Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF RENTON
Renton City Hall
1055 S. Grady Way
Renton, WA 98057

and

CITY OF VANCOUVER
210 East 13th Street
Vancouver, WA 98668

Defendants.

Civil Action

No. 2:11-CV-01156 JLR

April 6, 2012

DEFENDANTS' REPLY TO UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFEDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Congress expressly waived the sovereign immunity of the United States of America in the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq, requiring plaintiff to pay defendants' stormwater sewer system "reasonable service charges" when it wrote that "This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." 33 U.S.C. §1323(a)(2)(C). In the CWA's Stormwater Amendment of 2011, 33 U.S.C. § 1323(c), Congress clarified what constitutes a reasonable service charge, requiring that federal agencies pay qualifying charges "regardless of whether that reasonable fee, charge, or assessment is denominated a tax." The Cities' stormwater management fees are among the type that fall within "reasonable service charges" that Congress intended. When Congress clarified that the CWA Stormwater Amendment fees are one type of fee that fall within "reasonable service charges," it was reacting to the federal government's "failure" to pay them.[1]

The United States argues that the Cities are not entitled to summary judgment because, it believes, Congress must have defined "reasonable service charges" at the time that it waived sovereign immunity. The United States, in opposing the plain reading of the statute, has primarily relied on three pre-CWA Stormwater Amendment court decisions that have either been judicially distinguished or overturned by statute.[2] The significance of the United States' reliance

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1 "[T]oday the Congress stands ready to approve … a bill to clarify Federal responsibility to pay for stormwater pollution. This legislation, which will soon become law, requires the Federal government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties. At stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the Federal Government." 156 Cong. Rec. S11, 023 (daily ed. Dec. 22, 2010) (underline added).

2 *United States v. Nordic Village, Inc*., 503 U.S. 30 (1992) (a bankruptcy matter where the Supreme Court held that the Bankruptcy Code § 106(c) did not contain an unequivocal waiver of sovereign immunity, amended in P.L. 103-394, Title I, § 113, 108 Stat. 4117); *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992) (a CWA and Resource Conservation and Recovery Act of 1976 (RCRA) matter where the Supreme Court held that the CWA and RCRA did not contain waivers of sovereign immunity from civil fine liability, specifically, punitive fines,

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on such cases is that in each circumstance, Congress, by legislative action, stated unequivocally that the analysis that the United States suggests is wrong. This Court should reject the United States' arguments as contrary to Congress' expressed and unequivocal intent, long-standing rules of statutory construction and the United States Supreme Court decision in *Massachusetts v. United States*, 435 U.S. 444 (1978). As a result, the Cities ask this Court to grant their motion for partial summary judgment.

II. RESTATEMENT OF ISSUES

1. Whether Rules of Statutory Construction require the Court to plainly read the Clean Water Act to determine whether it waives sovereign immunity and to give effect to its words?

2. Should this Court find that Congress waived sovereign immunity in the Clean Water Act requiring the United States to pay "reasonable service charges" for the control and abatement of water pollution flowing from federal properties?

3. Whether the reasonable service charge language in 33 U.S.C. § 1323(c) is separate from the Clean Water Act's waiver of sovereign immunity language in 33 U.S.C. §1323(a)?

4. Whether defendants' stormwater fees are "reasonable service charges" under the three-prong test in *Massachusetts v. United States* and 33 U.S.C. § 1323(c)?

5. Whether the United States has received a service or benefit from the defendants before and after January 4, 2011?

6. When the parties agree that the question of sovereign immunity is one of statutory construction and interpretation and where the United States has failed to raise an issue of genuine material fact, should this Court grant the Cities' motion for partial summary judgment?

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superseded by Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505); and *EPA v. California*, 426 U.S. 200 (1976) (a CWA matter where the Supreme Court held that federal facilities were not subject to state NPDES permit requirements, superseded by P.L. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598).

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III. ARGUMENT AND AUTHORITIES

1. Rules of Statutory Construction require the Court to read the plain text of the Clean Water Act to determine whether it waives sovereign immunity.

The parties agree that the question of waiver of sovereign immunity is one of statutory construction and interpretation. Rules of statutory construction require this Court to interpret the Clean Water Act in a manner to give effect to Congress' legislation. **"**The words of the Act must be given their ordinary meaning." *United States v. First National Bank of Detroit, et al*, 234 U.S. 245, 258 (1914). "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word.'" *Ex Parte the Public National Bank of New York***,** 278 U.S. 101, 104 (1928). Additionally, "it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Ibid* (citations omitted). More recently, the United States Supreme Court explained that "Courts are expert at statutory construction, while agencies are expert at statutory implementation." *Negusie v. Holder*, 555 U.S. 511, 530 (2009).

