IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CIVIL ACTION FILE NO. 11-761C
Senior Judge B. Futey

DEKALB COUNTY, GEORGIA,
a political subdivision of the
State of Georgia,

Plaintiff,

v.

UNITED STATES OF AMERICA and
UNITED STATES POSTAL SERVICE

Defendants.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF FOR THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AND THE AMERICAN PUBLIC WORKS ASSOCIATION, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA) and the American Public Works Association (APWA) (collectively the *"amici")* respectfully move for leave to file the accompanying *amicus* brief and attached exhibits in support of the Motion for Partial Summary Judgment of plaintiff, DeKalb County, Georgia. *Amici* represent a broad coalition of local government stormwater management agencies. The United States refuses to pay DeKalb County for unpaid stormwater fees for the costs of stormwater clean up from federal properties assessed prior to the enactment of S. 3481, P.L. 111-378 (Jan. 4, 2011). The County's suit raises issues of national significance impacting the vital interests of *amici* and the citizens they represent. The impact of a ruling that S. 3481 does not apply to reasonable stormwater service charges billed by the County for periods prior to January 4, 2011 would have serious consequences on *amici* and their members in their efforts to recoup past stormwater treatment costs from federal facilities. The undersigned counsel for *amici* contacted Counsel for the United States regarding this motion for leave, but has not received a response.

STATEMENT OF INTEREST AND REASONS FOR GRANTING MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA), and the American Public Works Association (APWA) represent municipal governments and a large number of city and county public works organizations responsible for the operation, oversight and management of municipal separate storm sewer systems. *Amici* also

represent agencies, companies and professionals involved in ensuring that such systems are designed, funded, operated and maintained in compliance with applicable laws and regulations. Together, *amici* are responsible for ensuring that public storm water and waste water treatment systems meet the stringent and costly requirements of the Clean Water Act.

NACWA represents the interests of nearly 300 of the nation's wastewater and stormwater management agencies. NACWA has seven public utility members in the State of Georgia, including Plaintiff DeKalb County. NACWA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. NACWA was instrumental in securing passage of S. 3481 to amend the Clean Water Act § 313(c), which clarified the intent of Congress that stormwater user fees based on a reasonable approximation of a property's contribution to pollution in terms of the volume or rate of stormwater discharge or runoff are "reasonable service charges" payable by all federal government facilities.[1]

NAFSMA is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local

[1] S 3481 amended Section 313 of the Federal Water Pollution Control Act (33 U.S.C. 1323) by adding at the end the following: "(c) Reasonable Service Charges. (1) In general - for the purposes of this Act, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is - (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."

government. NAFSMA's 100 member agencies serve a combined population of approximately fifty (50) million people. NAFSMA's *Guidance for Municipal Stormwater Funding* (Jan. 2006) was published under a cooperative grant from the U.S. Environmental Protection Agency.

APWA is an organization of 28,500 public works professionals, including city and county Public Works Directors responsible for stormwater management, water and wastewater services, waste collection, and other municipal services. APWA members and their agencies are responsible for planning, budgeting, design and management of municipal stormwater programs. APWA is the publisher of *Financing Stormwater Facilities: a Utility Approach* (1991), which discusses the rationale behind the utility approach to financing stormwater management by an estimated 50 communities nationwide.

Amici have a keen interest in the outcome of this and similar litigation pending in the federal courts. In fact, *amici* were recently granted permission to file an amicus brief in a case pending in the U.S. District Court for the Western District of Washington that raises the same issue of whether regarding S. 3481 applies to stormwater charges billed for periods prior to January 4, 2011. United States v. Cities of Renton and Vancouver, (W.D. Wash.) (C.A. No 2:11-CV-01156 JLR.)

The costs of treating stormwater discharges from impervious surfaces has been a major concern for *amici* for many years. Local stormwater authorities throughout the United States have created stormwater utilities to collect user fees to pay for the expanding costs of treating storm water discharges, particularly by using impervious surface area to allocate costs based on each property's contribution of runoff to the stormwater

management system - the approach used by DeKalb County. However, local governments, like DeKalb County, often faced opposition from federal agencies that have failed to pay assessments claiming that such charges constituted an impermissible tax and not a "fee for service" and therefore not encompassed under the CWA's waiver of sovereign immunity in Section 313 (a) of the Act. A ruling in favor of the United States in this case would undermine the fundamental principles of fairness and equity that all contributors to stormwater runoff impairing our nation's waters must pay their fair share of these enormous costs in order to meet the goals of the Clean Water Act.

The filing of an *amicus* brief "should normally be allowed when a party is not represented completely or not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case...or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers or the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n,* 125 F. 3d. 1062, 1064 (7th Cir. 1997), (quoted in *Jin v. Ministry of State Security*, 557 F. Supp. 2d. 131, 137 (D.D.C. 2008). *See also Hoptowit v. Ray*, 682 F.2d. 1237, 1260 (9th Cir. 1982) ("there is no rule that *amicus* must be totally disinterested"); *Cobell v. Norton* , 246 F. Supp. 2d. 59, 69 (DDC 2003) (in case involving "individual Indian money accounts" the court accepts amicus brief addressing the "potential impact that such relief might have on American Indian tribes").

Here, *amici* can provide the unique perspective of a broad coalition of public agencies across the nation that depend on each contributor of stormwater runoff to pay their fair share of the enormous costs involved, including federal facilities that make up

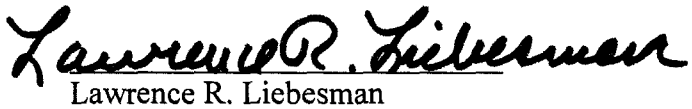
approximately 30% of the United States land area.[2] *Amici's* accompanying brief and attached exhibits provide an analysis of the Legislative History of S. 3481 demonstrating that Congress intended for that legislation to clarify that the waiver of sovereign immunity in Section 313 (a) of the Clean Water Act was intended to cover reasonable service charges for treating stormwater runoff from federal activities, including charges incurred prior to January 4, 2011. *Amici* also provide specific examples of municipalities across the nation that are still owed significant sums for costs of treating stormwater runoff from many different federal facilities and that could be directly impacted by the ruling in this case. Further, *amici* describe the important national policy reasons why the court should reject the United States position on retroactivity in this case. *Amici* submits that the unique national perspective they bring to this case will be of great assistance to the court in resolving this important issue.

[2] www.nationalatlas.gov/printable/fedlands.html

CONCLUSION

Amici, the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies and the American Public Works Association respectfully request that the court grant their motion for leave to file *amicus curiae* brief in support of Plaintiff DeKalb County's Motion for Partial Summary Judgment and accept for filing the accompanying *amicus* brief and attached exhibits.

Respectfully submitted,



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Dated: May 7, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the date provided below, the foregoing Motion for Leave to File *amicus* Brief and Proposed Order was mailed, postage prepaid, to the following:

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Dated: May 7, 2012

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEKALB COUNTY , GEORGIA, a political subdivision of the State of Georgia Plaintiff, v. UNITED STATES OF AMERICA , and UNITED STATES POSTAL SERVICE Defendants.	Civil Action File No. 11- 761 C Senior Judge B. Futey **ORDER GRANTING MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF FOR THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AND THE AMERICAN PUBLIC WORKS ASSOCIATION, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

ORDER

Having considered the Motion of the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies and the American Public Works Association for leave to file an a*micus curiae* brief in support of the Plaintiff Dekalb County's Motion for Partial Summary Judgment, it is hereby

ORDERED, that such motion be granted and that the brief of *amicus curiae* be filed.

Dated this _____ day of_____, 2012.

_____

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CIVIL ACTION FILE NO. 11-761C
Senior Judge B. Futey

DEKALB COUNTY, GEORGIA,
a political subdivision of the
State of Georgia,

Plaintiff,

v.

UNITED STATES OF AMERICA and
UNITED STATES POSTAL SERVICE

Defendants.

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, AND THE AMERICAN PUBLIC WORKS ASSOCIATION IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA) and the American Public Works Association (APWA) (collectively the *"amici")* respectfully submit this *amicus curiae* brief in support of the Motion for Partial Summary Judgment of Plaintiff DeKalb County Georgia. Plaintiff is seeking to recover moneys owed by the United States and the United States Postal Service for the costs of stormwater management from federal properties pursuant to the County's storm water utility ordinance that became effective on January 1, 2004, Code of DeKalb County, ("DeKalb Code") § 25-360 *et. seq.* DeKalb County alleges that various federal agencies and the United States Postal Service had refused to pay the County its stormwater fees assessed prior to January 4, 2011. These federal agencies, among other contentions, state that S. 3481, P.L. 111-378, Stat. 4128, signed into law on January 4, 2011, does not apply to stormwater services assessed prior to that date. (U.S. Br. At 12-15) The County claims that P.L. 111-378 merely clarified Congress's 1977 waiver of the United States sovereign immunity for "reasonable service charges" under Section 313(a) of the Clean Water Act, 33 U.S.C. 1323(c) and applies to the charges in question incurred prior to January 4, 2011. (Compl. § 7 and 8)

DeKalb County's suit raises issues of national significance with ramifications that transcend the specific facts of this case. The impact of a ruling that S. 3481 does not apply to reasonable stormwater service charges billed for periods prior to January 4, 2011 would have serious consequences on *amici* and their municipal members in their efforts to recoup past stormwater management costs from federal facilities. Not only is the position of the United States contrary to law, it undermines fundamental principles of fairness and equity that all contributors to stormwater runoff impairing our nation's waters must pay their fair share of these enormous costs in order to meet the goals of the Clean Water Act.

STATEMENT OF INTEREST

A. *Amici* Represent a Broad Coalition of Local Government Stormwater Management Agencies

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA), and the American Public Works Association (APWA) represent municipal governments and a large number of city and county public works organizations responsible for the operation, oversight and management of municipal separate storm sewer systems. *Amici* also represent agencies, companies and professionals involved in ensuring that such systems are designed, funded, operated and maintained in compliance with applicable laws and regulations. Together, *amici* are responsible for ensuring that public stormwater and wastewater treatment systems meet the stringent and costly requirements of the Clean Water Act.

NACWA represents the interests of nearly 300 of the nation's wastewater and stormwater management agencies. NACWA has seven public utility members in the State of Georgia, including Plaintiff DeKalb County. NACWA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. NACWA was instrumental in securing passage of S. 3481 to amend the Clean Water Act, 33 U.S.C. § 313(c), which clarified the intent of Congress that stormwater user fees based on a reasonable approximation of a property's contribution to pollution in terms of the volume or rate of stormwater discharge or runoff are "reasonable service charges" payable by all federal government facilities.[1]

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[1] S. 3481 amended Section 313 of the Federal Water Pollution Control Act, 33 U.S.C . 1323) by adding at the end the following:

NAFSMA is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local government. NAFSMA's 100 member agencies serve a combined population of approximately fifty million people. NAFSMA's *Guidance for Municipal Stormwater Funding* (Jan. 2006) was published under a cooperative grant from the U.S. Environmental Protection Agency.

APWA is an organization of 28,500 public works professionals, including city and county Public Works Directors responsible for stormwater management, water and wastewater services, waste collection, and other municipal services, including members in Georgia. APWA members and their agencies are responsible for planning, budgeting, design and management of municipal stormwater programs. APWA is the publisher of *Financing Stormwater Facilities: a Utility Approach* (1991), which discusses the rationale behind the utility approach to financing stormwater management by an estimated 50 communities nationwide.

(c) Reasonable Service Charges. (1) In general - For the purposes of this Act, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is -- (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.

B. *Amici* Have a Major Interest in The Outcome of This Case

The costs of managing stormwater discharges from impervious surfaces has been a major concern for *amici* for many years. Local stormwater authorities throughout the United States have devised appropriate funding mechanisms, including the creation of stormwater utilities and the collection of user fees and service charges in order to implement the expanding requirements of the stormwater management programs required in municipal stormwater permits issued by state and federal environmental regulators. By far the most common approach to establishing an appropriate rate structure for such utilities, an the approach used by DeKalb County, is the use of impervious surface area to allocate costs based on each property's contribution of runoff to the stormwater management system. These fee programs are commonly called Impervious Area Charge Programs (IACs). Local governments have relied on such fee programs to cover the cost of meeting the increasingly stringent requirements of the Clean Water Act as typified by municipal wet weather consent decrees and the requirements of meeting Total Daily Maximum Load (TDML) requirements under Section 303(d) of the CWA such as the Chesapeake Bay Total Daily Maximum Level ("TMDL") program.[2] These costs will certainly continue to increase given that stormwater remains a leading cause of water quality impairment and is the focus of increased federal regulatory requirements. For example, according to 2004 Water Quality Inventory, discharges of urban stormwater are the leading source of impairment to 22,559 miles (or 9.2 percent) of all impaired rivers and

[2] See Exec. Order No. 13,508, 74 Fed. Reg. 23,099 (May 15, 2009) (Chesapeake Bay Protection and Restoration, May 12, 2009).

streams, 701,024 acres (or 6.7 percent) of all impaired lakes, and 867 square miles (or 11.3 percent) of all impaired estuaries. [3]

However, while local governments have billed federal and non-federal facilities alike for years, they have faced strong resistance from federal agencies claiming that such charges constituted an impermissible tax and not a "fee for service" and therefore were barred by the principle of sovereign immunity and not covered by the "sovereign immunity waiver" in Section 313(a) of the CWA. The magnitude of this problem is especially serious when considering that the federal government owns 650 million acres of land, which compose approximately 30% of the United States land area.[4]

Amici and their municipal utility members have been dealing with the problem of federal government facilities refusing to pay reasonable stormwater services charges for over a decade, including participation in previous federal litigation addressing this exact issue. In 2004, *amici* supported the City of Cincinnati in a lawsuit against the federal government over a federal agency's failure to pay appropriate stormwater fees. The court in that case ultimately found that the federal agency was required to pay the stormwater charges in question and was not exempted from payment under the theory of sovereign immunity. This resulted in a consent decree between the city and federal agency that directed the federal government pay the City $17,000 for past fees and sanctioned the City to collect future stormwater service fees.[5] However, since that time, the number of federal government facilities nationwide refusing to pay municipal stormwater charges has

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[3] 2004 National Water Quality: EPA Report to Congress, available at epa.gov/lawsregs/guidance/cwa/305b/2004 report_index.cfn

[4] www.nationalatlas.gov/printable/fedlands.html.

