

Federal Agencies and Stormwater Fees

Joseph B. Rochelle
Senior Deputy Prosecuting Attorney



King County Prosecuting Attorney's Office

Joe.Rochelle@kingcounty.gov
206-296-9015

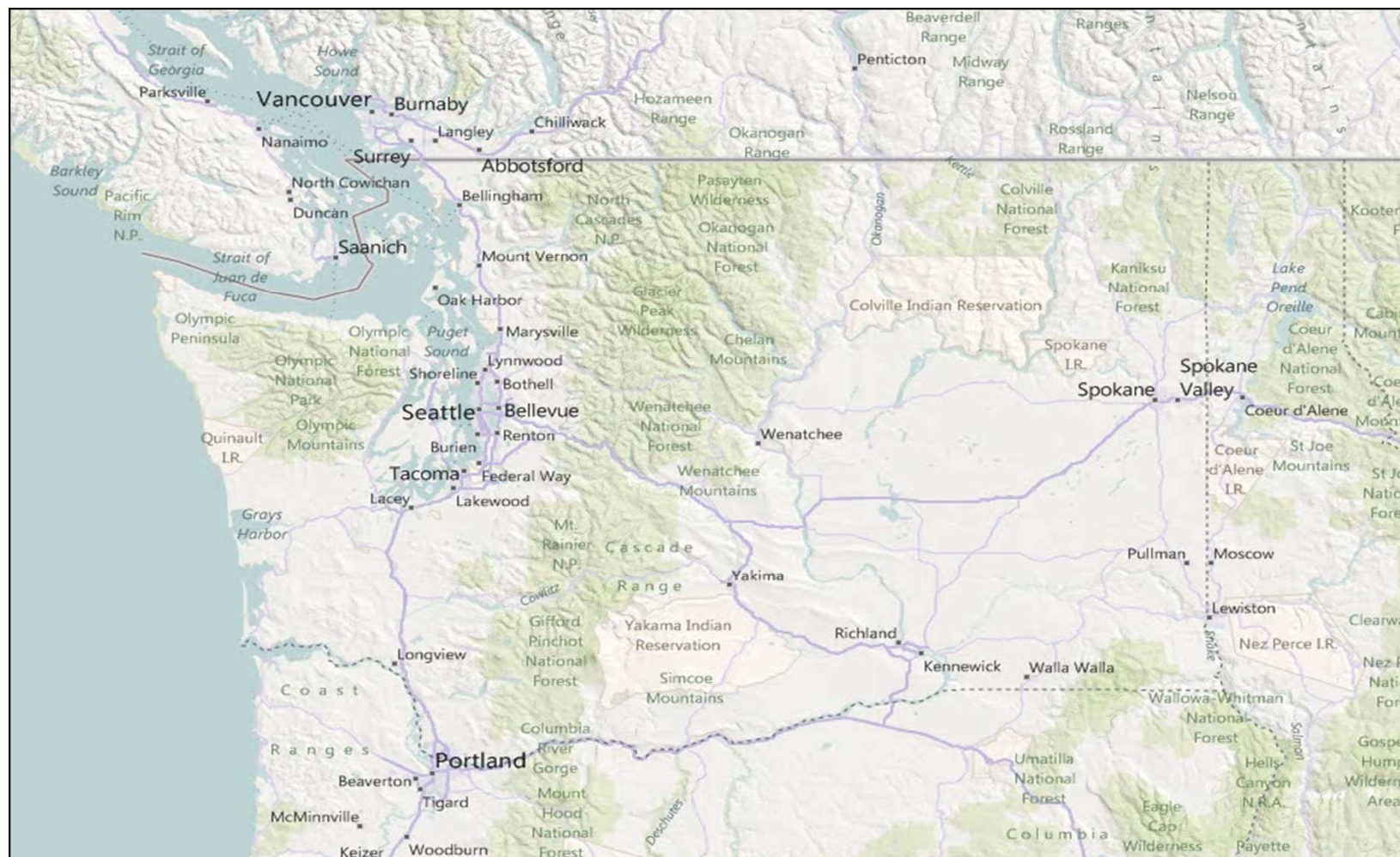
Federal Agencies and Stormwater Fees

Legitimate Service Charge or
Illegal Tax?