There is an unequivocal waiver of sovereign immunity in the statutory text of the Clean Water Act. The waiver of sovereign immunity in 33 U.S.C. § 1323(a) plainly states that "This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." The relevant language reads:

> 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

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> charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner**.** This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

33 U.S.C. § 1323(a) (underlines added).

There is no alternative or conflicting interpretation of this waiver of sovereign immunity language. Under the Clean Water Act, 33 U.S.C. § 1323(a), federal departments, agencies, or instrumentalities, of any branch of the federal government, having jurisdiction over any facility which has or may have polluted water runoff shall be subject to the requirements of 33 U.S.C. § 1323(a) regardless of any claims of sovereign immunity.

The waiver of sovereign immunity could not be clearer, and it could not be clearer that the waiver applies to "the payment of reasonable service charges." The Justice Department's *Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment* (*U.S.M.O.*) is an overt attempt to obfuscate and frustrate the intent of Congress and the laws of the United States. The issues presented in defendants' Motion for Partial Summary Judgment are questions of law for this Court and are recognized as such by the Justice Department in its arguments.

2. Congress waived sovereign immunity in the Clean Water Act requiring the United States to pay "reasonable service charges" for the control and abatement of water pollution flowing from federal properties.

Congress' express waiver of sovereign immunity requires the federal government to pay "reasonable service charges" claimed by the Cities in this case, and no new waiver of sovereign immunity is necessary. A statute such as the Clean Water Act creates a right capable of grounding a claim within the waiver of sovereign immunity if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell v.*

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United States, 463 U.S. 206, 217 (1983). As the Supreme Court has explained (in a Tucker Act case):

> This "fair interpretation" rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be "lightly inferred," a fair inference will do.

U.S. v. White Mountain Apache Tribe, 537 U.S. 465, 472-473 (2003) (internal citations omitted, emphasis added).

This approach was used in *City of Cincinnati v. United States of America*, 2007 U.S. Dist. LEXIS 26991, 5; 2007 WL 956432 (S.D. Oh. 2007), an action brought by the City of Cincinnati to recover unpaid stormwater system charges. The Court, in its role as an expert in statutory construction, stated:

> …this Court finds that the Supreme Court's discussion of the waiver contained in *Department of Energy v. Ohio* is largely inapplicable. The Supreme Court found that the provision provided a waiver of sovereign immunity, but found that the waiver only extended to fines which were coercive in nature. *Id*. Here, the City is seeking to collect fees, not impose fines. Based upon this Court's reading of *Department of Energy v. Ohio* and the federal facilities provision, the City's stormwater system charge falls squarely within the waiver of sovereign immunity contained in the provision.

City of Cincinnati, 2007 U.S. Dist. LEXIS at 16 (underlines added).

It is significant to note that the United States never appealed Judge Michael R. Barrett's finding and decision, but instead entered into a compromised settlement with the City of Cincinnati. If the Justice Department truly believed that the U.S. District Court had wrongly decided that the Clean Water Act's waiver of sovereign immunity did not apply to Cincinnati's stormwater fees, the solution was not a settlement, but rather an appeal to the U.S. Court of

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Appeals for the Sixth Circuit. Finally, it is important to note that the decision in *City of Cincinnati v. United States of America* was decided more than three years before the Stormwater Amendment was enacted on January 4, 2011.

3. The reasonable service charge language in 33 U.S.C. § 1323(c) is related to but separate from the Clean Water Act's waiver of sovereign immunity language in 33 U.S.C. §1323(a).

The United States concedes that after the enactment of the CWA Stormwater Amendment it must pay the reasonable service charges imposed by the Cities, and the Cities acknowledge that the United States has in fact paid those charges. (*See,* Affidavit of Gregg Zimmerman, ¶ 4, and Affidavit of Brian Carlson, ¶ 5 and 7). The United States also concedes that it paid the Cities' "reasonable service charges" prior to enactment of the Stormwater Amendment. (*See*, Affidavit of Gregg Zimmerman, ¶ 4, and Affidavit of Brian Carlson, ¶ 7). However, incongruently, the United States argues that there was no waiver of sovereign immunity for "reasonable service charges" until the CWA Stormwater Amendment codified what amounts to the *Massachusetts* test. This strained interpretation is not consistent with the plain language of 33 U.S.C. § 1323(a) and (c).