[5] City of Cincinnati v. United States, Case No. C-1-03-73 (S.D. Ohio) (Consent Decree filed Nov. 15, 2007).

continued to increase, especially as more and more municipalities have shifted towards IACs for stormwater billing. Accordingly, *amici* worked directly with Congress in 2010 to clarify the federal responsibility for payment of reasonable stormwater service charges, including past, present, and future amounts, through an amendment to the Clean Water Act. These efforts lead to the enactment of S. 3481 in early 2011.

Amici had expected that the enactment of S. 3481 would resolve this issue and that federal agencies would pay for all past and future storm water fee assessments without objection. Instead, the United States has persisted in asserting that S. 3481 does not apply to stormwater charges assessed prior to the bill's passage. The United States position threatens the ability of municipal stormwater agencies to seek fee assessments against federal facilities for costs incurred prior to the enactment of S. 3481 on January 4, 2011. *Amici* believe the position of the United States' is contrary to the clear intent of Congress in enacting S. 3481. A ruling by this court denying DeKalb County's motion for partial summary judgment on this key legal issue would have a severe adverse effect on many local governments stormwater programs at a time when the need for reliable and certain funding mechanisms to support those programs is rapidly increasing. Accordingly, *amici* offer this brief to aid the Court in its consideration of this issue.

ARGUMENT

I. IN ENACTING SENATE BILL 3481, CONGRESS CLARIFIED THAT THE WAIVER OF SOVEREIGN IMMUNITY IN SECTION 313 (a) OF THE CLEAN WATER ACT WAS INTENDED TO COVER REASONABLE SERVICE CHARGES FOR MANAGING STORMWATER RUN OFF FROM FEDERAL FACILITIES

Congress' intent to broadly waive federal facility sovereign immunity for both substantive and procedural requirements of the Clean Water Act is a consistent theme dating back to the enactment of the Federal Water Pollution Control Act of 1972.[6] After the Supreme Court in Hancock v. Train, 426 U.S. 167 (1976) and EPA v. California EPA ex rel. State Water Resources Control Board, 426 U.S. 200 (1976), held that the Section 313(a) waiver of sovereign immunity did not extend to state permitting requirements, Congress enacted the Clean Water Act Amendments of 1977[7] making it "unequivocally

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[6] S. Rep. No. 92-414, 92nd Cong., 1st Sess. 77 (1972) ("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."); H.R. Rep. No. 92-911, 92nd Cong., 1st Sess. 118 (1972) ("The Committee, after hearing of numerous examples of flagrant violation of pollution controls is determined that the Federal facilities shall be a model for the Nation and that unless exempted by the President, they shall be required to meet all requirements as if they were private citizens...") adopted in the conference report 92-1236 (92nd Cong. at 135).

[7] The Supreme Court in EPA v Cal. EPA. Ex rel. State Water Res. Control Bd., 426 U.S. 200 (1976) had interpreted the Federal Water Pollution Control Act of 1972 as not subjecting federal facilities to state permitting requirements to abate water pollution. In 1977 Congress amended the Act clarifying the broad scope of the sovereign immunity waiver. S. Rep. 95-370 states that

> 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 FWPCA amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent (citing EPA v. Cal. EPA ex rel. State Water Res. Control Bd.) ... section 313 is amended to specify that, as in the case of air pollution, a Federal facility is subject to any Federal, state and local requirements respecting the control or abatement of water pollution, both

clear" that federal facilities were subject to "all the provisions of state and local water pollution laws" including "the payment of reasonable service charges."[8] Thus, Congress explicitly created a very expansive waiver of sovereign immunity for all reasonable service charges. Over the years, the broad scope of federal liability under the waiver regarding state and local "requirements" under the CWA and other federal environmental laws, including various service charges, have been upheld.[9] However, as municipalities began to

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substantive and procedural ... **[including] the payment of reasonable service charges**. (emphasis supplied).

S. Rep. No. 370, 95th Cong. 1st Sess. at 67 reprinted in 1977 U.S. Cong. & Admin. News 4326, 4392

[8] The full text of § 313 as enacted in 1977 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 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.

P.L. 95-217 §§ 60-61(a), 91 Stat. 1597, 1598 (emphasis supplied)

[9] See State of Maine v. Dep't of Navy, 973 F.2d 1007(1st Cir. 1992) (J. Breyer) (holding that the Department of the Navy was liable to the State for reasonable service charges for hazardous waste disposal under the Resource Conservation and Recovery Act (RCRA)); N.Y. State Dep't of Envtl. Conservation v. Dep't of Energy, 772 F. Supp. 91 (N.D.N.Y. 1991) (regulatory fees assessed by N.Y. state on federal facilities under the CAA, CWA and RCA upheld as fee and not a tax), State of N.Y. v. United States, 620 F. Supp. 374, 383 (E.D.N.Y. 1985) (requirements under CWA relate to state pollution standards or limitations);State of Fla. Dep't of Envtl. Regulation. v. Silvex Corp., 606 F. Supp 159, 163

enact and enforce stormwater ordinances starting in the 1990s, such as IACs to cover the increasingly stringent costs of stormwater controls, federal facilities claimed immunity from paying such charges asserting that they were an impermissible tax and not a "reasonable service charge." This view was reinforced by a 2006 opinion of the Government Accountability Office (GAO), finding that King County, Washington could not assess an impervious area charge for stormwater services against federal facilities in that County, and another GAO opinion in 2010 making the same finding regarding the District of Columbia's stormwater assessment program.[10] Thus, by 2010, it had become clear that Congress needed to intervene to clarify that "reasonable service charges" in Section 313(a) was meant to incorporate municipal stormwater charges including IACs, given the federal government's refusal to pay its fair share of the tremendous costs of stormwater management being placed on the shoulders of local governments.

The Legislative History of S. 3481 reflects Congress's intent to resolve this serious issue for all stormwater and IAC charges including those assessed prior to the law's enactment and, as such, meets the two part test as a "clarification" of existing law. That test requires an analysis of: (1) whether statutory language is ambiguous and therefore in need of clarification and (2) whether Congress declared its intent to clarify. Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999).[11] When an amendment is a

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(M.D. Fla. 1985)(requirements under RCRA relate to "pollution standards or limitations, compliance schedules, emissions standards and control requirements").

[10] See GAO Decision B-30666, June 5, 2006 (Forest Service--Surface Water Management Fees) and see letter for David A. Lebryk, Commissioner, Financial Management Office from Lynn H. Gibson, Acting General Counsel, Government Accountability Office, B-320868 at 1 (Sept. 29, 2010).

[11] See also, Baptist Mem. Hosp.- Golden Triangle v. Sebelius, 566 F.3d. 226, 229 (D.C. Cir. 2009)("When a new legislation or executive body adopts a new clarifying law or rule, it does not necessarily follow that the earlier version did not have the same meaning"),

clarification, it should be used in interpreting the provision in question as if it had always been so clarified. United States v. Sanders, 67 F.3d 855, 856 (9th Cir. 1995) citing United States v. Quinn, 18 F.3d 1461, 1467 (9th Cir. 1994).

Congressional intent to meet the first test for clarification was evident at the outset of the legislative process. In introducing S. 3481, Senator Cardin stated that:

> I continue to have grave concerns about the failure of 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 must include the federal government. When enacted, my legislation will remove all ambiguity about the responsibility of the federal government to pay these normal and customary storm water fees.[12]

Further, the fact that the bill as introduced included specific language precluding the assertion of sovereign immunity which was not included in the final version of S. 3481 did not mean that Congress intended S. 3481 to be new legislation on waiver of sovereign immunity. Rather, the Floor comments by Senator Cardin, as well as three House members supporting the Bill, further removes any doubt that Congress intended the bill to clarify the existing waiver of sovereign immunity in section 313(a).[13] In fact, Sen. Cardin's floor comments expressly noted the current ambiguity over the interpretation of "reasonable

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Brown v. Thompson, 374 F.3d. 253, 269 (4th Cir. 2004)("A change in the statutory language need not *ipso facto* constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakenly clear.")

[12] Sen. Cardin Press Release statement of June 11, 2010 available at http://cardin.senate.gov/newsroom/press/release/cardin-bill-would-require-feds-to-pay-their-fair-share-to-clean-up-local-pollution.

[13] The original version of S. 3481 stated in relevant part that "(d) No Treatment as Tax of Levy. A fee or assessment described in the section- (1) shall not be considered to be a tax or other levy subject to an assertion of sovereign immunity...." The removal of this language in the final version does not in any way contradict the clear intent of Sen. Cardin and other bill supporters that S. 3481 who unequivocally stated that the bill was intended to clarify the sovereign immunity waiver under section 313(a) removal of this language in the final version.

service charges" stating that "at stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the Federal Government."[14] In the House, Cong. James Oberstar, then Chair of the House Transportation and Infrastructure Committee, and D.C. Del. Eleanor Holmes Norton discussed the fact that some federal agencies have "seemingly rejected local efforts to assess service fees to curb stormwater pollution originating or emanating from Federal facilities" citing to the District of Columbia's conflicts with the federal government over storm water fees.[15]

There is also no doubt that the second "clarification" test was met. Senator Cardin and three House members repeatedly "declared" their intent to clarify the meaning of "reasonable service charges" regarding fees for stormwater management. In fact, Sen. Cardin and the three House members used the word "clarifies" eight separate times in floor comments and Sen. Cardin explicitly stated that the bill "removes any ambiguity."[16] Thus,

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[14] "S. 3481, a bill **to clarify Federal Responsibility to pay for stormwater pollution**.... [a]t stake is a fundamental **issue of equity**: Polluters should be financially responsible for the pollution that they cause. That includes the Federal Government.... I believe that this administration recognizes its responsibility to manage the stormwater pollution that comes off Federal properties. But that responsibility needs to translate into payments to local governments that are forced to deal with this pollution. Adopting this legislation today **removes all ambiguity** about the responsibility of the Federal Government to pay these normal and customary stormwater fees." Cong. Record at S11023-24 (Dec. 22, 2010).

[15] "This bill clarifies that in my district and all other congressional districts, Federal agencies must continue to pay their utility fees instead of passing the fees to our constituents." Citing to the GAO letters to federal agencies in the District of Columbia instructing them not to pay the District of Columbia's Impervious area change. Comments of Del. Norton, Cong. Rec. H8979 (Dec. 22, 2010).

[16] "Simply put, **this legislation clarifies** that Federal agencies and departments are financially responsible for any reasonable Federal, state or locally derived charges for treating or otherwise addressing stormwater pollution that emanates from Federal Property.... S. 3481 amends section 313 of the Clean Water Act to clarify... this is a simple effort **to clarify again** that the Federal government bears a proportional responsibility for addressing pollution originating from its facilities and should remain an active participant

Congress expressly declared that the bill was intended to clarify existing law and describes the basis for the need to clarify, referring to the "saga" faced by the District of Columbia related to payment and the impact on other jurisdictions. Finally, there were no contrary statements made by any member of Congress. The legislation passed Congress by unanimous consent on December 22, 2010, and President Obama signed S. 3481 into law on January 4, 2011.[17]

Significantly, following the enactment of S. 3481, the U.S. Department of Justice's Office of Legal Counsel (OLC) affirmed Senator Cardin's intent by issuing an opinion for the EPA's General Counsel finding that S. 3481, codified as Section 313(c) of the CWA, does not impose a specific appropriations requirement for the payment of storm water assessments.[18] The OLC opinion cited "Senator Cardin's consistent, public and unambiguous articulation of the intended purpose and effect of the Stormwater amendment confirms our view that Congress intended the Stormwater amendment to facilitate the payment of stormwater assessments by the federal government."[19] In so doing, the OLC cited NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 66 (1964) ("it is the

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in improving the nation's water quality and the overall environment." Remarks of Cong. Oberstar, Cong. Rec. H8979, Col. 1 (Dec. 22, 2010); "**This bill clarifies** that in my district and all other congressional districts, **Federal agencies must continue to pay** their utility fees instead of passing the fees to our constituents." Remarks of Del. Norton, Cong. Record H8979. "S. 3481, a bill that **would clarify** Federal responsibility for stormwater runoff form buildings, facilities and lands owned or operated by the Federal government... S. 3481 amends section 313 of the Clean Water Act **to clarify....**" Remarks of Cong. Eddie Bernice Johnson, Cong. Record H8979-80. (emphasis supplied)

[17] Relevant Excerpts from the Leg. Hist. of S. 3481, attached hereto as Ex. A.

[18] Memorandum Opinion for the General Counsel, EPA, from Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, re. Reimbursement or Payment Obligation of the Federal Government Under Section 313(c)(2)(B) of the Clean Water Act, Feb. 25, 2011, attached hereto as Ex. B.

[19] Id. at 10

sponsors that we look to when the meaning of the statutory words is in doubt") (among other cases), concluding that "There is no indication in the legislative record that the understanding of the stormwater amendment offered by Senator Cardin and others was not shared universally in Congress."[20] Additionally, while the OLC opinion did not address the applicability of the P.L. 111-378 to pre- enactment assessments, it also did not in any way restrict federal payment of municipal stormwater charges assessed prior to enactment of P.L. 111-378 and still outstanding, such as DeKalb County's assessments at issue in this case.