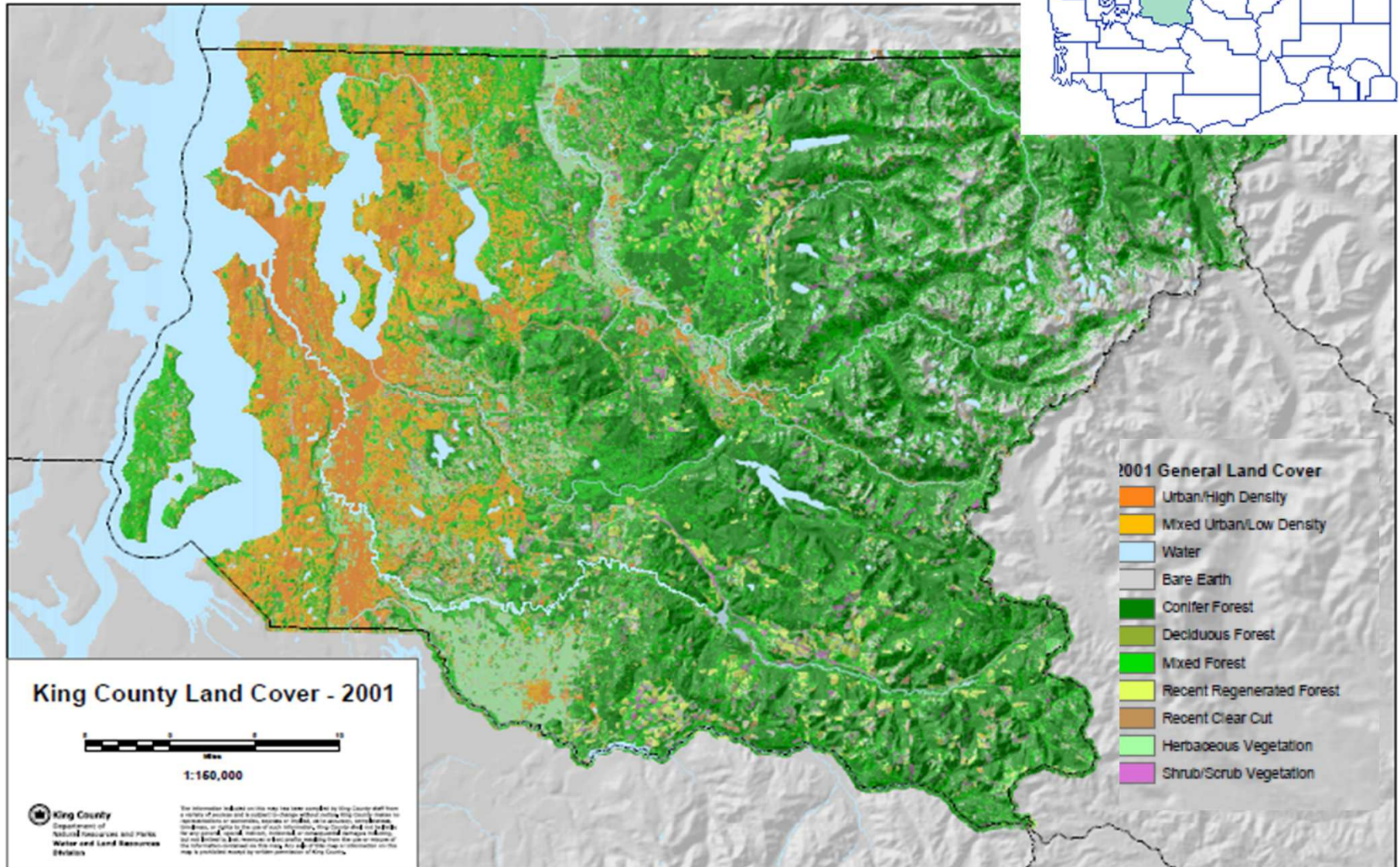
The King County Story

November 18, 2010

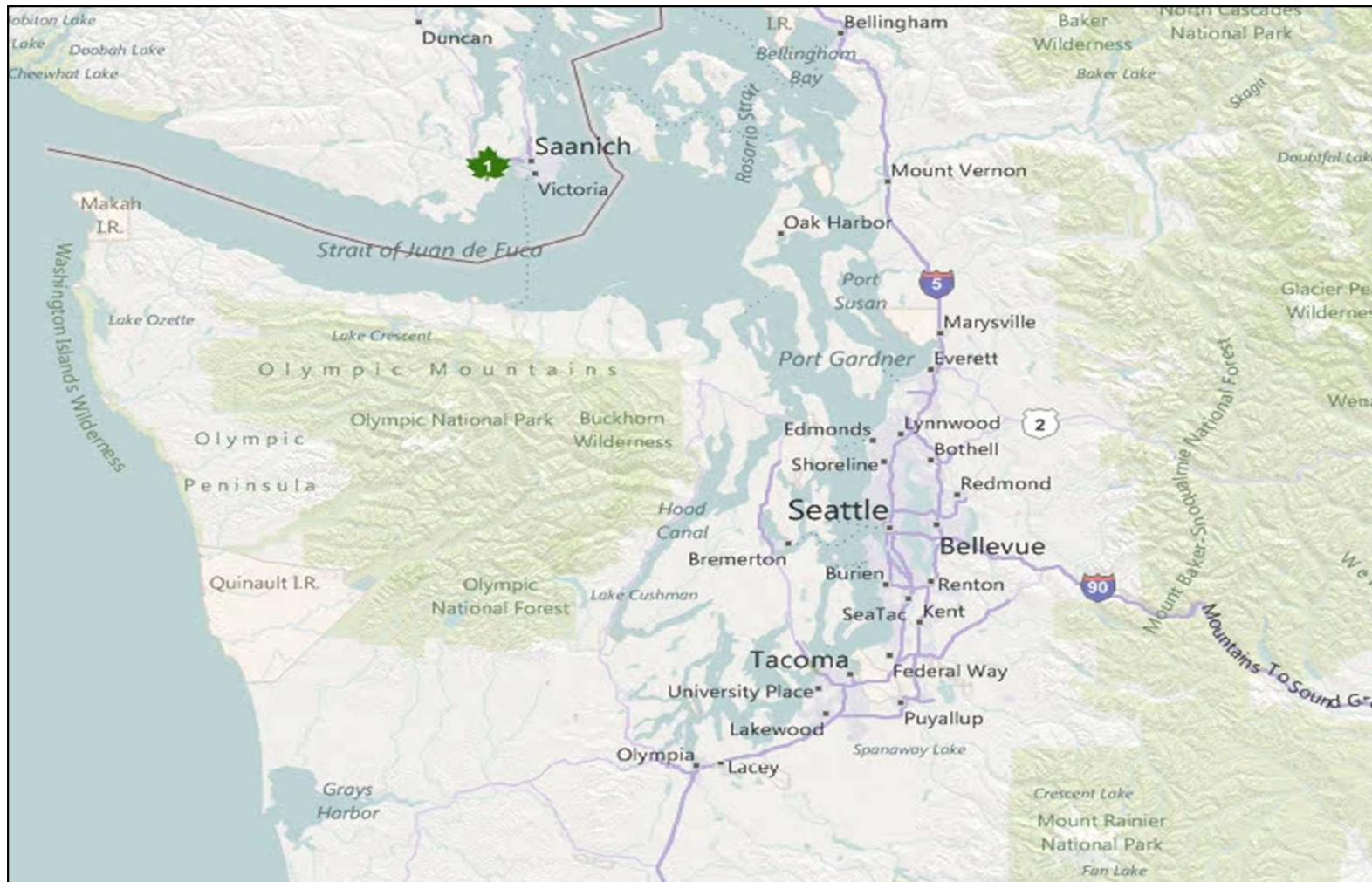
Washington State



King County



Puget Sound Region



Stormwater Management Is A Very Big Issue in Puget Sound

- Rains a lot!







