IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 11-761C
(Senior Judge B. Futey)

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

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

FRANKLIN E. WHITE, JR.
Assistant Director

OF COUNSEL:

MICHAEL F. KIELY
United States Postal Service

JAMES MISRAHI
Department of Health & Human Services
Center for Disease Control

HAROLD ASKINS
Department of Veterans Affairs

CHRISTOPHER A. BOWEN
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
PO Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 305-7594
Fax: (202) 305-7643

Attorneys for Defendant

February 27, 2012

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES

PAGE(S)

MEMORANDUM OPINION

STATUTES AND REGULATIONS

LEGISLATIVE HISTORY

DEKALB COUNTY CODE

COMPTROLLER GENERAL DECISION

MISCELLANEOUS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEKALB COUNTY, GEORGIA a political subdivision of the State of Georgia, Plaintiff, v. THE UNITED STATES, Defendant.	))))))))))	No. 11-761 C (Senior Judge B. Futey)

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant, the United States, respectfully asks that this Court dismiss plaintiff DeKalb County's ("DeKalb") complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

First, pursuant to 28 U.S.C. § 2501, all claims that accrued prior to November 14, 2005 must be dismissed, because they accrued more than six years prior to the filing of the complaint.

Second, all of the claims, which relate to periods prior to January 4, 2011, must be dismissed, because DeKalb is impermissibly attempting to levy a tax upon Federal properties prior the United States waiving its right not to pay such taxes. The DeKalb law, as described in the complaint and the accompanying statute, is not a fee for a service that the Federal agencies may decline to use. Rather, it is an assessment based upon owning developed property that is used for a general public good, specifically controlling stormwater run-off. This is highlighted by the fact that this "fee" is collected on the annual county tax bill. Additionally, there is

nothing within the 2011 amendments 33 U.S.C. § 1323 indicating that the 20011 amendment was retroactive.

STATEMENT OF THE ISSUES

1. Whether this Court should dismiss claims relating to periods prior to November 14, 2005 for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2501, because DeKalb did not file its complaint until November 14, 2011.

2. Whether this Court should dismiss the remainder of DeKalb's claims for failure to state claims upon which relief can be granted, because DeKalb's stormwater "fee" assesses charges against all owners of developed land and is not given in exchange for a specific "government-provided" benefit, thereby meeting the definition of a tax.

STATEMENT OF THE CASE

I. Legal Background

On undeveloped land (such as forests and untilled fields), much of the water from storms is absorbed into the ground. On developed land, much of the surface area is impervious, because it is covered with buildings and parking lots, and, as a result, the ground cannot absorb the stormwater. Developed land, therefore, tends to produce more stormwater flowing onto streets and adjacent properties than does undeveloped land. Additionally, water that flows off of an impervious surface, such as a parking lot, will transport chemicals and materials on the surface (such as oil or other fluids leaked from cars in a parking lot) into the drainage system and potentially into rivers. *See generally* Sen. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3691, 3718-19 (Oct. 28, 1971).

As more land became developed, more stormwater would enter into stormwater systems, resulting in the sewers overflowing more often onto land and into rivers. 1972 U.S.C.C.A.N.

at 3718-19. To combat this problem, the Clean Water Act mandated that states, counties, and municipalities develop approaches that limited the effects of stormwater run-off from developed land. Complaint at ¶ 14.

A. The DeKalb Stormwater Law

In December 2003, the Board of Commissioners for DeKalb County, Georgia passed the current version of the DeKalb County Stormwater law. Complaint Exhibit 1 at p.7 (citing DeKalb Cty. Code § 25-374). Pursuant to Section 25-362, DeKalb County established what it deemed a "Stormwater Utility" ("the Stormwater Utility" or "SU") within the Public Works Department, responsible for stormwater management throughout DeKalb County.[1] The Public Works Department monitors the design, construction, and maintenance of all stormwater systems in the county, as well as ascertaining whether the stormwater facilities are functioning. DeKalb Cty. Code § 25-363(a). The primary responsibility for operating and maintaining the stormwater system is the Roads & Drainage Division within Public Works Department, although other departments handle other SU responsibilities. *Stormwater Management Background*, available at http://www.co.dekalb.ga.us/publicwrks/stormwater_mangmt/sw_mgmtBackgrnd.html, (last visited Feb. 21, 4:23pm) (attached as Exhibit 1 to this Motion to Dismiss). All SU operations are primarily funded by a stormwater enterprise fund ("the fund") in the county budget, containing all of the funds placed in the stormwater fund. DeKalb Cty. Code § 25-364. Additionally, the DeKalb County Board of Commissioners may authorize resources and money

[1] For purposes of this motion to dismiss, the Government assumes as true the facts alleged in the complaint, as well as the fact that the DeKalb Stormwater law functions as written.

from outside of the fund for stormwater management operations and capital investments. *Id*. at § 25-364.

