin of test arising out of application of Tax Injunction Act, above.
[29] This Section provides, in relevant part that all the powers, authority and duties imposed on county officers by state general law, are vested in the legislative authority of the county, unless specifically vested in specific officers by the charter.
[30] Under the King County Home Rule Charter, it is the County Council that has all of the legislative powers of the county and that appropriates revenue and adopts budgets. King County Charter, Article 2, § 220.20.

budgets for county agencies, and it is the Council that is responsible for appropriating for expenditure any funds collected by such fees. So while it may be facially appealing to conclude that this element easily and naturally falls on the tax side of the ledger because a legislative body imposes it, the fact that the fee is required to be charged by the legislative branch of government and could not be charged by an agency of that government suggests that this element falls under neither "tax" or "regulatory fee". It is neutral to either determination.

Second Element: What population is subject to the charge?

As to the second element of the *San Juan Cellular* test, what population is subject to the charge, three facts are worth noting. First, the general citizenry are not subject to this charge, but only property owners owning a certain kind of property. Second, only developed parcels are subject to the fee. Of the vast acreage owned by the U.S. Forest Service in King County (according to the Decision it is 363,543 acres), King County assesses only 1,860 acres, or approximately ½ of 1% of such acreage, at a total cost of $1,032.00. Thus it is incorrect to conclude that one is charged the fee solely on the basis of status as property owner. Third, once a property owner makes the decision to develop a parcel and place impervious surface on that parcel, the amount of the fee that is charged is entirely dependent upon the property owner's voluntary choice on *how much* impervious surface to have on the parcel. The more impervious surface on a parcel, the more stormwater and accompanying pollutants one discharges, and the higher the SWM fee will be.

The decision to develop and the decision of how much to develop are voluntary decisions.[31] The decision of the Pollution Control Hearings Board on Low Impact Development techniques described at the beginning of this Memorandum underscores the fact that techniques do exist to minimize the use of impervious surface as a development tool and that steps can be taken to reduce impervious surfaces in the course of developing or redeveloping a parcel. Since the SWM fee is directed towards developed parcels with impervious surface, and the amount of the fee directly corresponds to the amount of impervious surface that is voluntarily placed on the parcel, the SWM fee falls on the regulatory fee side of the ledger for this second element.

Third Element: What purposes are served by ultimate use of monies collected?

The third element of the *San Juan Cellular* test, what purposes are served by the ultimate use of the monies obtained by the charge, is the most difficult of the three to apply, as the purposes for the imposition of fees can be multiple. At the outset, we should state that it cannot be denied that one of the purposes of the collection of the SWM fee is to improve the water quality of the

[31] In addition to providing a credit to the Washington State Department of Transportation for the significant amount of stormwater management services provided by that department in connection with its construction , operation and maintenance of stormwater systems associated with roadways, the King County SWM fee code provisions allow for discounts to property owners on a variety of bases, including but not limited to, a parcel having flow control and water quality treatment facilities onsite that are maintained by the owner, a parcel having a 65% forest cover and no more than 20 % impervious surface the stormwater flow from which is dispersed to the forested area, and a parcel having its stormwater absorbed onsite by the pervious surface area. K.C.C. 9.08.080.

surface waters in and about King County. Indeed, the recent rulings of PCHB regarding the requirements of the NPDES Phase I Municipal Stormwater Permit underscore the need to reduce pollutants to the maximum extent practicable and to meet state water quality standards. (See Permit discussion above, pp. 3-6). These can hardly be termed benefits that each property owner of the parcel charged the SWM fee receives in any immediate sense upon payment of the fee. And yet the fee is charged each such property owner based on that property owner's parcel's generation of stormwater and its accompanying pollutants, i.e., its contribution to the problem. The money collected is placed into a separate fund, the expenditures from which directly address the problem that the property owner's parcel causes in the first place.

The Decision appears to be arguing that because the SWM fee is imposed as an exercise of the police power and has as one of its purposes promotion of public health, safety and welfare, this general purpose transforms it into a tax, as the general public receives benefits from its collection and expenditure by having presumably cleaner surface waters. The problem with this argument is that it proves too much. Virtually every environmental statute in one fashion or another has as its ultimate purpose and benefit the public health and welfare of the citizenry. By the nature of the very mediums they regulate, environmental statutes contribute to the health and welfare of all by addressing and regulating aspects and mediums of the environment, which we all share. A perusal of Title 42 of the United States Code demonstrates this point. This Title contains numerous major federal environmental statutes (including the Clean Water Act, the Safe Drinking Water Act, the Solid Waste Act, the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and the Pollution Prevention Act of 1990) and significantly, it bears the subtitle "The Public Health and Welfare," expressing the clear intent that these statutes promote a very general purpose. Surely the Decision could not be arguing that every charge authorized or imposed under these statutes, if directed at the federal government, constitutes a tax because in some very large sense general benefits are conferred?