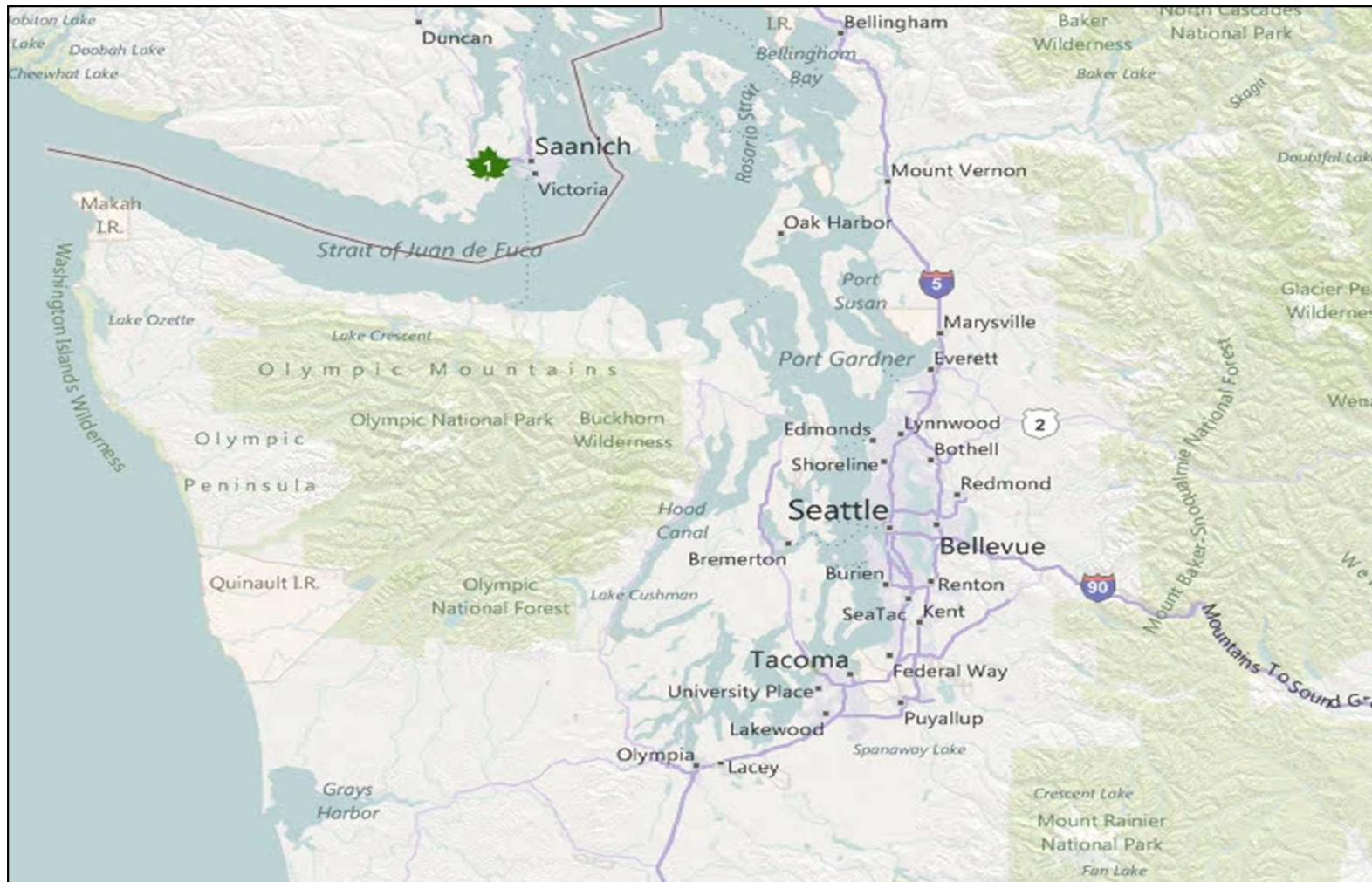


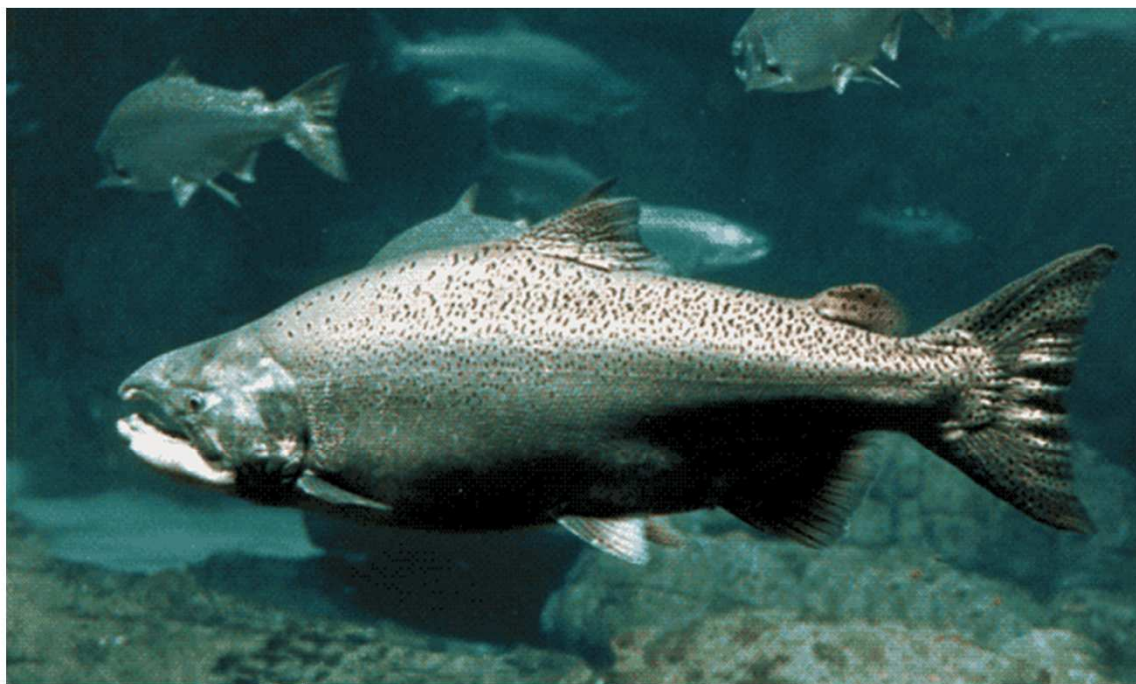
Stormwater Management Is A Very Big Issue in Puget Sound

- Rains a lot!
- Major water quality problems – Puget Sound Partnership



Puget Sound Region









In 2001, King County sent a letter to Bonneville Power Administration (“BPA”) requesting payment of delinquent surface water management (“SWM”) fees.

Two problems:

1. SWM fee appears on property tax statement.
2. Statutory remedy is placement of lien, and then lien foreclosure as in taxes.

SEE REVERSE SIDE

 PROPERTY TAX ACCOUNT NUMBER
 RP10
 052107-9022-08

**KEEP
THIS
PORTION**

BRING ALL PARTS WHEN PAYING IN PERSON

 BONNEVILLE POWER ADMIN 443200
 REAL ESTATE OFFICE - SRPF
 PO BOX 3621
 PORTLAND OR 97208

LOT BLOCK CODE SEC TWP RG

 05-21-07 9022 4870 05 21 07
 POR GLS 8-9 & NE 1/4 OF SE 1/4
 WHICH WITH 9035-04-21-07 MAKE
 PAUL J RAVEN SUBSTATION SITE DAF
 BAAP IN C/L CO RD 2228.4 FT SLY
 ALG SEC LN FR NE COR TH CONT SLY ETC

2010 KING COUNTY, WA, REAL ESTATE TAX
 RM 600 - 500 FOURTH AVE SEATTLE WA 98104-2387

CURRENT TAX DISTRIBUTION

 State.....
 Local School Support.....
 County.....
 City.....
 Unincorporated/Road.....
 Port.....