II. THE COURT SHOULD REJECT THE UNITED STATES CLAIM THAT S. 3481 DOES NOT APPLY TO ASSESSMENTS PRIOR TO JANUARY 4, 2011.

The United States claim that the court should reject DeKalb's position because the courts "disfavor" retroactive application of the law, especially involving waivers of sovereign immunity (U.S Motion at pp. 12-15), ignores the clear intent of Congress that S. 3481 was not new legislation requiring specific retroactive application, but instead was a clarification of "reasonable service charges" in Section 313(a) that have always applied to federal government facilities. The clear language of that waiver should have put the United States on notice in 1977 that it was subject to "**all state, interstate and local requirements, administrative authority and process and sections respecting the control and abatement of water pollution in the same manner and to the same extent as non governmental entity <u>including reasonable service charges</u>.**" Yet, under the United States theory, Congress was essentially required in 1977 to even go beyond that language and enumerate a myriad number of "service charges" that a local government could assess against a federal facility related to water pollution abatement. Otherwise, any

[20] Id.

subsequent Congressional action to clarify that a specific kind of service charge (such as stormwater fees) was covered by the waiver would be considered new "substantive legislation" and not a "clarification" — regardless of the original intent of Congress. Such an interpretation makes no logical sense in the face of the broad waiver language of section 313(a). Indeed, we are not aware of any decision holding that the case law criteria for determining whether a subsequent amendment is a clarification of the law or new substantive legislation may not be applied in construing waivers of sovereign immunity.[21] Congress's intent in enacting S. 3481 that "reasonable service charges" include storm water fees under the Clean Water Act's waiver of sovereign immunity could not be any clearer.

[21] Unlike Landgraf v. USI Film Products, 511 U.S. 244 (1994) and other cases cited by the United States (br. pp 12-15) this is not a case involving the retroactivity of S. 3481. Landgraf dealt with the issue of whether section 102 of the Civil Rights Act of 1991 (waiving sovereign immunity for certain types of intentional employment discrimination claims) applied to employment cases pending on appeal when the statute was enacted. The Court articulated criteria for the presumption against retroactive application of a statute noting that "antiretroactivity concerns are most pressing in cases involving a new provision affecting contractual or property rights in which predictability and stability are prime importance ..." 511 U.S. at 271. In contrast, this case does not involve a question of whether a new statute waiving sovereign immunity retroactively applies to claims that pre-dated the waiver statute. Rather, Congress has already broadly waived sovereign immunity of the United States under the Clean Water Act and S. 3481 was enacted to remove any doubt that storm water fees were "reasonable service charges" under that broad 1977 waiver of sovereign immunity.

III. A RULING THAT S. 3481 DOES NOT APPLY TO STORMWATER ASSESSMENTS PRIOR TO JANUARY 4, 2011 WOULD HAVE SERIOUS NATIONWIDE IMPACTS ON *AMICI*

Should the United States prevail in this case, such a ruling would have a serious negative, nationwide impact on *amici* and their municipal utility members. There are not only practical reasons why this Court's ruling will have nationwide impact, but also policy and equity reasons as well.

A. A Ruling In Favor of the United States Would Negatively Impact Other Municipal Stormwater Agencies Nationwide Attempting to Collect Past Due Service Charges

Amici wish to emphasize for the Court that the dispute at the heart of this case not only impacts DeKalb County, but also numerous other communities around the nation. There are many municipal stormwater agencies around the country that are attempting to collect properly assessed reasonable service charges that are past due from federal government facilities, similar to what DeKalb County is seeking to accomplish. The Court's ruling in this case will not only impact DeKalb County, but will also impact many other communities with such storm water programs.

DeKalb County is not the only Georgia municipality that could be impacted by this court's decision. Gwinnett County, Georgia is owed over $475,000 in unpaid stormwater charges from a variety of federal agencies including the Army Corps of Engineers, the National Park Service, the Centers for Disease Control, the Federal Aviation Administration and the U.S. Postal Service. There are numerous communities in other states attempting to recover past due stormwater and IAC assessments from federal facilities that will be directly impacted by the Court's ruling in this case. The example of King County, Washington is especially significant. King County strongly objected to a 2006 decision by the General Accountability Office ("GAO") finding that the County's IAC

program was impermissible tax.[22] The U.S. Forest Service, a major landholder in the County, had consistently objected to King County's IAC based on a parcel's relative percentage of impervious surface claiming that the County's IAC was an impermissible tax.[23] The Forest Service has continued to refuse payment of past municipal stormwater and surface water charges, as have a number of other federal agencies located within the county such as the U.S. Army Corps of Engineers, the Department of Interior, and the Bonneville Power Administration. To date, the federal government owes King County over one million dollars in reasonable service charges related to municipal stormwater service, the vast majority of which are fees assessed prior to January 2011. In fact, the United States is currently suing the cities of Renton and Vancouver Washington for declaratory and injunctive relief claiming that those cities storm water fee programs may not be applied to assessments prior to January 4, 2011. [24] Other noteworthy examples are the City of Richmond, Virginia which is owed nearly $158,000 by approximately 20 different federal government facilities within its service area for reasonable service charges related to municipal stormwater service assessed prior to January 2011 and the City of Seattle Washington owned nearly $400,000 in unpaid stormwater fees for 2011 from the federal government properties as well as substantially more that that for past due fees assessed prior to 2011. Municipalities in California, Kansas, and Colorado report similar problems with unpaid bills from federal government facilities for reasonable stormwater service charges. All of these communities need these unpaid amounts to help cover the

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[22] See GAO Decision B-3066 (June 5, 2006)

[23] Chapter 9.08 of the King County Code

[24] United States v. Cities of Renton and Vancouver, No 2:11-CV-01156 JLR, U.S. Dist. Ct. W.D. of Wash., *Amici* filed a brief in support of the cities in that pending case.

costs of their Clean Water Act compliance, and all of these communities will be directly impacted by the Court's decision in this case.

B. There Are Important National Policy Reasons Why The Court Should Rule in Favor of DeKalb County

Amici also wish to highlight for the Court a number of policy reasons why a ruling in favor of the United States would have an extremely negative national impact on municipal stormwater agencies.

First, such a ruling would grossly violate basic principles of fairness and equity. Many local governments have been stymied in their efforts to recover stormwater and IAC fees assessed against the federal facilities. Their inability to recover the significant costs from managing federal facility stormwater incurred prior to January 4, 2011 (or have to reimburse the federal agency for fees already paid) means that local governments will have no choice but to pass those costs on to local businesses and residents. This would be fundamentally unfair by making non-federal property owners cover the IAC charges assessed against the federal government prior to January 4, 2011 while requiring the federal government to pay fees assessed after that date, despite the fact that local governments have been "on the hook" for storm water pollution costs for years. Such a result would place a disproportionate financial burden on many financially strapped local governments at a time when municipalities are already facing unprecedented budgetary shortfalls due to the current economic climate. Additionally, such a result will lead to even higher stormwater rates for municipal ratepayers to make up for the federal government's share, including many residents in low income areas of communities, that can ill afford to pay for extra stormwater fees.

Second, such a ruling would make it very difficult for local governments to convince their citizens to implement measures to reduce or eliminate stormwater pollution if a neighboring federal facility does not have to pay for stormwater treatment costs from their properties into the very same municipal system incurred prior to January 4, 2011. EPA has recognized that compliance with stormwater mandates requires the "buy in" by local residents, businesses and non profits. For example, implementation plans being developed to comply with new water quality requirements in places like the Puget Sound, the Chesapeake Bay, the Mississippi River basin, and other areas throughout the country will likely require certain stormwater best management practices (such as green roofs, bioretention and harvest/reuse systems) to attenuate stormwater flows. Non-federal property owners may very well balk at implementing and paying for such measures if their federal neighbors do not have a similar obligation to pay for past stormwater and IAC costs.

Third, such a ruling would complicate the ongoing efforts of local governments to plan for and meet CWA mandates, particularly those related to stormwater management and reducing the water quality impacts of wet weather flows. Many communities around the country have started using IACs to help defray the huge costs of paying for massive sewer system and stormwater system infrastructure projects to reduce sewer overflows and stormwater pollution in the nation's waters. If the Court rules in favor of the United States, many such ongoing projects that predate January 4, 2011 will not be able to recoup such costs from federal facilities incurred prior to that date, but could fully assess those facilities for costs incurred after that date even though the IAC scheme had not changed. Such a situation would undoubtedly impact the budget process for ongoing projects that have been

underway for years. Local governments may have to seek additional appropriations from local legislatures to make up the difference – a very difficult task in today's difficult economic climate – or place additional financial burdens on their customers through higher rates. This is a particularly important concern right now, as EPA is currently in a rulemaking process to rewrite and strengthen its national stormwater regulations – a process that will likely lead to even higher costs for municipal stormwater management.

Finally, such a ruling could lead to unnecessary and piecemeal litigation. Many local governments seeking to recoup past invoices from federal agencies would be forced to litigate over whether individual IAC programs met the test as a "fee for service" and not an impermissible tax instead of relying on the clear standard laid out in S. 3481, as well as litigate to recoup past due fees from federal facilities. Such litigation would further increase the burden on financially strapped local governments and could result in piecemeal and conflicting interpretations of the law – contrary to the clear intent of Congress in enacting S. 3481.

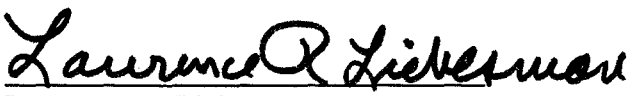
CONCLUSION

Amici the National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA) and the American Public Works Association (APWA), representing municipal governments and many city and county public works organizations around the nation, strongly urge this court to reject the United States' claim that S. 3481 should not be applied to IACs and other municipal stormwater charges assessed prior to January 4, 2011. The legislative history of S. 3481 demonstrates that Congress intended to clarify that Section 313 was always intended to cover such charges. A ruling in favor of the United States interpretation would

have serious national consequences. It would undermine the fundamental principle that all contributors including federal faculties must pay their fair share of the huge costs of treating stormwater pollution.

Date: May 7, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date provided below, the foregoing *amicus* brief of the National Association of Clean Water Agencies, the National Association of Flood and Storm Water Management Agencies and the American Public Works Association in Support of Plaintiff's Motion for Partial Summary Judgment and Exhibits, was mailed, postage pre-paid to the following individual(s):

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EXHIBIT A

CONTINUING RESOLUTION

Mr REED Mr President, I want to make a few observations about the continuing resolution and the appropriations process this year

First, I want to commend Chairman INOUYE for his leadership and efforts to accommodate the views and input of all senators in crafting the omnibus appropriations bill He went a long way to meet the demands of the minority leader and other senators to include a $29 billion cut from the budget level requested by the President Indeed, I was deeply disappointed that the proposed omnibus would have eliminated the Leveraging Educational Assistance Program, LEAP For more than a decade, I worked with states, educators, and others to reauthorize and fund this program, which uses Federal resources to leverage additional state aid to help low income students attend college As much as I was dissatisfied by this outcome, I was prepared to vote for this bill because it is far superior to the inefficiencies and consequences of a continuing resolution I am disappointed that such a significant compromise was blocked by the other side of the aisle

Instead, we are being forced to adopt a short-term continuing resolution, CR, through March 4, 2011 With few exceptions, the CR provides no direction from Congress on how funds can be used, while at the same time failing to make critical adjustments and investments for certain programs and agencies Critics of the omnibus appropriations bill should understand that unlike the thoughtful, lengthy, and open appropriations process that produced the omnibus, this CR was put together quickly without the input of most senators As a result, it is hardly a thoughtful instrument for funding the government

I am particularly concerned about the impact the CR will have on the capabilities of the Securities and Exchange Commission to provide robust oversight of financial markets

Fair and orderly markets are critical to restoring confidence in the American economy Despite considerable increases in the number of firms it is required to oversee and tremendous growth in the size and complexity of the securities markets and products it regulates, the SEC's workforce and technology investments are only now returning to the levels of five years ago

Under the CR, the SEC will be funded at the fiscal year 2010 rate, which is nearly $200 million less than what was included during bipartisan negotiations on the omnibus Without the omnibus's funding level, the SEC will have to halt several technology projects and forgo replacement of departing staff Shortchanging the SEC will also make it extraordinarily difficult to fulfill new statutory requirements under the Dodd Frank Wall Street Reform and Consumer Protection Act The SEC has been tasked with helping establish an effective regulatory system for the previously unseen and largely unregulated over-the-counter derivatives market and the hedge fund markets It has new responsibilities over credit rating agencies, including annual exams

We should not make the past mistake of underfunding the SEC This agency is critical to restoring the confidence of retirees and investors in the United States capital markets, so that they will again invest in American companies, helping inject new life into our economy We should not be penny-wise and pound-foolish Continuing to starve the SEC of the funds it needs to police markets will ultimately make it more likely to see a major fraud Any incremental savings will be cold comfort for the losses incurred by taxpayers and investors

Likewise, I believe we need to fully fund the Commodity Futures Trading Commission At a hearing that Senator LEVIN and I held on December 8, 2010, Chairman Gensler informed us that his agency is going to be woefully short of resources The continuing resolution for the CFTC will leave them about $116 million short of the funding level included in the omnibus

I hope that we will have chance to address these critical shortfalls in the next funding vehicle to come before the Senate

While it is true that overall the 36-page CR did not provide sufficient direction and oversight, it is important to acknowledge that the CR does make a few adjustments—some that are essential and others which I believe deserved greater consideration

I want to applaud the addition of language in the CR that requires the Department of Health and Human Services to obligate the same amount of funding for the Low Income Home Energy Assistance Program as it did during the same period last year This will make a total of $3 95 billion available to low-income families and individuals during the cold winter months I hope that in the final appropriations bill we will meet the bipartisan request of 44 Senators to fully fund this program at the $5 1 billion level for the entirety of fiscal year 2011

I am also pleased that the CR addresses funding for the Pell grant According to recent estimates from the Office of Management and Budget, students would have faced a reduction of as much as $1,840 from the maximum grant The CR will address the shortfall and ensure that we can maintain the Pell grant maximum at $5,550 Despite the economic hardships families are facing, they continue to prioritize education They know that it is the foundation for our economic recovery and future prosperity We must keep our end of the bargain by maintaining our commitment to the Pell grant