The immediate nexus between the charge of the SWM fee and the problem of stormwater generation and its accompanying pollutants correlated to the amount of impervious surface clearly establishes that this charge fits within the penumbra of "regulatory fee." "Contribution to the problem" is an entirely valid foundation upon which to base the collection of this charge. *Valero* itself acknowledges such a proposition "...the further inquiry must be whether the money is used "to benefit regulated entities . . . *to defray the cost of regulation"* (making it resemble a "fee") or else to benefit the general public." *Valero*, at 135 [emphasis added]. *San Juan Cellular* supports this proposition: "whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies *or defrays the agency's cost of regulation.*" *San Juan Cellular,* at 685 [emphasis added].[32]

King County has not attempted to charge its general citizenry a tax to pay for its program to manage municipal stormwater discharges in accordance with the federal mandates (and goals) in

[32] See also in *San Juan Cellular*, "...the Ninth Circuit has held that a Public Utilities Commission's assessment was a 'fee,' not a 'tax,' because it helped 'defray the cost of performing the regulatory duties imposed' on the Commission." *Id.* at 685-686. The SWM fee is used by the Stormwater Services Section of the Water and Land Resources Division of the Department of Natural Resources and Parks to fund its stormwater management program, which is mandated by regulations promulgated by the U.S. EPA under the authority of the Clean Water Act.

its NPDES Permit, but instead charges those responsible for generating stormwater and its accompanying pollutants, according to a rational, scientifically based methodology. That such a charging regime and rate structure results in ultimate benefits to the citizenry at large does not transform the charge into a tax, but rather confers the kind of ultimate benefits that all environmental statutes strive to achieve as their larger purpose.

Federal agencies own developed properties that generate stormwater "just as any nongovernmental entity"[33] and are charged the same rate as any nongovernmental entity or governmental entity for that matter. It is difficult to comprehend how a federal agency that recognizes that its developed site generates stormwater and its accompanying pollutants, could still refuse to pay its proportionate share of the fund that is directed solely to resolving the problem towards which the federal agency contributes. A simple hypothetical example illustrates the point. Four buildings of the same size surrounded by parking lots of the same size exist on four separate parcels in unincorporated King County. One is privately owned, one is owned by King County, one is owned by the State of Washington, and one is owned by a federal agency. All, save the parcel owned by the federal agency, will be charged and will pay the SWM fee based on parcel size and amount of impervious surface. As a matter of pure equity, and under the legal standard contained in Section 313(a) of the Clean Water Act, "to the same extent as any nongovernmental entity, including the payment of reasonable service charges" federal agencies should not attempt to evade their responsibilities for impacts they cause to their immediate environment, by calling what is essentially a "reasonable service charge" a "tax."

The Decision contains no suggestion that King County's SWM fees are either unreasonable as to amount, or that the methodological basis of tying the amount of stormwater and accompanying pollutants to the amount of impervious surface is improper. Rather the only place where the Decision could be construed as arguing at all on a methodological basis is to be found in Footnote 12 of the Decision. There the assertion is made that the SWM fee's assessment is discriminatory (under the criteria set forth in the *Massachusetts* test) because the Washington State Department of Transportation (WDOT) and King County Roads (Roads) are afforded a discount that results in their being required to pay only 30% of the fees that they would be otherwise charged. This assertion is entirely off the mark.

The discount that is afforded WDOT and King County Roads amounts to a credit that each agency receives for the extensive stormwater systems each agency builds, constructs, and maintains in connection with *only the roadways* for which they are responsible. It is because they operate stormwater systems in roadways, that they receive a credit under state law for these stormwater systems. In contrast, if WDOT or Roads own parcels of land that contain structures and parking lots - not roadways - they are in fact charged the SWM fee on the same basis of size and percentage of impervious surface as every other owner of developed property in King County. There is no "discrimination" in their favor. A credit is given to them for the stormwater systems they operate and maintain solely in connection with their operation of roadways. If there is any discrimination on this point, it exists in *favor* of the Forest Service which is *not* charged any SWM fee for federal roadways, including forest service roads. In 2007, WDOT,

[33] 33 U.S.C. § 313(a), Section 313(a) of the Clean Water Act.

even with application of the stormwater system credit, paid King $712,321.00. King County Roads Department on its part paid the SWM fee fund $3,715,447.00 as the SWM fee applicable to its roadways. In 2007, the Forest Service SWM fee bill for all its developed 9 parcels was $1,032.00, of which it has paid nothing.

As a final point, the Decision relies on a 4th Circuit Court of Appeals decision to make its strongest case regarding the third element of the *San Juan Cellular* test, as supporting a tax determination. This decision is clearly distinguishable and factually inapposite. In *United States v. Huntington, West Virginia,* 999 F.2d 71 (4th Cir. 1993), the Court held that the City of Huntington's "municipal service fee", imposed to pay for the combined services of fire service, flood protection and street maintenance, based upon square footage of buildings in the city, constituted, when applied to a building owned by a federal agency, an impermissible tax on the federal government. The court found that the services provided were "core government services" and that the effort to denominate them as "user fees" was improper, as they were imposed purely on the basis of property owner status and not from the property owners' use of a city service. *Huntington*, at 74. The City of Huntington's clever effort to call this "thinly disguised tax" a "user fee" did not remove the immunity of federal agencies from having to pay it. *Id.*

First, it should be stated that we do not disagree with the result of the *Huntington* decision. In that case, the City blended the costs for three unrelated services into a single charge on a basis that is entirely suspect. There appeared to be no demonstration, based on the text of the *Huntington* opinion, that building square footage directly linked to and caused a need for a particular level of fire service, street maintenance, or flood protection.