 Fire.....
 Hospital.....
 Library.....
 Other.....
 Emergency Med Svc.....
 Ferry.....
 Flood Control.....

 *OTHER CHARGES:
 SWM 14,994.08

First half must be paid or postmarked by April 30, or FULL AMOUNT BECOMES DELINQUENT and accrues interest and penalty as prescribed by law. If first half paid by April 30 second half must be paid by October 31 or it becomes delinquent and accrues interest and penalty.

 FULL AMOUNT MAY BE
 PAID APRIL 30th

CURRENT BILLING INFORMATION

 Land Value.....
 Improvements.....
 Less: Exempt Value.....
 TAXABLE VALUE.....
 Levy Rate.....
 General Tax..... 12.21375
 *Other Charges.....
 TOTAL CURRENT BILLING 14,994.08
 Omitted Taxes.....
 TOTAL CURRENT BILLING
 INCLUDING OMTS..... 14,994.08
 VOTER APPROVED

DELINQUENCY INFORMATION

YEAR	INTEREST PENALTY	PRINCIPAL
09	1649.35	14,994.08
08	3448.64	14,994.08
OTHER	218405.43	186,302.98
DELINQUENT TOTAL		439,794.56
GRAND TOTAL		454,788.64

MAIL WITH 1ST PAYMENT

PROPERTY TAX ACCOUNT NUMBER

052107-9022-08

2010 REAL ESTATE TAX

RM 600 - 500 FOURTH AVENUE, SEATTLE 98104-2387

<http://www.kingcounty.gov/propertytax>

Make check payable to: KING COUNTY TREASURY. Your cancelled check is your receipt.