The essence of the United States' argument is that "Congress did not unambiguously waive sovereign immunity for local government stormwater charges until its 2011 amendment to that section." (*U.S.M.O.*, p. 9; lines 12-15). Stated differently, what the United States is saying is that the term "reasonable service charges" had no meaning until Congress gave it content, and was not subject to judicial interpretation. The United States arrives at its conclusion that the term "reasonable service charges" is not subject to judicial interpretation by reversing the order of statutory analysis required for 33 U.S.C. § 1323.

The United States claims that the waiver of sovereign immunity for "reasonable service charges" only came into existence in 2011 with the enactment of the Stormwater Amendment,

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despite the fact that 33 U.S.C. §1323(a) specifically waives sovereign immunity as to "reasonable service charges." Before 2011, there was no subsection "c" in this section of the code. If the United States' argument is taken to its logical conclusion, that would mean that 33 U.S.C. § 1323(a), which requires payment of reasonable service charges, would have been meaningless. However, the United States has failed to offer a single case that suggests such a result. To the contrary, several courts have interpreted and/or applied the *Massachusetts* "reasonable service charges" test. *See, e.g., City of Cincinnati v. United States of America, supra* and *New York Dep't of Envtl. Conservation v. U.S. DOE*, 850 F. Supp. 132, 135, 141-143; 1994 U.S. Dist. LEXIS 5840 (N.D.N.Y. 1994). ("In making this determination, the parties and the court agreed that the proper test was the one set forth in *Massachusetts v. United States*").

Congress' waiver of sovereign immunity as it relates to federal departments, agencies or instrumentalities took place in 1977. The 1977 waiver unquestionably predates enactment of the CWA Stormwater Amendment, 33 U.S.C. § 1323(c) in 2011. While the two are related, in that they both fall under 33 U.S.C. § 1323, entitled *Federal facilities pollution control*, 33 U.S.C. § 1323(c) is not the waiver of sovereign immunity, but rather the means of determining the appropriateness of the "reasonable service charges."

In fact, 33 U.S.C. § 1323(c) does not, and does not need to refer to a waiver of sovereign immunity which is contained in § 1323(a). The Stormwater Amendment, S. 3841, [is] "*An Act to amend the Federal Water Pollution Control Act* <u>*to clarify*</u> *Federal responsibility for stormwater pollution*" (underline added) and 33 U.S.C. § 1323(c) which defines the "reasonable service charges" referenced in subsection 33 U.S.C. § 1323(a) of the Clean Water Act states specifically:

> (c) REASONABLE SERVICE CHARGES.—
> (1) IN GENERAL.—For the purposes of this Act, reasonable service charges described in subsection (a) include <u>any reasonable</u> <u>nondiscriminatory fee, charge, or assessment</u> that is—

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> (A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and
>
> (B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

Pub. L. 111-378, § 1, 124 Stat. 4128 (underlines added).

The Stormwater Amendment clarifies pre-existing language in the Clean Water Act. Contrary to the United States' argument, it does not offer a new waiver of sovereign immunity for federal responsibility for "reasonable service charges." It clarifies what already existed -- liability for reasonable service charges -- to avoid additional litigation and court decisions that are inconsistent with Congress' legislative intent.

In sum, Congress' intent could not be clearer: "…the Federal government [is] to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on [Federal] properties. At stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the Federal Government." See, 156 Cong. Rec. S11, 023 (daily ed. Dec. 22, 2010) (emphasis added). That is all that defendants are asking for, and that is what the United States is seeking to prevent.

4. Defendants' stormwater fees are "reasonable service charges" under the three-prong test in *Massachusetts v. United States* and 33 U.S.C. § 1323(c).

In deciding how reasonable service charges were to be evaluated by courts, Congress chose to codify the three-prong *Massachusetts v. United States* test in 33 U.S.C. § 1323(c). Specifically, the *Massachusetts* test and 33 U.S.C. § 1323(c) require that defendants' stormwater fees be: (1) "reasonable nondiscriminatory;" (2) "fair approximation;" and (3) "revenues to recoup costs."