I am, however, concerned that the CR includes a provision to codify a misguided Bush era regulation that undermines our central goal of ensuring that students in high poverty schools are taught by highly qualified teachers and that parents know the qualifications of their children's teachers Under the No Child Left Behind Act, enacted in 2002, a highly qualified teacher must have obtained full state certification, which may include certification obtained through alternative routes The Bush administration published regulations allowing that a teacher who is merely enrolled in or making progress toward state certification to be deemed highly qualified Parents in California have challenged the regulation in the courts and have won a favorable decision on appeal Quite simply, they want to know whether their children's teachers are fully certified or just in the process of becoming certified This provision prevents them from knowing that

I am also deeply disappointed that this CR does not contain important language that would have allowed the Department of Defense to reprogram funds for new starts, increases in production, or other realignments This provision would have given the Department further flexibility to ensure critical defense programs stay on schedule and on cost This is especially important for the Navy's ship construction programs—programs that the Navy supports, were authorized by the Defense Authorization Act, and employ thousands of Rhode Islanders

Without this provision, the Navy, and all of the services, will be further limited and constrained to execute programs within the funding levels set last year

I have described some of the pitfalls with this CR It is a crude instrument that has many shortcomings Regrettably, the decision by our colleagues on the other side of the aisle to walk away from the omnibus placed the continued operation of government agencies from the Pentagon to the FBI to the FDA to the Treasury at risk Adopting the CR, notwithstanding its significant flaws is the only responsible option available In the coming months, it is my hope that we can craft a full year funding measure that corrects the serious issues the CR has created and failed to address

STORMWATER POLLUTION

Mr CARDIN Mr President, today the Congress stands ready to approve S 3481, 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

Annually hundreds of thousands of pounds of pollutants wash off the hardened surfaces in urban areas and into local rivers and streams, threatening the health of our citizens and causing significant environmental degradation

A one-acre parking lot produces about 16 times the volume of runoff that comes from a one-acre meadow These pollutants include heavy metals, nitrogen and phosphorous, oil and grease, pesticides, bacteria (including deadly e coli), sediment, toxic chemicals, and debris Indeed, stormwater runoff is the largest source sector for many impervious bodies of water across the country According to the Environmental Protection Agency, stormwater pollution affects all types of water bodies including in order of severity, ocean shoreline, estuaries such as the Chesapeake Bay, Great Lakes shorelines, lakes and rivers Degraded aquatic habitats are found everywhere that stormwater enters local waterways

We added a provision to the bill in order to rectify a specific problem in the District of Columbia, where the Department of Treasury has been paying some stormwater fees The provision simply says that agencies and departments should use their annual appropriated funds to pay for stormwater fees This is exactly what they all do today in paying for their drinking water and wastewater bills or any other utility bill, for that matter This new language requires that Congress make available, in appropriations acts, the funds that could be used for this purpose It does not mean that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges The legislative language doesn't say that, and I want to be perfectly clear that such a restrictive reading is not our intent

I believe that this administration recognizes its responsibility to manage the stormwater pollution that comes off Federal properties But that responsibility needs to translate into payments to the local governments that are forced to deal with this pollution Adopting this legislation today removes all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees

This is a matter of basic equity

ACCOMPLISHMENTS OF THE 111TH CONGRESS

Mrs BOXER Mr President, as we end this year, I wanted to look back at what we have been able to accomplish—and look ahead at some of the important priorities we must tackle next year

The 111th Congress has been one of the most productive in our Nation's history

Congressional scholar Norman Ornstein has said the legislative achievements of this session are "at least on par with the 89th Congress" of 1965–1966, under President Johnson, which produced landmark civil rights legislation as well as Medicaid and Medicare

We should take a moment to reflect on some of those accomplishments

After years of unsupervised gambling on Wall Street fueled an unsustainable housing bubble, we inherited the worst economic crisis since the Great Depression We helped bring our economy back from the brink by taking bold action

We passed the Economic Recovery Act, which has created or saved more than 350,000 jobs in my home State of California alone

We approved the bipartisan HIRE Act—a jobs package that cut taxes for companies that hire unemployed workers and extended the highway trust fund As chairman of the Senate Environment and Public Works Committee, I was pleased to help advance this critical measure to protect more than 1 million jobs nationwide building our roads, bridges and transit systems

We helped small businesses—which are the true engines of our economic growth—by passing the Small Business Jobs and Credit Act I was proud to join with Senator JEFF MERKLEY to create the new $30 billion small business lending fund, which will help community banks give small businesses the credit they need to create hundreds of thousands of new jobs

We approved legislation to help save up to 16,500 teacher jobs in California—and nearly 160,000 teachers' jobs nationwide—and paid for it by closing tax loopholes for companies that ship jobs overseas

We worked across the aisle to give much-needed tax relief to millions of middle-class families and extend unemployment insurance for 2 million out-of-work Americans and 400,000 Californians who would otherwise have lost their benefits this month And I was proud to work with Senator FEINSTEIN and others to make sure this tax relief package invests in clean energy which will create tens of thousands of jobs in California and across the country

And to ensure that we never again face a similar financial crisis, we passed landmark legislation to crack down on the reckless gambling on Wall Street, enacting tough reforms that will curb abuses, shine a light on dark markets and put a new cop on the beat to protect consumers I was proud to offer the first amendment, which will ensure that taxpayers are never again on the hook to bail out Wall Street

The 111th Congress was a landmark Congress for advancing civil rights for all Americans

We approved the Lilly Ledbetter Fair Pay Act, to help ensure equal pay for equal work—regardless of age, race, gender, religion or national origin It was the first bill signed into law by President Obama last year

We passed the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act to strengthen the ability of law enforcement to investigate and prosecute hate crimes The law adds gender, sexual orientation, disability and gender identity as protected categories under Federal hate crimes law

Last week, in a historic step, we repealed the discriminatory don't ask, don't tell policy that has banned gays and lesbians from serving openly in the U S military Back in 1993, I offered an amendment on the Senate floor to keep this unjust policy from being codified into law Now, 17 years later, I am so proud to witness this incredible victory for civil rights, equality and a stronger nation

I was also proud to join in confirming two new Supreme Court Justices—Sonia Sotomayor, the first Latina to serve on the high court, and Elena Kagan When Kagan was sworn in this fall, it marked the first time our country has had three women serving together on the Supreme Court

We also confirmed some highly qualified and historic judicial nominees from California this Congress—including Judge Lucy Koh for the Northern District of California, Judge Jacqueline Nguyen for the Central District of California, Judge Dolly Gee for the Central District of California, and Judge Kimberly Mueller for the Eastern District of California

The 111th Congress also took momentous steps forward in protecting consumers, children and all our families

We passed a landmark health care reform bill that will extend coverage to 7 million uninsured Californians, help seniors pay for prescription drugs, provide tax credits to help small business owners afford coverage, and ensure that insurance companies can no longer deny coverage because of preexisting conditions

We approved legislation to allow the Food and Drug Administration to regulate tobacco and crack down on cigarette marketing and sales to kids

We approved major reforms to the student loan system—ending subsidies to big banks, saving taxpayers money and providing Pell grants to 63,000 more students in California over the next decade

We passed credit card reform legislation to protect consumers from excessive fees and deceptive practices

And this month, we enacted a food safety bill that will help consumers and California's agriculture industry by protecting our Nation's food supply from outbreaks of foodborne illnesses

I am also pleased that the Airline Passenger Bill of Rights that I have championed with Senator OLYMPIA SNOWE is now being implemented by the Department of Transportation As a result, we are already seeing fewer long tarmac delays for airline passengers

The 111th Congress has also taken great strides to protect public health and our environment

We passed legislation protecting more than 2 million acres of wilderness and creating a national system to conserve land held by the Bureau of Land Management The legislation included three bills I sponsored designating 700 000 additional acres of wilderness in California, from the Eastern Sierra Nevada to the San Jacinto Mountains in Riverside County

authorize the tax court to appoint employees

The SPEAKER pro tempore Is there objection to the request of the gentleman from Washington?

There was no objection

A motion to reconsider was laid on the table

MAKING A TECHNICAL CORRECTION TO IMPLEMENT THE VETERANS EMPLOYMENT OPPORTUNITIES ACT

Mrs DAVIS of California Madam Speaker, I ask unanimous consent that the Committee on House Administration be discharged from further consideration of the resolution (H Res 1783) making a technical correction to a cross-reference in the final regulations issued by the Office of Compliance to implement the Veterans Employment Opportunities Act of 1998 that apply to the House of Representatives and employees of the House of Representatives, and ask for its immediate consideration in the House

The Clerk read the title of the resolution

The SPEAKER pro tempore Is there objection to the request of the gentlewoman from California?

There was no objection

The text of the resolution is as follows

H RES 1783

Resolved That section 3(b) of House Resolution 1757, agreed to December 15, 2010, is amended by striking paragraph (1) and redesignating paragraphs (2) through (5) as paragraphs (1) through (4)

The resolution was agreed to

A motion to reconsider was laid on the table

CLARIFYING FEDERAL RESPONSIBILITY TO PAY FOR STORMWATER POLLUTION

Mr PERRIELLO Madam Speaker, I ask unanimous consent to take from the Speaker's table the bill (S 3481) to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution, and ask for its immediate consideration in the House

The Clerk read the title of the bill

The SPEAKER pro tempore Is there objection to the request of the gentleman from Virginia?

There was no objection

The text of the bill is as follows

S 3481

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

SECTION 1. FEDERAL RESPONSIBILITY TO PAY FOR STORMWATER PROGRAMS.

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

"(c) REASONABLE SERVICE CHARGES —

"(1) IN GENERAL —For the purposes of this Act, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is—

"(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

"(2) LIMITATION ON ACCOUNTS —

"(A) LIMITATION —The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury

"(B) REIMBURSEMENT OR PAYMENT OBLIGATION OF FEDERAL GOVERNMENT —Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government, as described in subsection (a), shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment "

Mr OBERSTAR Madam Speaker, I rise in strong support of S 3481, a bill to amend the Clean Water Act to clarify Federal responsibility for stormwater pollution

I applaud the outstanding work of the sponsors of this legislation, the distinguished Senator from the State of Maryland (Mr CARDIN), as well as the sponsor of the House companion bill (H R 5724), the Delegate from the District of Columbia (Ms NORTON), for their efforts to move this important legislation for the protection of our Nation s waters

Simply put, this legislation clarifies that Federal agencies and departments are financially responsible for any reasonable Federal, state, or locally derived charges for treating or otherwise addressing stormwater pollution that emanates from Federal property

Madam Speaker, over the past 4 years, the Committee on Transportation and Infrastructure has examined the progress made over the past few decades in improving the overall quality of the Nation's waters, as well as the challenges that remain to achieving the goals of "fishable and swimmable waters' called for in the enactment of the 1972 Clean Water Act

Although significant progress has been made in the past four decades, approximately 40 percent of the Nation's assessed rivers, lakes, and coastal waters still do not meet water quality standards States, territories, Tribes, and other jurisdictions report that poor water quality continues to affect aquatic life, fish consumption, swimming, and sources of drinking water in all types of waterbodies

In a recent report on the National Water Quality Inventory, States, territories Tribes, and interstate commissions report that they monitor only 33 percent of the Nation's waters Of those, about 44 percent of streams, 64 percent of lakes, and 30 percent of estuaries were not clean enough to support their designated uses (e g , fishing and swimming)

While these numbers highlight the remaining need to improve the quality of the Nation s waters, they also demonstrate how this country's record on improving water quality is slipping—demonstrating a slight, but significant reversal of efforts to clean up the Nation's waters over the past 30 years

For example, in the 1996 National Water Quality Inventory report, States reported that of the 3 6 million miles of rivers and streams that were assessed, 64 percent were either fully supporting all designated uses or were threatened for one or more of those uses In the 1998 report, this number improved to 65 percent of assessed rivers and streams However in the 2000 National Water Quality Inventory report, this number slipped to only 61 percent of assessed rivers and streams either meeting water quality standards or being threatened for one or more of the waterbodies' designated uses and in the 2004 Inventory this number slipped again, to 53 percent of rivers and streams fully supporting their designated uses—a significant reversal in the trend toward meeting the goals of the Clean Water Act

According to information from the Environmental Protection Agency, stormwater remains a leading cause of water quality impairment For example, in the 2004 Water Quality Inventory, discharges of urban stormwater are the leading source of impairment to 22,559 miles (or 9 2 percent) of all impaired rivers and streams, 701,024 acres (or 6 7 percent) of all impaired lakes, and 867 square miles (or 11 3 percent) of all impaired estuaries

The continuing negative environmental impacts of stormwater are echoed in a National Academy of Sciences 2009 report that expressed concern about the 'unprecedented pace" of urbanization in the United States According to this report, "the creation of impervious surfaces that accompanies urbanization profoundly affects how water moves both above and below ground during and following storm events, the quality of stormwater, and the ultimate condition of nearby rivers lakes and estuaries '

Madam Speaker, this National Academy of Sciences report made several findings on national efforts to understand and manage urban stormwater A key finding was a lack of available resources to implement and enforce Federal and state stormwater control programs According to the report, "State and local governments do not have adequate financial support to the stormwater program in a rigorous way " While the report recommended that the Federal Government provide more financial support to state and local efforts to regulate stormwater, such as through increased funding of existing Clean Water Act authorities, the report also highlights the importance of Federal agencies contributing to the costs of environmental and water quality protections, including the costs of addressing sources of pollution originating or emanating from Federal facilities

This finding echoes concerns raised by numerous state and local governmental officials over how some Federal agencies have seemingly rejected local efforts to assess service fees to curb stormwater pollution originating or emanating from Federal facilities