DELINQUENT PAYMENTS RECEIVED WITHOUT INTEREST AND PENALTY WILL BE RETURNED. CANCELLATION AND DELINQUENCY CHARGES WILL BE IMPOSED FOR DISHONORED CHECKS. PAYMENTS SUBJECT TO IMMEDIATE COLLECTION. NO POST DATED CHECKS.

*First half payment must be paid or postmarked by April 30th or ENTIRE BILLING BECOMES DELINQUENT AND WILL ACCRUE ANNUAL INTEREST AND PENALTY

 12%
 FULL AMOUNT MAY BE PAID APRIL 30th

 BONNEVILLE POWER ADMIN 443200
 REAL ESTATE OFFICE - SRPF
 PO BOX 3621
 PORTLAND OR 97208

TAX TYPE	TAX YEAR	OMIT YEAR	INTEREST TO	PENALTY (SEE REVERSE)	PRINCIPAL AMOUNT	*HALF AMOUNT
Current	10		03-10		14994.08	7497.04
Omitted						
Delinquent	09		1649.35		14994.08	
	08		3448.64		14994.08	
	07		5247.93		14994.08	
	06		6417.39	1.10	13654.02	
	OTHER		6738.46	.55	157654.88	

*All payments must include the PRINCIPAL + INTEREST + PENALTY when due.

 PAY THIS
 AMOUNT


447,291.60

King County Rate Structure

CLASS	IMPERVIOUS SURFACE PERCENTAGE	RATE
➤ Residential		\$111.00 per parcel/year
➤ Very light	0 to \leq 10%	\$111.00 per parcel/year
➤ Light	> 10% to \leq 20%	\$277.39/acre/year
➤ Moderate	> 20% to \leq 45%	\$597.85/acre/year
➤ Mod. Heavy	> 45% to \leq 65%	\$1,005.67/acre/year
➤ Heavy	> 65% to \leq 85%	\$1,363.76/acre/year
➤ Very Heavy	> 85% to \leq 100%	\$1,737.74/acre/year

State Law: SWM Fees Not Taxes

- *Teter v. Clark* (1985) and *Covell v. Seattle* (1995)
- State Supreme Court establishes 3 part test:
 - 1) Regulate or raise money?
 - 2) Spend freely or restricted fund?
 - 3) Rate based on benefits or burden imposed?

Covell v. City of Seattle, 127 Wn. 2d 874, 905 P.2d 324 (1995), citing *Teter v. Clark*, 104 Wn.2d 227, 704 P.2d 1171 (1985)


BPA Rejects King County Position

In 2005 Forest Service Raises Objection

- Charged \$1032 for 9 parcels
- Refused to pay
- Asked Comptroller General of GAO for Decision
- GAO issues Decision on June 5th, 2006

GAO Decision


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.



GAO Decision

Continued -

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.



Section 313(a) of the Clean Water Act

Each agency of the Federal Government engaged in any activity resulting in the discharge or runoff of pollutants shall be subject to local requirements, respecting the control and abatement of water pollution to the same extent as any nongovernmental entity, including the payment of reasonable service charges.

This subsection shall apply notwithstanding any immunity of such agencies, officers, agents or employees under any law or rule of law.

Tax Injunction Act (TIA), 28 U.S.C.A. § 1341

- Limits jurisdiction of federal courts to review taxes under state law where a remedy may be had in state courts of such state.
- The term "tax" is subject to a "broader interpretation when reviewed under the aegis of the TIA."

San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992) as cited by *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000)

GAO 3 Part Test

1. What entity imposes the charge?
2. What population is subject to the charge?
On many or only those regulated?
3. What use of the money?
Benefit general public or are benefits more narrow?