Further, at least two of the three services at issue in *Hungtington*, fire protection and street maintenance, are of the very kind of governmental services that taxes are raised for and spent upon. As to flood protection, while this service can be supported by taxes (as could most any governmental service), this particular charge apparently bore no relation to the level of problem caused or service received. Presumably a 20 story office building and a one story office building having the same footprints and having the same impacts from a stormwater generation perspective, nonetheless would be charged (unfairly and disproportionately) different rates by an order of magnitude under the City of Huntington's ordinance, whose charge is based on the total square footage of the building. Such a charge is clearly inequitable, as it bears no rational relation to services provided or to contribution to problem, and as such is more akin to a tax than a regulatory fee.

The *Huntington* case, therefore, which was rightly decided, does not stand for the proposition that a municipality cannot charge a federal agency for its contribution to a problem (generation of stormwater and its accompanying pollutants), which the municipality under the Clean Water Act is required to manage and address, particularly when that municipality has a rational and scientifically defensible basis for its charge and its rate structure.

CONCLUSION

King County urges the GAO to reconsider its Decision, and to reach the determination that the U.S. Forest Service is not precluded from paying the King County SWM charge, on the basis that it constitutes a reasonable regulatory fee that equates to a reasonable service charge under the language of Section 313(a) of the Clean Water Act. While time has elapsed since the Decision was first issued in June of 2006, two recent events suggest that the conclusions reached by the Decision merit reconsideration. The settlement of the Cincinnati lawsuit in June, 2008, in the direction of federal agencies agreeing to pay legitimate surface water management charges imposed by municipalities, and the recent rulings of the Washington State Pollution Control Hearings Board supporting a broad programmatic approach to managing municipal stormwater under the federally mandated NPDES permit program, clearly support a reconsideration and redetermination. Further, a careful examination of the bases for the imposition of the King County SWM fee, and the federal law applicable to the "tax" vs. "regulatory fee" distinction, supports a determination that the SWM fee constitutes a "reasonable service charge" that not only may legally be paid, but legally should be paid, under the mandates of the federal Clean Water Act.

COPY

GSA National Capital Region

APR 26 2010

Mr. George S. Hawkins
General Manager
District of Columbia Water and Sewer Authority
500 Overlook Avenue, SW
Washington, DC 20032

RE: Impervious Surface Area Billing Program

Dear Mr. Hawkins:

I have been briefed on the District of Columbia Water and Sewer Authority's (WASA) new Impervious Surface Area Billing Program. We at the U.S. General Services Administration (GSA), National Capital Region, laud the efforts of WASA to temper stormwater runoff in order to abate the adverse environmental impacts of uncontrolled discharges into neighboring waterways, and ultimately the Chesapeake Bay. GSA is actively involved in procuring and installing "green" roofs and other mechanical and architectural features across its inventory which will abate unwanted storm water discharges into waterways. Our responsibilities under the American Recovery and Reinvestment Act further underscore GSA's commitment and obligation to create or improve high efficiency green buildings in the national capital region by reducing energy demand and consumption while minimizing impact to the surrounding environment. I do, however, have a concern with regard to the WASA Impervious Surface Area Billing Program's application to Federal Government facilities.

The Impervious Surface Area Billing Program is an impermissible tax for the purposes of Federal appropriations and fiscal law. The United States General Accountability Office has opined that WASA's Impervious Surface Area Billing Program, and similar charges in other jurisdictions, constitute unconstitutional taxes on Federal property owners. (*See* B-319556) Consequently, GSA does not have authority to pay the charges from appropriated funds. While the United States may pay reasonable user fees if a service is provided by a jurisdiction to the Federal Government or where Congress has specifically consented, charges for services that a locality is required by law to provide are not fees but rather taxes. The United States may not pay these taxes. In order to be payable, the charge must be voluntary – the agency can choose not to use the service, and thus not incur the charge – but the Impervious Surface Area Billing is involuntary and does not reflect actual stormwater system usage in any case.

U.S. General Services Administration
301 7th Street, SW
Washington, DC 20407-0001
www.gsa.gov

I have contacted the United States Department of the Treasury, Financial Management Service, and requested that it not make payments to WASA from GSA's appropriations for the Impervious Surface Area Billing Program. Should you have any questions regarding this matter, please contact Ms. Paula J. DeMuth, GSA Regional Counsel, at (202) 708-5155.

Sincerely,

Bart Bush
Regional Commissioner
Public Buildings Service

Enclosure

cc: David A. Lebryk, Commissioner, Financial Management Service - Treasury