Several states and municipalities, including the District of Columbia, have taken aggressive action to address ongoing sources of stormwater pollution Yet, when a significant percentage of Federal property owners take the position that they cannot be held responsible for their pollution, it places a greater financial burden on our states, cities, communities, and local ratepayers and makes it less

likely that significant reductions in stormwater pollution can be achieved

For example, in April 2010, the Regional Commissioner of the U S General Services Administration GSA, rejected efforts by the District of Columbia Water and Sewer Authority, DCWASA, to collect an assessment under its Impervious Surface Area Billing Program for impervious surfaces under the control of GSA According to DCWASA, this charge is a "fair way to distribute the cost of maintaining storm sewers and protecting area waterways because it is based on a property s contribution of rainwater to the District's sewer system "

S 3481 amends section 313 of the Clean Water Act to clarify that "reasonable service charges ' for addressing pollution from Federal facilities includes reasonable nondiscriminatory fees, charges, or assessments that are based on the proportion of stormwater emanating from the facility and used to pay (or reimburse) costs associated with any stormwater management program

This is a simple effort to clarify, again, that the Federal Government bears a proportional responsibility for addressing pollution originating from its facilities, and should remain an active participant in improving the nation's water quality and the overall environment

The intent of subsection (c)(2)(A) of Section 313 of the Clean Water Act, as added by S 3481, is to ensure that there is no increase in mandatory spending pursuant to the U S Treasury's permanent authority to pay, without further appropriation, the water and sewer service charges imposed by the government of the District of Columbia The reference in such section to "any permanent authorization account in the Treasury" refers to any account for which a permanent appropriation exists, such as the U S Treasury account entitled "Federal Payment for Water and Sewer Services', and does not imply that GSA's Federal Buildings Fund may not be used to make such payments

In addition, the intent of subsection (c)(2)(B) of Section 313 of the Clean Water Act, as added by S 3481, is to require that Congress make available, in appropriations acts, the funds that could be used to pay stormwater fees, but not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges

Nothing in S 3481 affects the payment by the United States or any department, independent establishment, or agency thereof of any sanitary sewer services furnished by the sanitary sewage works of the District of Columbia through any connection thereto for direct use by the government of the United States or any department, independent establishment, or agency thereof The rules for those payments are set forth in law, codified at section 34–2112 of the D C Code, and nothing in this bill amends or otherwise affects those rules

Madam Speaker, this legislation has the strong support of several organizations representing state and local elected officials, including the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U S Conference of Mayors, and the International City/County Management Association It also has been endorsed by the National Association of Clean Water Agencies, NACWA

I urge my colleagues to join me in supporting S 3481

Ms NORTON Madam Speaker, I rise today in strong support of S 3481 to amend the Federal Water Pollution Control Act, which clarifies that the Federal Government like private citizens and businesses, must take responsibility for the pollution it produces This bill is the Senate companion to my bill, H R 5724, cosponsored by my good friends from Virginia and Arizona, Representative JIM MORAN and Representative GABRIELLE GIFFORDS The bill passed the Senate with strong bipartisan support because the Senate understood that this is simply an issue of fairness and equity to users and a matter of managing pollution and protecting the environment In fact, this bill simply clarifies current law, that the Federal Government has a responsibility to pay its normal and customary fees assessed by local governments for managing polluted stormwater runoff from Federal properties, just as private citizens pay The consequence of failing to pass this bill is that we give the Federal Government a free ride and pass its fees on to our constituents throughout the United States

Section 313 of the Federal Water Pollution Control Act states, "Each department, agency, or instrumentality of the Federal Government shall be subject to, and comply with all Federal, State, interstate, and local requirements in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges " However, the Government Accountability Office issued letters to Federal agencies in the District of Columbia instructing them not to pay the District of Columbia s Water and Sewer Authority's, D C Water s Impervious Area Charge D C Water calculates the charges to manage stormwater runoff based on the amount of impervious land occupied by the landowner Impervious surfaces, such as roofs, parking lots, sidewalks and other hardened surfaces are the major contributors to stormwater runoff entering the sewer system and local rivers, lakes and streams, causing significant amounts of pollutants to enter these waters This bill clarifies that in my district and all other congressional districts, Federal agencies must continue to pay their utility fees instead of passing the fees to our constituents

Nothing in this Act was intended to affect the payment by the United States or any department, independent establishment or agency thereof of any sanitary sewer services furnished by the sanitary sewage works of the District through any connection thereto for direct use by the government of the United States or any department, independent establishment, or agency thereof The rules for those payments are set forth in law codified at section 34–2112 of the D C Code and nothing in this Act amends or otherwise affects those rules This bill requires that Congress make available, in appropriations acts, the funds that could be used to pay for stormwater management charges, but not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges

This bill is supported by The National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U S Conference of Mayors, the International City/County Management Associations, as well as the National Association of Clean Water Agencies All of these national groups understand that stormwater management fees, without any exceptions, are necessary for managing and reducing water pollution caused by stormwater runoff Moreover they understand that many agencies in states and localities may stop paying their water and stormwater management fees if we do not act, putting even more financial burden on residents

Federal law has mandated that these local governments must collect these fees No exemption has been granted to Federal facilities Please support S 3481 to clarify the original intent of the law

I urge my colleagues to support this bill

Ms EDDIE BERNICE JOHNSON of Texas Madam Speaker, I rise in strong support of S 3481, a bill that would clarify Federal responsibility for stormwater runoff from buildings, facilities, and lands owned or operated by the Federal government This commonsense bill ensures that the Federal Government maintains its equitable responsibility for stormwater pollution runoff originating or emanating from its property

I applaud the outstanding work of the sponsors of this legislation the distinguished Senator from the State of Maryland (Mr CARDIN) as well as the sponsor of the House companion for this bill, the Delegate from the District of Columbia (Ms NORTON), for their efforts to move this legislation so quickly to the President's desk

Madam Speaker, simply put, this legislation clarifies that Federal agencies and departments are financially responsible for any reasonable Federal, State, or locally derived charges for treating or otherwise addressing stormwater pollution that emanates from Federal property

Existing section 313 of the Clean Water Act states that "Each department agency, or instrumentality of the Federal Government shall be subject to, and comply with, all Federal, State, interstate, and local requirements including the payment of reasonable service charges '

Unfortunately, over the past few months, Congress has learned of several Federal agencies, including some here in the Nation's Capital, that have made the determination that stormwater management fees are "taxes" for which the agencies have claimed sovereign immunity and have refused to pay

This has left several State and local municipalities with the financial responsibility of addressing ongoing sources of pollution to the Nation's waters that any other private business, landowner, or homeowner would otherwise be responsible for paying

Polluted runoff from urban areas is the fastest growing source of water pollution in America As urbanization increases, impervious surfaces such as highways, roads, parking lots and buildings replace non-impervious surfaces that absorb stormwater

Runoff from impervious surfaces is a central cause of pollution for the Nation's waters, and is estimated to be the primary source of impairment for 13 percent of rivers, 18 percent of lakes, and 32 percent of estuaries in the United States These are significant figures especially given that urban areas cover only 3 percent of the land mass of the country

Even here, in the Nation s Capital, pollution from stormwater runoff poses a significant

challenge to the quality of local receiving waters, and negatively impacts the overall environmental health of the Chesapeake Bay

According to the Environmental Protection Agency, stormwater runoff from urban and suburban areas is "a significant source of impairment to the Chesapeake Bay ' According to Agency statistics, 17 percent of phosphorus, 11 percent of nitrogen, and 9 percent of sediment loads to the Bay come from stormwater runoff

In addition, chemical contaminants from runoff can rival or exceed the amount reaching local waterways from industries, Federal facilities, and wastewater treatment plants

Several states and municipalities including the District of Columbia, have taken aggressive action to address these ongoing sources of pollution Yet, when a significant percentage of property owners take the position that they cannot be held responsible for their pollution, it places a greater financial burden on our States, cities, communities, and local-ratepayers, and makes it less likely that significant reductions in stormwater pollution can be achieved

S 3481 amends section 313 of the Clean Water Act to clarify that "reasonable service charges" for addressing pollution from Federal facilities includes reasonable nondiscriminatory fees, charges, or assessments that are based on the proportion of stormwater emanating from the facility and used to pay (or reimburse) costs associated with any stormwater management program

Madam Speaker, in the amendment to section 313 of the Clean Water Act, a provision was included to rectify a specific problem in the District of Columbia, where the U S Department of the Treasury has been paying some stormwater fees The provision simply says that agencies and departments should use their annual appropriated funds to pay for stormwater fees This is exactly what they all do today in paying for their drinking water and wastewater bills or any other utility bill This new language requires that Congress make available, in appropriations acts, the funds that could be used for this purpose It should not be interpreted as requiring appropriations act to state specifically or expressly that the funds could be used to pay these charges The statutory language does not require this, and such a restrictive reading is not intended

Madam Speaker, this legislation is a simple effort to clarify, again, that the Federal Government bears a proportional responsibility for addressing pollution originating from its facilities, and should remain an active participant in improving National water quality and the overall environment

I urge passage of this bill

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table

HELPING HEROES KEEP THEIR HOMES ACT OF 2010

Mr PERRIELLO Madam Speaker, I ask unanimous consent to take from the Speaker's table the bill (S 4058) to extend certain expiring provisions providing enhanced protections for servicemembers relating to mortgages and mortgage foreclosure, and ask for its immediate consideration in the House

The Clerk read the title of the bill

The SPEAKER pro tempore Is there objection to the request of the gentleman from Virginia?

There was no objection

The text of the bill is as follows

S 4058

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Helping Heroes Keep Their Homes Act of 2010

SEC. 2. EXTENSION OF ENHANCED PROTECTIONS FOR SERVICEMEMBERS RELATING TO MORTGAGES AND MORTGAGE FORECLOSURE UNDER SERVICEMEMBERS CIVIL RELIEF ACT.

Paragraph (2) of section 2203(c) of the Housing and Economic Recovery Act of 2008 (Public Law 110-289) is amended--

(1) by striking "December 31 2010 ' and inserting "December 31, 2012", and

(2) by striking ' January 1, 2011" and inserting " January 1 2013"

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table

LEASE AUTHORIZATION FOR OHKAY OWINGEH PUEBLO

Mr LUJÁN Madam Speaker, I ask unanimous consent to take from the Speaker's table the bill (S 3903) to authorize leases of up to 99 years for lands held in trust for Ohkay Owingeh Pueblo, and ask for its immediate consideration in the House

The Clerk read the title of the bill

The SPEAKER pro tempore Is there objection to the request of the gentleman from New Mexico?

There was no objection

The text of the bill is as follows

S 3903

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

SECTION 1. OHKAY OWINGEH PUEBLO LEASING AUTHORITY.

Subsection (a) of the first section of the Act of August 9, 1955 (25 U S C 415(a)), is amended in the second sentence by inserting "and lands held in trust for Ohkay Owingeh Pueblo" after "of land on the Devils Lake Sioux Reservation,"

Mr LUJÁN Madam Speaker today I rise to ask my colleagues to support an important measure that will allow the Pueblo of Ohkay Owingeh, in Northern New Mexico, to expand economic opportunities for their tribal members

Ohkay Owingeh is a small tribal community (Pueblo) in the northern part of my district and is part of the cultural fabric of Northern New Mexico Since before Spanish rule, and American Manifest Destiny the small pueblo of Ohkay Owingeh used it's surrounding lands to provide for its people

As history moved to present day the Federal government and tribal communities entered into trust treaties to provide for the well being of Indian people across our nation As part of the federal government's trust obligation to tribal communities, putting lands into trust for use by tribal people is something that is fundamental to the government-to-government relationship between the United States and individual tribal communities

In the modern age many tribes develop part of their trust lands to create economic opportunities for their people In many cases their ventures are successful and the tribe can use their trust lands as they see fit, but in other cases like that of Ohkay Owingeh the cumbersome nature of obtaining approval to lease their lands for economic activity can prevent very beneficial business ventures from ever taking place and, thus hindering the tribes ability to provide for its own people

The importance of allowing tribal governments to enter into long term leases is paramount to giving them the ability to create better opportunities for their tribal members, their children and future generations Many tribes have vast lands that can benefit the tribe and surrounding areas economically, but because of the process of getting secretarial approval to lease their own lands can be detrimental for the tribe

I am asking my colleagues to support this no cost measure that will allow the tribe of Ohkay Owingeh to enter into long term leases to expand economic opportunities for the tribe and to lift the cumbersome requirement of Secretarial Approval for use of their own lands

Many of my colleagues on both sides of the aisle have supported such measures for other tribes around the country in this congress and in congresses past, and this kind bipartisan support is crucial to providing opportunities for the small Pueblo of Ohkay Owingeh

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table

GENERAL LEAVE

Mr LUJÁN Madam Speaker I ask unanimous consent that all Members may revise and extend their remarks on the measures considered by unanimous consent today

The SPEAKER pro tempore Is there objection to the request of the gentleman from New Mexico?

There was no objection

APPOINTING A COMMITTEE TO INFORM THE PRESIDENT

Mr MCDERMOTT Madam Speaker, I send to the desk a privileged resolution and ask for its immediate consideration

The Clerk read the resolution, as follows

H RES 1784

Resolved That a committee of two Members of the House be appointed to wait upon the President of the United States and inform him that the House of Representatives has completed its business of the session and is ready to adjourn unless the President has some other communication to make to them

The resolution was agreed to

A motion to reconsider was laid on the table

□ 1750

APPOINTMENT OF COMMITTEE TO NOTIFY THE PRESIDENT

The SPEAKER pro tempore Pursuant to House Resolution 1784 the Chair

classified, no reasonable person with original classification authority under Executive Order 13292 (68 Fed Reg 15315), or any successor order could have identified or described any damage to national security that reasonably could be expected to be caused by the unauthorized disclosure of the information

"(f) EXTRATERRITORIAL JURISDICTION — There is jurisdiction over an offense under this section if—

"(1) the offense occurs in whole or in part within the United States,

"(2) regardless of where the offense is committed, the alleged offender is—

"(A) a national of the United States (as defined in section 101(a) of the Immigration and Nationality Act (8 U S C 1101(a))),

"(B) an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a) of the Immigration and Nationality Act (8 U S C 1101(a))), or

"(C) a stateless person whose habitual residence is in the United States,

'(3) after the offense occurs, the offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States, or

"(4) an offender aids or abets or conspires with any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (b)(1) "

(b) TECHNICAL AND CONFORMING AMENDMENT —The table of sections for chapter 93 of title 18, United States Code, is amended by adding at the end the following

"1925 Violation of classified information nondisclosure agreement "

SEC. 5. DIRECTIVE TO SENTENCING COMMISSION.