San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico, 967 F.2d 683 (1st Cir. 1992) as developed by *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130 (4th Cir. 2000)

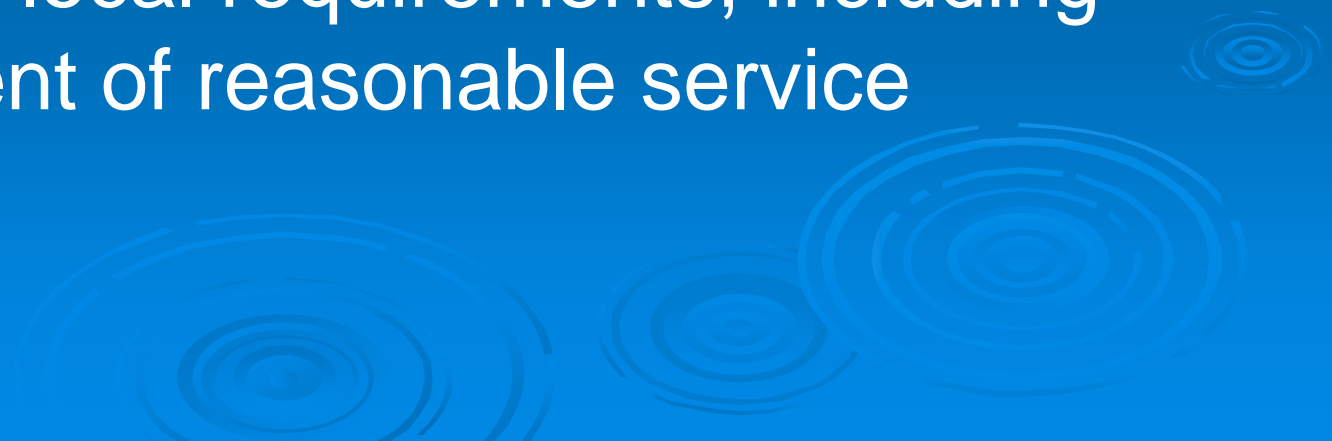
State of Maine 3 Part Test: (NOT Used by GAO Decision)

1. So long as the charges do not discriminate;
2. Are based on a fair approximation of use of the system;
3. Are structured to produce revenues that will not exceed the total cost of the benefits to be supplied.

State of Maine v. Department of the Navy, 973 F.2d 1007 (1st Cir. 1992),
citing *Massachusetts v. United States*, 435 U.S. 444 (1978)

Resource Conservation and Recovery Act - 42 U.S.C § 6961

Each agency of the Federal Government engaged in any activity resulting in the disposal or management of hazardous waste shall be subject to all Federal, State, and local requirements, including the payment of reasonable service charges.



So GAO Decision . . .

- Uses a test from a non-environmental context (*San Juan*);
- Weighted towards tax (*San Juan*);
- Ignores a test construing almost identical language (*State of Maine*);
- Decided 3 months after *San Juan* (*State of Maine*);
- From same Court of Appeals (1st Cir.) as *San Juan*.

Written by the same judge who wrote the *San Juan* opinion, then Chief Judge Breyer, who now sits on the U.S. Supreme Court.

GAO Decision misapplies *Huntington*

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 an impermissible tax on the federal government.

United States v. Huntington, West Virginia, 999 F.2d 71 (4th Cir. 1993)

Equity?





King County Response

November 26, 2008

- GAO Decision used biased test;
- Better test available rejected by GAO;
- Misapplies *U.S. v. Huntington* decision;
- Ignores equity.

The Rest of the Story...

- March 20, 2009 - GAO responds to KC: Decision stands.
- March 24, 2009 - DOJ letter to KC and Seattle: will sue to remove SWM liens on federal prison property.
- October 14, 2009: Federal Bureau of Prisons: not pay SWM fee, as is a charge on status as property owner.
- Fall, 2009: DOJ sends "rush" requests to cities and counties in Washington asking for amounts delinquent for federal facilities.

- February, 2010: BPA stops \$8500 monthly payment to City of Vancouver, Washington.
- June 10, 2010: US Senate Bill 3481 introduced to clarify feds obligation to pay SWM fees.
- September 29, 2010: GAO sends two letters to D.C.'s Water and Sewer Authority - will pay Impervious Surface Area Charge to water/sewer authority for CSO capital facilities, but not stormwater fee for stormwater program.



SUNNY AFTER
MORNING FOG
High, 71. Low, 54.
> B10

FRIDAY, OCTOBER 1, 2010

The Seattle Times

WINNER OF A 2010 PULITZER PRIZE



75¢

\$1.00 outside King, Pierce,
Snohomish, Kitsap counties

Independent and locally owned since 1896 | seattletimes.com
1.6 million readers weekly in Western Washington, in print and online

Winter could be a whopper, forecasters say

LA NIÑA EFFECT

**Wetter and colder,
bigger snowstorms
said to be likely**

BY SANDI DOUGHTON
Seattle Times science reporter

The most intense La Niña conditions since 1955 are brewing near the equator, raising the odds of a wild winter in the Pacific Northwest.