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By paying the same reasonable service charges now that it refused to pay before the Stormwater Amendment, the United States has conceded that the Cities' stormwater fees meet the three-prong test of both *Massachusetts* and 33 U.S.C § 1323(c). Plaintiff cannot, and could not, pay defendants' stormwater fees without first determining that Renton and Vancouver meet the *Massachusetts* and 33 U.S.C. §1323(c) test. By paying fees accrued after January 4, 2011, the United States has essentially started paying what it claimed it should not pay before January 4, 2011. (*See*, Affidavit of Gregg Zimmerman, ¶ 4, and Affidavit of Brian Carlson, ¶ 7). The United States Supreme Court decided *Massachusetts v. United States* in 1978. Under that pre-Stormwater Amendment test, the United States was liable to pay the Cities' stormwater fees before 2011, just as they are paying them after 2011, because the fees are reasonable nondiscriminatory, a fair approximation of use, and the revenue was used to recoup costs.

5. Congress has decided that the United States shall receive the services and benefits of stormwater control and abatement of water pollution.

The United States claims that Bonneville Power Administration (BPA) has not voluntarily requested a service or received a benefit from defendants. This claim is not well considered by plaintiff.

The United States' argument is not only inconsistent, but it would violate the concept of separation of powers and violate United States Constitution Article I. Specifically, United States Constitution Article I, Section 1 states that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Further, in United States Constitution Article I, Section 8, Clause 18, it states that Congress has legislative powers "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

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The question is not whether BPA (or a BPA official or employee) voluntarily requested a service and received a benefit for BPA, but rather whether Congress on behalf of the United States voluntarily requested a service and the United States received a benefit. Congress has demanded that its departments, agencies and instrumentalities comply with the Clean Water Act. Through the Clean Water Act, Congress has spoken, and what Congress has said is that (1) states and their political subdivisions shall have the responsibility to ensure that stormwater is properly managed and controlled before it enters the nation's waters, and (2) that agencies or instrumentalities of the United States, that control real property that contributes or may contribute pollution to stormwater shall be subject to and comply with all local requirements related to stormwater control and abatement, "including the payment of reasonable service charges." 33 U.S.C. § 1323(a).

6. When the parties agree that the question of sovereign immunity is one of statutory construction and interpretation, and when the United States has failed to raise an issue of genuine material fact, this Court should grant the Cities' motion for partial summary judgment.

As stated above, all parties agree that the question of waiver of sovereign immunity is one of statutory construction and interpretation. Pursuant to the requirements of Fed. R. Civ. P. 56(c)(1)(B), the Cities assert that the alleged facts raised by the United States do not establish the presence of a genuine issue of material fact.

The first two paragraphs of the United States' Statement of Material Facts in Genuine Dispute argue two conclusions that are not facts and that are not material to the Cities' motion for partial summary judgment. The conclusions are: (1) that the Cities' reasonable service charges are a tax under federal law; and (2) the Cities' have not provided a service to BPA. The question of whether the Cities' "reasonable service charges" are a tax is immaterial to the issues presently before the Court. As stated above, Congress has decided that the Cities shall provide a

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service and benefit to the United States, its departments, agencies and instrumentalities, by requiring the Cities to comply with the Clean Water Act, 33 U.S.C. § 1323.

In the third and fourth paragraphs of the United States' Statement of Material Facts in Genuine Dispute, the United States alleges that the Cities' stormwater charges do not comply with the Stormwater Amendment because they are not "nondiscriminatory," and that the Cities' rate structures are not a fair approximation of the Cities' stormwater costs because they are "not consistent" with each other. These, like the previous claims, are not material to determining whether Congress waived sovereign immunity, which is the issue addressed in defendants' Motion for Partial Summary Judgment.

The parties agree that BPA administers property owned by the United States of America in Renton and Vancouver, Washington; that the BPA properties have impervious surfaces; that stormwater flows from BPA impervious surfaces to Renton's and Vancouver's stormwater systems; that the Cities reasonable stormwater charges are required to pay or reimburse the Cities for stormwater management that is required by the Clean Water Act; that BPA has paid the Cities' stormwater management fees prior to the Stormwater Amendment; and that BPA has resumed paying those same fees after the Stormwater Amendment. These are the relevant and material facts related to the Cities' Motion for Partial Summary Judgment.

IV. CONCLUSION

Federal agencies own developed properties that generate stormwater and pollutants. It is difficult to comprehend how the United States still refuses to pay its stormwater fees. Congress has waived sovereign immunity for "reasonable service charges" that are imposed to comply with federal regulations to control and abate stormwater and its pollutants coming from federal properties. Congress has gone so far as to clarify its intent in the CWA Stormwater Amendment

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that the United States must pay its fair share of the costs of abatement. This Court should grant defendants' motion for partial summary judgment.

RESPECTFULLY SUBMITTED this 4th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the date provided below, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individual(s):

DATED this 4th day of April, 2012.

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