(a) IN GENERAL —Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission, shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to a person convicted of an offense under section 1925 of title 18, United States Code, as added by this Act

(b) CONSIDERATIONS —In carrying out this section, the Sentencing Commission shall ensure that the sentencing guidelines account for all relevant conduct, including—

(1) multiple instances of unauthorized disclosure delivery, communication, or transmission of the classified information

(2) the volume of the classified information that was disclosed, delivered, communicated, or transmitted,

(3) the classification level of the classified information

(4) the harm to the national security of the United States that reasonably could be expected to be caused by the disclosure, delivery, communication, or transmission of the classified information, and

(5) the nature and manner in which the classified information was disclosed, delivered, communicated, or transmitted

AMENDMENTS SUBMITTED AND PROPOSED

SA 4917 Mr HARKIN (for Mr CARDIN (for himself Mr VOINOVICH, Ms CANTWELL Mrs MURRAY, and Mr INHOFE)) proposed an amendment to the bill S 3481, to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution

SA 4918 Mr CORNYN (for himself and Mr RISCH) submitted an amendment intended to be proposed to amendment SA 4904 submitted by Mr CORKER to the resolution of ratification for Treaty Doc 111-5, Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on April 8, 2010, with Protocol, which was ordered to lie on the table

SA 4919 Mr CONRAD (for himself, Mr BAUCUS, and Mr TESTER) submitted an amendment intended to be proposed to amendment SA 4884 submitted by Mr BARRASSO (for himself and Mr ENZI) and intended to be proposed to the resolution of ratification for Treaty Doc 111-5, supra, which was ordered to lie on the table

SA 4920 Mr THUNE (for himself and Mr KYL) submitted an amendment intended to be proposed by him to the resolution of ratification for Treaty Doc 111 5, supra, which was ordered to lie on the table

TEXT OF AMENDMENTS

SA 4917. Mr HARKIN (for Mr CARDIN (for himself, Mr VOINOVICH, Ms CANTWELL, Mrs MURRAY, and Mr INHOFE)) proposed an amendment to the bill S 3481, to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution, as follows

Strike all after the enacting clause and insert the following

SECTION 1. FEDERAL RESPONSIBILITY TO PAY FOR STORMWATER PROGRAMS.

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

"(c) REASONABLE SERVICE CHARGES —

'(1) IN GENERAL —For the purposes of this Act reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is—

"(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

"(2) LIMITATION ON ACCOUNTS —

"(A) LIMITATION —The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury

"(B) REIMBURSEMENT OR PAYMENT OBLIGATION OF FEDERAL GOVERNMENT —Each department, agency, or instrumentality of the executive legislative, and judicial branches of the Federal Government, as described in subsection (a), shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment '

SA 4918. Mr CORNYN (for himself and Mr RISCH) submitted an amendment intended to be proposed to amendment SA 4904 submitted by Mr CORKER to the resolution of ratification for Treaty Doc 111-5, Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on April 8, 2010, with Protocol, which was ordered to lie on the table, as follows

On page ___ of the amendment, between lines ___ and ___, insert the following

(___) PRESIDENTIAL CERTIFICATION REJECTING INTERRELATIONSHIP BETWEEN STRATEGIC OFFENSIVE AND STRATEGIC DEFENSIVE ARMS — The New START Treaty shall not enter into force until the President certifies to the Senate and notifies the President of the Russian Federation in writing that the President rejects the following recognition stated in the preamble to the New START Treaty "Recognizing the existence of the interrelationship between strategic offensive arms and strategic defensive arms, that this interrelationship will become more important as strategic nuclear arms are reduced, and that current strategic defensive arms do not undermine the viability and effectiveness of the strategic offensive arms of the Parties"

(___) PRESIDENTIAL CERTIFICATION REGARDING ADDITIONAL GROUND BASED INTERCEPTORS —The New START Treaty shall not enter into force until the President certifies to the Senate and notifies the President of the Russian Federation in writing that the President intends to continue to improve and modernize the United States ground based midcourse defense system, including—

(A) two stage interceptors that could be deployed in Europe if the Iranian ICBM threat emerges before Phases 3 and 4 of the Phased Adaptive Approach are ready, and

(B) three stage ground based interceptors in the United States, including additional missiles for testing and emergency deployment, as necessary

SA 4919. Mr CONRAD (for himself, Mr BAUCUS, and Mr TESTER) submitted an amendment intended to be proposed to amendment SA 4884 submitted by Mr BARRASSO (for himself and Mr ENZI) and intended to be proposed to the resolution of ratification for Treaty Doc 111-5, Treaty between the United States of America and the Russian Federation of Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on April 8, 2010, with Protocol, which was ordered to lie on the table, as follows

On page 2 of the amendment beginning on line 3 strike 'that—' and all that follows through line 7 and insert that the Department of Defense will maintain not fewer than 450 deployed and non deployed ICBM launchers silos for the duration of the treaty "

SA 4920. Mr THUNE (for himself and Mr KYL) submitted an amendment intended to be proposed by him to the resolution of ratification for Treaty Doc 111-5, Treaty between the United States of America and the Russian Federation of Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on April 8, 2010, with Protocol, which was ordered to lie on the table, as follows

At the end of subsection (a) of the resolution of ratification, add the following

(11) RUSSIAN COOPERATION ON IRAN (A) In giving its advice and consent to ratification of the New START Treaty, the Senate has accepted and relied upon the representation

EXHIBIT B

REIMBURSEMENT OR PAYMENT OBLIGATION OF THE FEDERAL GOVERNMENT UNDER SECTION 313(C)(2)(B) OF THE CLEAN WATER ACT

Section 313(c)(2)(B) of the Clean Water Act does not impose a specific-appropriation requirement for the payment of stormwater assessments. Federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations.

February 25, 2011

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, ENVIRONMENTAL PROTECTION AGENCY

Congress recently passed "An Act To amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution," Pub. L. No. 111-378, 124 Stat. 4128 (2011) (the "Stormwater Amendment"), which revised section 313 of the Clean Water Act ("CWA"), 33 U.S.C. § 1323 (2006), to clarify that reasonable service charges payable by federal agencies, as described in section 313(a), include certain stormwater assessments. Section 313(c)(2)(B), enacted as part of this amendment, provides that federal agencies may not pay certain stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." You have asked whether section 313(c)(2)(B) bars federal agencies from paying stormwater assessments unless Congress makes a specific appropriation (for example, a line-item appropriation) for such payments, or instead whether agencies may "use general, lump-sum appropriations" for such payments.[1] We believe that the best reading of section 313(c)(2)(B), when construed in accord with the structure, purpose, and history of the Stormwater Amendment, is that the provision does not impose a specific-appropriation requirement. In our view, federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations

[1] *See* Letter for Jonathan Cedarbaum, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Scott C. Fulton, General Counsel, Environmental Protection Agency at 1 (Jan. 21, 2011) ("EPA Letter"). In preparing this opinion, we have received comments from the Tax Division, *see* Memorandum for John A. DiCicco, Acting Assistant Attorney General, Tax Division, from David A. Hubbert, Chief, Special Litigation (Jan. 26, 2011) ("Tax Memorandum"); the Bonneville Power Administration, *see* Letter for Jonathan Cedarbaum, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Randy A. Roach, General Counsel, Bonneville Power Administration (Feb. 2, 2011); the Environment and Natural Resources Division, *see* Memorandum for Karen Wardzinski, Section Chief, Law & Policy Section, Environment and Natural Resources Division, from Peter J. McVeigh, Attorney, Law & Policy Section (Feb. 3, 2011) ("ENRD Memorandum"); the U.S. General Services Administration, *see* Letter for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Kris Durmer, General Counsel, General Services Administration (Feb. 3, 2011) ("GSA Letter"); the U.S. Postal Service, *see* Letter for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Carrie M. Branson, Attorney, U.S. Postal Service Law Department (Feb. 3, 2011) ("Postal Service Letter"); the Council on Environmental Quality, *see* Letter for Caroline Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Nancy H. Sutley, Chair, Council on Environmental Quality (Feb. 3, 2011) ("CEQ Letter"); the U.S. Department of Agriculture, *see* Letter for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from James Michael Kelly, Associate General Counsel, U.S. Department of Agriculture (Feb. 7, 2011) ("USDA Letter"); and the U.S. Department of Defense, *see* Letter for Caroline Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Robert S. Taylor, Principal Deputy General Counsel, Department of Defense (Feb. 8, 2011) ("DOD Letter").

consistent with section 313(c)(2)(B) of the CWA. We emphasize that our opinion is limited to the application of that subsection.

I.

A.

The CWA, as amended, established a National Pollution Discharge Elimination System ("NPDES") that is "designed to prevent harmful discharges into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). As a general matter, "the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Because stormwater runoff collects debris, chemicals, and other pollutants and therefore may be a source of pollution when discharged into the Nation's waters, Congress amended the CWA in 1987 to direct the Environmental Protection Agency ("EPA") to issue rules requiring and governing NPDES permits for certain categories of discharges of stormwater, including municipal and industrial discharges. *See* 33 U.S.C. § 1342(p)(3)(B) (2006); Final Rule, National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990); Final Rule, National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999); *see also Natural Res. Defense Council v. EPA*, 526 F.3d 591, 594-601 (9th Cir. 2008) (recounting statutory and regulatory history of EPA stormwater regulations).

The EPA has issued regulations that, among other things, require municipalities operating separate storm sewer systems to obtain NPDES permits and undertake certain control measures designed to minimize the discharge of pollution from stormwater into the Nation's waters. *See, e.g.*, 40 C.F.R. § 122.34 (2010). Municipal separate storm sewer systems are "publicly owned conveyances or systems of conveyances that discharge to waters of the U.S. and are designed or used for collecting or conveying storm water, are not combined sewers, and are not part of a publicly owned treatment works." Notice, Stakeholder Input; Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617, 68,619 (Dec. 28, 2009); *see* 40 C.F.R. § 122.26(b)(8) (defining "municipal separate storm sewer").

Under this federal regulatory scheme, municipalities operating municipal separate storm sewer systems are required to undertake costly control efforts to minimize pollution from stormwater discharges into the Nation's waters. In response, many municipalities have adopted local stormwater ordinances that attempt to recover the costs of these compliance efforts from property owners, including federal agencies.

B.

The efforts by municipalities to recover stormwater assessments from federal agencies gave rise to a controversy whether federal agencies could be required to pay such assessments. The Supreme Court has explained that as a general matter "the activities of the Federal Government are free from regulation by any state," *Mayo v. United States*, 319 U.S. 441, 445

(1943), and that a state or local law that "regulate[s] the [federal] Government directly" "run[s] afoul of the Supremacy Clause." *North Dakota v. United States*, 495 U.S. 423, 434 (1990) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425-37 (1819)); *see also Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 269 (1943) ("in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation" of federal entities). Nevertheless, "a clear congressional mandate" divests the presumptive immunity of federal agencies from state and local regulatory compulsion. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1956).

Prior to Congress's enactment of the Stormwater Amendment, there was some doubt whether section 313(a) of the CWA, 33 U.S.C. § 1323(a), divested the immunity of federal agencies with respect to stormwater assessments. *See* ENRD Memorandum at 2-3; EPA Letter at 5-7; USDA Letter at 1-2. Section 313(a), in relevant part, provides that federal agencies owning property or engaged in activities that may result

> in the discharge or runoff of pollutants . . . 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.

33 U.S.C. § 1323(a). The section further mandates that these requirements attach "notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Id.*; *see Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (interpreting section 313(a) of the CWA). In dispute was whether the phrase "reasonable service charges" in section 313(a) included stormwater assessments, thereby waiving federal immunity and requiring federal agencies to pay such assessments.[2]

As we explain further in part II below, the Stormwater Amendment reflected an effort by Congress to resolve the controversy whether local governments could levy stormwater assessments against the federal Government for its facilities. On June 10, 2010, Senator Cardin introduced S. 3481, "A bill to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution." *See* 156 Cong. Rec. S4855 (daily ed. June 10, 2010) (statement of Sen. Cardin). He explained that "the issue of polluted stormwater runoff from federal properties has . . . gained significant attention" and that he had "grave concerns about the failure of the Federal Government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties." *Id.* Senator Cardin stressed that "Uncle Sam must pay his bills" and that he was "introducing legislation that makes [that] clear." *Id.*; *see also id.* at S4856 ("Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these

[2] For example, the U.S. Government Accountability Office ("GAO") had concluded that federal agencies could not pay the District of Columbia's stormwater assessment because it was a "tax" for which "Congress has not . . . legislated a waiver of sovereign immunity." Letter for David A. Lebryk, Commissioner, Financial Management Service, U.S. Department of Treasury, from Lynn H. Gibson, Acting General Counsel, Government Accountability Office, B-320868, at 1 (Sept. 29, 2010); *see also* Letter for Peter J. Nickles, Attorney General of the District of Columbia, from Lynn H. Gibson, Acting General Counsel, Government Accountability Office, B-320795 (Sept. 29, 2010).

normal and customary stormwater fees."). At that time, S. 3481 would have accomplished this objective by adding a subsection (c) to section 313 of the CWA to make explicit that the "reasonable service charges" described in section 313(a) include certain stormwater assessments. S. 3481 also stated that such stormwater assessments "may be paid using appropriated funds." *Id.* at S4856 (text of S. 3481).