Meteorologists say more rain, colder temperatures and bigger snowstorms are

can produce.

"La Niña winters are snowy winters," said Brad Colman, National Weather Service meteorologist-in-charge for Seattle. "Skiers and departments of transportation should be paying attention."

The flip side of the more-famous El Niño pattern, La Niñas occur when the ocean near the equator becomes colder than usual. Current temperatures are the coldest for this time of year since the Eisenhower administration.

Are we in for this again?



ELAINE THOMPSON / THE ASSOCIATED PRESS

The mere mention of snow will have many in Seattle remembering December 2008, when a series of storms over two weeks brought repeated snowfall, paralyzing the city during the holiday-shopping season.

111TH CONGRESS
2^D SESSION

S. 3481

To amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution.

IN THE SENATE OF THE UNITED STATES

JUNE 10, 2010

Mr. CARDIN introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**SECTION 1. FEDERAL RESPONSIBILITY FOR STORMWATER
POLLUTION.**

Section 313 of the Federal Water Pollution Control Act (33 U.S.C. 1323) is amended by adding at the end the following:

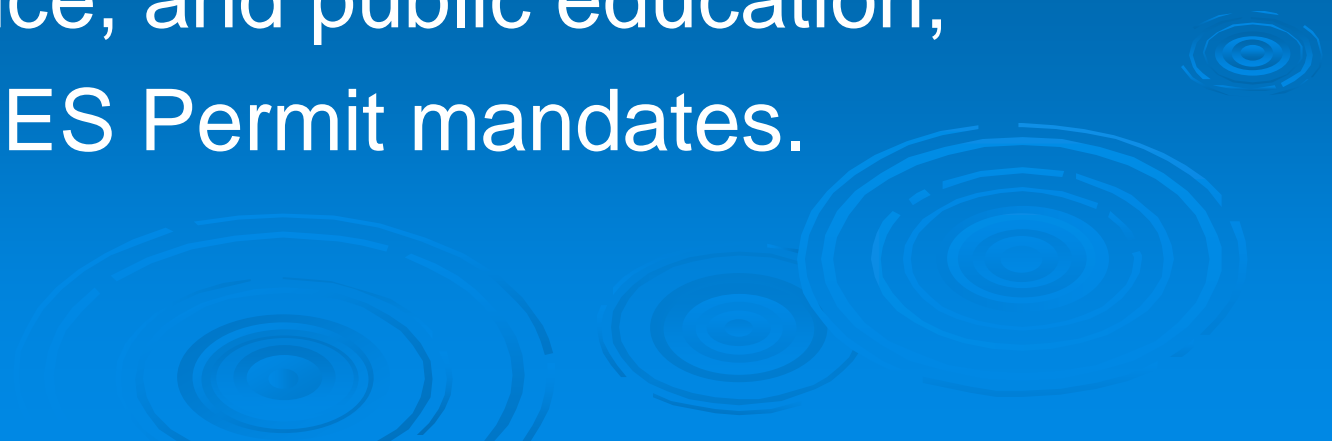
“(c) **FEDERAL RESPONSIBILITY FOR STORMWATER POLLUTION.**—Reasonable service charges described in subsection (a) include reasonable fees or assessments made for the purpose of stormwater management in the same manner and to the same extent as any nongovernmental entity.

“(d) **NO TREATMENT AS TAX OR LEVY.**—A fee or assessment described in this section—

“(1) shall not be considered to be a tax or other levy subject to an assertion of sovereign immunity; and

“(2) may be paid using appropriated funds.”.

King County Stormwater Program

- Fee authorized under state law;
 - Fee used to fund comprehensive stormwater program;
 - Includes basin planning, land use regulation, construction of facilities, maintenance, and public education;
 - 2007 NPDES Permit mandates.
- 

King County Stormwater Management Program as Mandated by NPDES Permit

1. Legal Authority
 2. Mapping and Documentation
 3. Coordination
 4. Public Involvement and Participation
 5. Controlling Runoff from New Development, Redevelopment, and Construction Sites
 6. Structural Stormwater Controls (Retrofits)
 7. Source Control Program for Existing Development
 8. Illicit Discharges Detection and Elimination (IDDE)
 9. Operation and Maintenance Program
 10. Education and Outreach Program
- 