The Senate amended S. 3481 in the nature of a substitute, S. Amdt. 4917, on Dec. 21, 2010, a day before its passage. The apparent aim of the last-minute revision was to address certain appropriations issues that might otherwise arise with the payment of stormwater assessments. Like the original amendment, the substitute bill, which was introduced on behalf of Senator Cardin, contained language in proposed section 313(c)(1) to make explicit that the phrase "reasonable service charges" includes certain stormwater assessments. *See* 156 Cong. Rec. S10,932 (daily ed. Dec. 21, 2010) (text of amendment).[3]

The substitute bill also added a new subsection (c)(2), with the heading "Limitation on Accounts," containing the appropriations language that is at issue here. *See id.* Proposed section 313(c)(2) provided in full:

> (2) LIMITATION ON ACCOUNTS.—
>
> > (A) LIMITATION.—The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury.
> >
> > (B) REIMBURSEMENT OR PAYMENT OBLIGATION OF FEDERAL GOVERNMENT.—Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government, as described in [section 313(a)], shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.

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[3] Section 313(c)(1) provided in full:

> (1) IN GENERAL.—For the purposes of this Act, reasonable service charges described in [section 313(a)] include any reasonable nondiscriminatory fee, charge, or assessment that is—
>
> > (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.

156 Cong. Rec. S10,932 (daily ed. Dec. 21, 2010). The relevant text of section 313(a) is set forth above. *See supra* p. 3.

Id. The substitute bill passed the Senate by unanimous consent on December 21, 2010, and passed the House by unanimous consent on December 22, 2010 (the last day of the 111th Congress). The President signed the enrolled bill into law on January 4, 2011.

On January 21, 2011, you requested our opinion whether "it is permissible to construe . . . section 313(c)(2)(B) as authorizing federal governmental entities to use general, lump-sum appropriations to pay the reasonable service charges described in . . . section 313(c)(1)," EPA Letter at 1, or instead whether section 313(c)(2)(B) "requires a specific appropriation"—for example, a line-item appropriation—"for the payment of the stormwater charges," *id.* at 12.

II.

The issue we address here is whether section 313(c)(2)(B)'s language limiting the payment of stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee" forbids federal agencies from paying stormwater assessments from annual lump-sum appropriations. We conclude that it does not.

The Stormwater Amendment contains two principal provisions. The first provision, section 313(c)(1), instructs that the "reasonable service charges described in [section 313(a)] include any reasonable nondiscriminatory fee, charge, or assessment that is . . . based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution" and that is "used to pay or reimburse the costs associated with any stormwater management program." The first provision thus resolves the dispute over federal agencies' duty to pay stormwater assessments, by making clear that the phrase "reasonable service charges" in section 313(a)—which is an unambiguous waiver of immunity—includes certain stormwater assessments. *See* 33 U.S.C. § 1323(a) (requirements of section 313(a) apply "notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law").[4]

The second provision, section 313(c)(2), sets forth requirements for the payment of such stormwater assessments by federal agencies. After stating in section 313(c)(2)(A) that federal agencies may not pay these assessments from "any permanent authorization account in the Treasury," section 313(c)(2)(B) allows payment only "to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." Section 313(c)(2)(B) could be read to allow federal agencies to pay stormwater assessments out of lump-sum appropriations, but could also be read to impose a rule that Congress must annually enact a specific appropriation (for example, a line item) for such payments. In our view, the best reading of the text, structure, purpose, and history of the Stormwater Amendment, taken together, is that Congress did not intend to require a specific appropriation.

[4] Some agencies providing views on EPA's opinion request suggested that this Office clarify the meaning of certain terms in section 313(c)(1) and address other legal issues under the Stormwater Amendment. *See, e.g.*, GSA Letter at 2-5; Postal Service Letter at 1-3; USDA Letter at 5. To respond to EPA's request expeditiously, we confine this opinion to the interpretation of the appropriations language in section 313(c)(2)(B). GSA, for example, asked us to advise whether the Federal Buildings Fund may be used to pay stormwater assessments in light of section 313(c)(2)(A). *See* GSA Letter at 4-5. Although we recognize the importance of this question, it lies beyond the scope of EPA's request, which is focused on section 313(c)(2)(B).

A.

Although "[s]tatutory construction is a holistic endeavor," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted), our analysis of the Stormwater Amendment, "begin[s], as always, with the text of the statute." *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1443 (2009). The text of section 313(c)(2)(B), standing alone, does not unambiguously resolve the issue before us. On the one hand, the phrase "except to the extent and in an amount provided in advance by any appropriations Act" might be read to authorize the payment of stormwater assessments only when Congress makes a specific appropriation of funds for that purpose. *See* Postal Service Letter at 1 ("The language lends itself to only one logical interpretation, i.e., federal entities are not required to pay stormwater fees unless Congress has provided specific appropriations for that purpose."); USDA Letter at 2-4. On the other hand, the phrase might be interpreted as authorizing federal agencies to pay stormwater assessments, not from a "permanent authorization account in the Treasury," declared off limits by section 313(c)(2)(A),[5] but instead from annual lump-sum appropriations.

While the text of section 312(c)(2)(B), standing alone, does not resolve the issue, reading the section to allow payment from annual lump-sum appropriations is ultimately the better reading of the text. First, such a reading accords with basic principles of appropriations law. The "except to the extent and in an amount" language can be read to clarify that the Stormwater Amendment provides spending authority for payment of stormwater assessments, but is not itself an appropriation. *See* U.S. General Accounting Office, GAO-04-261SP, *Principles of Federal Appropriations Law*, at 2-5 (3d ed. 2004) ("*Principles of Federal Appropriations Law*") ("While other forms of budget authority may authorize the incurring of obligations, the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury. Thus, at some point if obligations are paid, they are paid by and from an appropriation.") (internal citations omitted); 31 U.S.C. § 1301(d) (2006) ("A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made."). The phrase further can be understood to embody the basic principle that any stormwater assessments paid by federal agencies must come from and may not exceed an actual appropriation. *See, e.g., Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 14 (1990) (noting that a statute providing that payments "are effective only 'in such amounts as are provided in advance in appropriation Acts'" reflects a "concept that mirrors Art. I, § 9, of the Constitution ('No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law')"). *See generally* EPA Letter at 12; CEQ Letter at 6; Tax Memorandum at 5.

Second, this reading of the text comports with earlier opinions of this Office interpreting other authorization or appropriations provisions. For instance, faced with a statute that authorized the Secretary of Defense to make available five million dollars out of previously

[5] Although we do not address here the meaning of the phrase "permanent authorization account in the Treasury," we note that Senator Cardin explained section 313(c)(2)(A) as "rectify[ing] a specific problem in the District of Columbia, where the Department of Treasury has been paying some stormwater fees" and as reflecting "that agencies and departments *should use their annual appropriated funds to pay for stormwater fees*." 156 Cong. Rec. S11,024 (daily ed. Dec. 22, 2010) (emphasis added).

appropriated funds to the Director of the National Science Foundation "[t]o the extent provided in appropriations Acts," this Office concluded that this condition did not require that there have been a specific line-item appropriation in those appropriations acts. *See Funding for the Critical Technologies Institute*, 16 Op. O.L.C. 77, 79-83 (1992) ("*Critical Technologies Institute*") (interpreting section 822(d)(1) of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 822, 105 Stat. 1290, 1435 (1991)). In reaching this conclusion, we noted that the term "provided" can mean "to make a proviso or stipulation," but can also mean, more generally, "to make preparation to meet a need." *Id* at 81 (citing *Webster's Ninth New Collegiate Dictionary* 948 (1986)). Construing the term against the background of the "fundamental principle of appropriations law" that "Congress is not required to enact a specific appropriation for a program," and in the absence of any textual indication that Congress intended to depart from this principle, we concluded that a lump-sum appropriation was sufficient to meet the condition. *Id* at 81-82; *see also id* at 79-80 (observing that it is "axiomatic" that Congress uses lump-sum appropriations to "cover[] a wide range of activities without specifying precisely the objects to which the appropriation may be applied") [6]

Finally, section 313(c)(2)(B)'s limitation that stormwater assessments can be paid only "to the extent and in an amount provided in advance by any appropriations Act to pay or

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[6] Nor do we think this Office's interpretation of section 207 of the Equal Access to Justice Act ("EAJA")—which provided that the payment of fees as provided by the statute was "effective only to the extent and in such amounts as are provided in advance in appropriations Acts," 94 Stat 2330—is to the contrary *See Funding of Attorney Fee Awards Under the Equal Access to Justice Act*, 6 Op O L C 204, 208-09 (1982) ("Olson Memorandum") Although this Office observed in *Critical Technologies Institute* that the Department of Defense's reliance on the Olson Memorandum was inapposite because the different statutory language presented a "significantly different question" and that the addition of the phrase "and in such amounts" requires "a greater degree of precision than 'to the extent provided' would alone," 16 Op O L C at 83, we do not believe that this analysis, which effectively was *dicta*, precludes the interpretation of section 313(c)(2)(B) we set forth here As explained in *Critical Technologies Institute*, section 207 of EAJA had *not* been "interpreted" by the Olson Memorandum to "require a specific line-item appropriation " *Id* at 83 Rather, "the concern motivating section 207's clause was not," we said, "whether a line-item appropriation rather than a lump-sum appropriation was required, but instead whether an appropriation was necessary at all " *Id* On this view, section 207 was an effort to "make clear that the bill merely authorized funds, but did not appropriate them" and thus to avoid "hav[ing] the EAJA bill ruled out of order because it contained appropriations, in violation of House rules " *Id* For these reasons, far from mandating that section 313(c)(2)(B) be interpreted to impose a specific-appropriation requirement, *Critical Technologies Institute*, read as whole, supports our conclusion that section 313(c)(2)(B)'s function is not to impose a rigid specific-appropriation requirement but rather to clarify that the Stormwater Amendment "merely authorized funds, but did not appropriate them " *Id* at 82

The GAO has suggested a contrary interpretation of similar language in other statutory contexts, *see e g*, Letter for Hon William Lehman, Chairman, Subcommittee on Transportation and Related Agencies, Committee on Appropriations, House of Representatives, from Milton J Socolar, Acting Comptroller General of the United States, B-204078 (May 6, 1988) (construing a similar phrase as reflecting "a clear prohibition on the obligation or expenditure of funds unless specifically provided for in an appropriation act"), but the GAO has not addressed this particular statutory context and, to the extent that its interpretation of other provisions might be extended here, its interpretation is not binding in any event, *see e g*, Memorandum Opinion for the General Counsel, Small Business Administration, from Jeannie Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, *Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone 8(A) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs* at 13 (Aug 21, 2009) ("Our Office has on many occasions issued opinions and memoranda concluding that GAO decisions are not binding on Executive Branch agencies and that the opinions of the Attorney General and of this Office are controlling "), *available at* http //www justice gov/olc/opinions htm, *see also Critical Technologies Institute*, 16 Op O L C at 84 (disagreeing with GAO advice)

reimburse the [stormwater assessment]," which makes clear that the amendment itself is not an appropriation, plainly responded to the need to ensure that the statute conformed to the requirements of 2 U.S.C. § 651 (2006). *See* EPA Letter at 7-8. That section provides that "[i]t shall not be in order in either the House of Representatives or the Senate to consider any bill . . . that provides," among other things, "new authority to incur indebtedness . . . for the repayment of which the United States is liable . . . unless that bill . . . also provides that the new authority is to be effective for any fiscal year *only to the extent or in the amounts provided in advance in appropriation Acts*." 2 U.S.C. § 651(a) (emphasis added). Under section 651, "legislation providing new [spending] authority will be subject to a point of order in either the Senate or the House of Representatives unless it also provides that the new authority will be effective for any fiscal year *only to such extent or in such amounts as are provided in advance in appropriation acts*." *Principles of Federal Appropriations Law*, at 2-6 (emphasis added).[7] Section 313(c)(2)(B)'s confirmation that the Stormwater Amendment is not an appropriation thus served the important function of avoiding a point of order, thereby enabling passage of the bill. *See* EPA Letter at 8 (setting forth this explanation); *accord* DOD Letter at 3.[8]

B.

Our textual interpretation is supported by consideration of the text in the context of the Stormwater Amendment's overall structure, purpose, and legislative history. The structure of the Stormwater Amendment favors reading section 313(c)(2)(B) to allow payment from lump-sum appropriations and undermines a specific-appropriation interpretation of that section. *See FDA v Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted). Reading section 313(c)(2)(B) to restrict payment of stormwater assessments unless and until a *future* Congress makes a *specific* appropriation for that purpose would be in considerable tension with Congress's decision in the immediately preceding subsection—section 313(c)(1)—to clarify that federal agencies are responsible for paying reasonable stormwater assessments. Such a restriction would frustrate the ability of federal agencies to pay those assessments, and "[w]e are disinclined to say that what Congress imposed with one hand . . . it withdrew with the other." *Logan v United States*, 552 U.S. 23, 35 (2007); *see Greenlaw v United States*, 554 U.S. 237, 251 (2008) ("We resist attributing to Congress an intention to render a statute so internally inconsistent."). Rather,

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[7] Section 651 traces its statutory lineage to section 401(a) of the Congressional Budget Act of 1974 (originally codified at 31 U.S.C. § 1351(a) (Supp. IV 1974)). The legislative history of the 1974 statute explains that the purpose of the requirement was to ensure that "backdoor spending authority (such as contract authority, loan authority, and mandatory or open-ended entitlements) could not take effect until funds were provided through the appropriations process." H.R. Rep. No. 93-658, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3462, 3463.

[8] Because we understand section 313(c)(2)(B) to be serving several purposes on this reading—including clarifying that the Stormwater Amendment authorizes spending but is not itself an appropriation, forbidding federal agencies from incurring any stormwater assessment obligations in excess of their appropriations, and conforming with the requirements of 2 U.S.C. § 651—we do not believe that this reading gives no effect to, and thus renders surplusage, the phrase "except to the extent and in an amount provided in advance by any appropriations Act." *Cf.* DOD Letter at 4. Indeed, we rejected a similar objection lodged against our interpretation of the phrase "[t]o the extent provided in Appropriations acts" in *Critical Technologies Institute*, reasoning, among other things, that the phrase "makes clear that the act merely authorized funds, and that a further appropriation is required." 16 Op. O.L.C. at 82. In any event, "[s]urplusage does not always produce ambiguity and [a] preference for avoiding surplusage constructions is not absolute." *Lamie v U.S. Trustee*, 540 U.S. 526, 536 (2004).

here, a provision that "seem[s] ambiguous in isolation is . . . clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC*, 543 U.S. at 60.

Interpreting section 313(c)(2)(B) to require a specific appropriation also would substantially conflict with the general purpose of the Stormwater Amendment. *See Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (statutory interpretation must take account of the "'the objects and policy of the law'") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)); *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) ("[e]xamination of purpose is a staple of statutory interpretation"). The central purpose of the Stormwater Amendment was to resolve the controversy surrounding the payment of stormwater assessments by requiring that federal agencies pay such assessments. The very first words of the amendment—"[a]n Act To . . . clarify Federal responsibility for stormwater pollution"—show Congress's purpose to resolve the dispute regarding stormwater assessments and make clear that the federal Government as an owner of federal facilities is responsible for the payment of stormwater assessments. Although "[t]he title of an act cannot control its words," it "may furnish some aid in showing what was in the mind of the legislature." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) (C.J. Marshall); *see Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) ("title of the act" may shed light on the "intent of the legislature"). The title here does just that. *See* ENRD Memorandum at 4 (arguing that the "purpose is readily apparent from the title of the act").

In addition to the title, all of the available legislative history confirms this account of Congress's purpose.[9] The Senate sponsor of the bill, Senator Cardin, explained in introducing the bill: "Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees." 156 Cong. Rec. S4856 (daily ed. June 10, 2010).[10] Several members of the House repeated this understanding of the objective of the Stormwater Amendment, including after the substitute version of the bill passed the Senate. Representative Oberstar, for example, noted that "[s]everal states and municipalities . . . have taken aggressive action to address ongoing sources of stormwater pollution" but that such action is undermined "when a significant percentage of Federal property owners take the position that they cannot be held responsible for their pollution." 156 Cong. Rec. H8978 (daily ed. Dec. 22, 2010). He explained that the amendment would "clarif[y] that Federal agencies and departments are financially responsible for any

[9] This Office has previously found legislative history one potentially instructive factor to consider, along with other evidence, when confronted with ambiguous appropriations language. *See Critical Technologies Institute*, 16 Op. O.L.C. at 80 (relying on legislative history in ascertaining the meaning of similar appropriations language); *see also Authority of Chrysler Corporation Loan Guarantee Board to Issue Guarantees*, 43 U.S. Op. Att'y Gen. 219, 219-23 (1980) (construing phrase "to the extent such amounts are provided in advance in appropriations acts" based principally on legislative history).

[10] Although some of the legislative history we cite here was in connection with the bill as it existed prior to the last-minute addition of section 313(c)(2)(B), that does not render that prior history irrelevant. Senator Cardin's explanation of the purpose of the Stormwater Amendment was the same before and after the addition of the relevant appropriations language (which was added at Senator Cardin's request), and is consistent with statements made by members of the House *after* the revised language was added. Standing alone, the fact that Congress revised the Stormwater Amendment provides no basis for adopting a restrictive interpretation of section 313(c)(2)(B), especially when all available legislative evidence is to the contrary.

reasonable . . . charges for treating or otherwise addressing stormwater pollution that emanates from Federal property." *Id.* Other statements in the legislative record are to the same effect.[11]

Indeed, after the Senate's passage of the Stormwater Amendment, Senator Cardin again explained the purpose of the amendment in similar terms:

> [T]oday the Congress stands ready to approve S. 3481, 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); *see id.* at S11,024 (statement of Sen. Cardin) (the federal responsibility "to manage . . . stormwater pollution . . . needs to translate into payments to the local governments that are forced to deal with this pollution"). Senator Cardin's consistent, public, and unambiguous articulation of the intended purpose and effect of the Stormwater Amendment confirms our view that Congress intended the Stormwater Amendment to facilitate the payment of stormwater assessments by the federal Government. *See N.L.R.B. v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (internal quotation marks omitted); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (relying on the stated understanding of "the principal sponsor of the Senate bill" in interpreting a statute). Although the "remarks of a single legislator who sponsors a bill" may not be "controlling in analyzing legislative history," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), Senator Cardin's remarks accord with *all* of the available legislative history. There is no indication in the legislative record that the understanding of the Stormwater Amendment offered by Senator Cardin and others was not shared universally in Congress.

Reading the statute to impose a specific-appropriation requirement would frustrate that purpose. Such a requirement would place a substantial obstacle in the path of payment of stormwater assessments because of the practical burdens associated with attaining specificity in annual appropriations, especially specificity in appropriations bills applying to a range of federal agencies. *See, e.g., Critical Technologies Institute*, 16 Op. O.L.C. at 80 ("A rule requiring greater specificity in appropriations would create extreme obstacles for the functioning of the Federal Government."). Indeed, we note that, to the extent some federal agencies were paying stormwater assessments from lump-sum appropriations prior to the passage of the Stormwater Amendment, a specific-appropriation interpretation would require ascribing to Congress an

[11] *See* 156 Cong. Rec. E2259 (daily ed. Dec. 29, 2010) (statement of Rep. Johnson) (describing the bill as "a simple effort to clarify . . . that the Federal Government bears a proportional responsibility for addressing pollution originating from its facilities"); *id.* at E2258 (statement of Rep. Johnson) (explaining that the "common sense bill" would "ensure[] that the Federal Government maintains its equitable responsibility for stormwater pollution runoff originating or emanating from its property"); 156 Cong. Rec. E2245 (daily ed. Dec. 22, 2010) (statement of Del. Norton, who sponsored the Stormwater Amendment in the House) ("The consequence of failing to pass this bill is that we give the Federal Government a free ride and pass its fees on to our constituents throughout the United States.").

intent to forbid such ongoing payments unless and until Congress made a specific appropriation. We can find no indication of such a congressional intent. Equally important, a specific-appropriation interpretation of section 313(c)(2)(B), rather than resolving once and for all the obligation of the federal Government as an owner of federal facilities to pay certain stormwater assessments, would effectively leave the issue where Congress found it—passing on to future Congresses the task of determining, on an annual basis, whether stormwater assessments should be paid. Such a reading of section 313(c)(2)(B) would reintroduce the same cloud of legal uncertainty Congress intended the Stormwater Amendment to dispel.

Furthermore, the legislative history relating specifically to the addition of section 313(c)(2)(B) weighs heavily against interpreting the section to impose a specific-appropriation requirement. Senator Cardin explained the appropriations language at issue here as follows:

> [W]e added a provision to the bill in order to rectify a specific problem in the District of Columbia, where the Department of Treasury has been paying some stormwater fees. The provision simply says that agencies and departments should use their annual appropriated funds to pay for stormwater fees. This is exactly what they all do today in paying for their drinking water and wastewater bills or any other utility bill, for that matter. This new language requires that Congress make available, in appropriations acts, the funds that could be used for this purpose. *It does not mean that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges*. The legislative language doesn't say that, and I want to be perfectly clear that such a restrictive reading is not our intent.

156 Cong. Rec. S11,024 (daily ed. Dec. 22, 2010) (emphasis added).[12] Senator Cardin's view was echoed by several members of the House of Representatives, including the House sponsor of the Stormwater Amendment, Delegate Norton. She explained: "The bill requires that Congress make available, in appropriations acts, the funds that could be used to pay for stormwater management charges, but *not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges*." *Id.* at H8979 (daily ed. Dec. 22, 2010) (emphasis added).[13] There is no legislative history pointing to a contrary result. *See* CEQ Letter at 5 (canvassing legislative history supporting an interpretation of section 313(c)(2)(B) as authorizing annual appropriations to pay stormwater assessments and noting "[n]o comments to the contrary appear anywhere in the legislative history" of the Stormwater Amendment).

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[12] Although Senator Cardin's statement was made after the passage of the Senate version of the bill, his description is consistent with the understanding expressed by members of the House, including the sponsor, prior to passage there. *See infra* n. 13 and accompanying text.

[13] *See also* 156 Cong. Rec. H8979 (daily ed. Dec. 22, 2010) (statement of Rep. Oberstar) ("In addition, the intent of subsection (c)(2)(B) of Section 313 of the Clean Water Act, as added by S. 3481, is to require that Congress make available, in appropriations acts, the funds that could be used to pay stormwater fees, but not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges."); *id.* at H8980 (daily ed. Dec. 22, 2010) (statement of Rep. Johnson) ("This new language requires that Congress make available, in appropriations acts, the funds that could be used for this purpose. It should not be interpreted as requiring appropriations act [sic] to state specifically or expressly that the funds could be used to pay these charges. The statutory language does not require this, and such a restrictive reading is not intended.").

In sum, we conclude that the best reading of the text of the appropriations provision in section 313(c)(2)(B), in light of the structure, purpose, and history of the Stormwater Amendment, is that Congress did not intend to impose a specific-appropriation requirement. Indeed, a specific-appropriation requirement—that, as we have noted, would have the predictable effect of restricting payment by federal agencies and would leave the status of future stormwater payments in legal limbo—would undermine Congress's central aims in enacting the Stormwater Amendment. We therefore believe that federal agencies may pay stormwater assessments out of annual—including current—lump-sum appropriations.[14]

C.

One significant argument might be advanced against our reading of the Stormwater Amendment. It might be said that, if the plain text of section 313(c)(2)(B) does not definitively resolve the source of payment, then we must embrace a construction that restricts payment on the ground that "a condition to [a] waiver of sovereign immunity . . . must be strictly construed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990). We disagree that this rule of construction justifies reading section 313(c)(2)(B) to impose a specific-appropriation requirement.

In our view, the appropriations language in section 313(c)(2)(B) is not properly understood as a condition on the waiver of immunity. Sections 313(a) and 313(c)(1), read together, accomplish that waiver for stormwater assessments. *See supra* p. 5. Section 313(c)(2)(B) serves a different function, operating as an internal accounting provision, directing when and how federal agencies may pay such assessments. *Cf. Henderson v. United States*, 517 U.S. 654, 667-68 (1996) (holding that, notwithstanding that the Suits in Admiralty Act is a broad waiver of sovereign immunity, the provisions in section 742 of the statute governing service of process are not "sensibly typed 'substantive' or 'jurisdictional'"—and therefore a condition on the waiver—but "[i]nstead, they have a distinctly facilitative, 'procedural' cast" as "[t]hey deal with case processing, not substantive rights or consent to suit"). The heading of section 313(c)(2), "Limitation on Accounts," supports the view that section 313(c)(2) is not a condition on a waiver of immunity but rather that it governs the sources from which federal agencies may

[14] USDA suggests that section 313(c)(2)(B), in all events, forbids the use of *current* appropriations to pay stormwater assessments because an "additional act of Congress is required." USDA Letter at 4. But the conclusion does not follow from the premise. It is true that an "additional act of Congress is required"—because the Stormwater Amendment is not an appropriation, a point that is central to our reading of section 313(c)(2)(B)—but the view that section 313(c)(2)(B) may be satisfied by a lump-sum appropriation leads logically to the conclusion that such an appropriation may be a current *or* future lump-sum appropriation. Payment of stormwater assessments from a current appropriation would not countermand the statutory requirement that funds be "provided in *advance* by any appropriations Act" because federal agencies' payments of stormwater assessments going forward would be made from appropriations acts previously enacted by Congress. This same analysis largely responds to DOD's concern that section 313(c)(2)(B) "clearly require[s] some additional action by Congress." DOD Letter at 3. DOD appears to posit that the "shall not be obligated" clause in section 313(c)(2)(B) means that federal agencies *may* pay stormwater assessments out of general operating funds but that agencies *must* pay such assessments in the event that Congress enacts specific "appropriations act language." *Id.* at 4. As we have explained, we agree that "additional action by Congress" is required, but that additional action may be a current or future general lump-sum appropriation. Therefore, we disagree with DOD's suggested interpretation of the "shall not be obligated" phrase because, in our view, a general lump-sum appropriation is sufficient to trigger the "mandatory" payment of stormwater assessments. *Id.*

pay stormwater assessments. *See* U.S. Government Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process*, at 2 (Sept. 2005) (defining account as "[a] separate financial reporting unit for budget, management, and/or accounting purposes"); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that the "heading of a section" is a "tool[] available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted); ENRD Memorandum at 4. For these reasons, reading section 313(c)(2)(B) not as a condition on the waiver of immunity, but as a separate internal accounting provision specific to stormwater assessments, is most faithful to the Supreme Court's instruction to "interpret [a] statute as a symmetrical and coherent regulatory scheme" that "fit[s] . . . all parts into a harmonious whole." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (internal quotation marks and citations omitted).

We recognize that section 313(c)(2)(B)'s direction that federal agencies "shall not be obligated to pay" stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act" might be read as a condition on the waiver of immunity. *See* DOD Letter at 4; *cf.* Tax Memorandum at 4 (suggesting that section 313(c)(2)(B) "read[s] more like a traditional waiver given the context of the amendment"). But we believe, in this statutory context, that the phrase "shall not be obligated to pay . . . except to the extent and in an amount provided in advance by any appropriations Act" is instead a textual cue that the Stormwater Amendment is not an appropriation and that stormwater assessment payments require a separate appropriation by Congress. In other words, the "shall not be obligated to pay" phrase is an instruction that federal agencies may not pay stormwater assessments unless there is a separate appropriation of funds by Congress to do so. Because we do not read section 313(c)(2)(B) as a condition on the waiver of immunity effected by sections 313(a) and 313(c)(1), the strict construction canon governing conditions on waivers of immunity is inapposite.

For these reasons, we conclude that section 313(c)(2)(B) of the CWA does not impose a specific-appropriation requirement. Instead, federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations.

/s/

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