The stormwater enterprise fund receives its funding from what are deemed "fees" levied upon all property owners ("charges"). Specifically, owners of single-family homes pay four dollars per month; the owners of multi-family dwelling units pay four dollars month per dwelling unit multiplied by an adjustment factor based upon an average measure of the impervious surface attributed to each dwelling unit; and the owners of commercial property are charged four dollars per month for every 3,000 feet of impervious surface on the property. DeKalb Cty. Code § 25-365(b)-(e). The fund charges began to accrue on January 1, 2004, and "appears annually on the county tax bill." DeKalb Cty. Code § 25-366; *DeKalb County Stormwater Utility Homepage*, available at http://www.co.dekalb.ga.us/publicwrks/stormwater_mangmt/index.html; last visited Feb. 21, 2012 at 3:10pm (attached as Exhibit 2 to this motion to dismiss).

A property owner may appeal an assessment (or any other determination made by the SU) to the SU chief executive officer. DeKalb Cty. Code § 25-373(a)(1). Any appeal of the assessment must contain a survey from a registered surveyor or professional engineer regarding the total property area, the impervious surface area, and any other features which influence the flow of stormwater from the property. *Id*.

To collect any unpaid charges, the SU may sue a property owner using any method permitted under Georgia law. DeKalb Cty. Code § 25-371(a). An uncollected fee cannot constitute a direct lien against the property. *Id*. The county may receive a direct lien, however, against a property owner who fails to control the stormwater on the property, resulting in a public nuisance. DeKalb Cty. Code § 25-372.

B. The Addition Of Section C To 33 U.S.C. § 1323

Federal agencies resisted attempts by municipalities to collect stormwater fees similar to DeKalb's by asserting that the "fees" were in fact a "tax." *See*, *e.g.*, *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 275-76 (1997) (holding that stormwater fee was in fact a tax), *aff'd on different grounds*, 153 F.3d 1375 (Fed. Cir. 1998); Comp. Gen. Dec. B-320795, Decision, Use of GAO's Appropriations To Pay District of Columbia Stormwater Fee (Sept. 29, 2010); Comp. Gen. Dec. B-306666, Decision, Matter of Forest Service - Surface Water Management Fees (Jun. 5, 2006).

On June 10, 2010, Senator Cardin introduce a bill to amend Section 1323 of Title 33 of the United States Code. Senator Cardin's proposed bill stated:

> Section 313 of the Federal Water Pollution Control Act (33 U.S.C. 1323) is amended by adding at the end the following:
>
> (c) Federal Responsibility for Stormwater Pollution. Reasonable service charges described in subsection (a) include reasonable fees or assessments made for the purpose of stormwater management in the same manner and to the same extent as any nongovernmental entity.
>
> (d) No Treatment as Tax or Levy. A fee or assessment described in this section-
>
> (1) shall not be considered to be a tax or other levy subject to an assertion of sovereign immunity; and
> (2) may be paid using appropriated funds.

S. 3481, 111th Cong. (Jun. 10, 2010); 156 Cong. Rec. S4851, 4855. In introducing the proposed bill, Senator Cardin explained 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." 156 Cong. Rec. S4851, 4855 (statement of Senator Cardin). This version of the bill

was referred back to the Senate by the Committee on Environment and Public Works on December 17, 2010. S. 3481, 111th Cong. (Dec. 17, 2010).

On December 21, 2010, the Senate passed the bill, but only after completely re-writing the proposed amendments. As passed by the Senate, the bill read:

> (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.

S. 3481, 111th Cong. (Dec. 21, 2010) (enacted). [2]

---

[2] Congress also changed the appropriations language, replacing the language "may be paid using appropriated funds" with language stating that Federal agencies "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." 33 U.S.C. § 1323(c)(2)(B). The Office of Legal Counsel later interpreted the new appropriation language as meaning that an agency was obligated to pay so long as Congress had passed an appropriation, rather than requiring Congress to pass a specific, line-item appropriation for stormwater fees. Memorandum Opinion for Scott C. Fulton from Office of Legal Counsel, Reimbursement Or Payment Obligation Of The Federal Government Under Section 313(C)(2)(B) Of The Clean Water Act (Feb . 25, 2011), 2011 WL 1085035.

This version of the bill was approved by the House. Pub. L. 111-378, 124 Stat. 4128. On January 4, 2011, the President signed the bill into law.

II. Statement Of The Facts And Procedural Posture

On November 14, 2011, DeKalb County Georgia filed the present lawsuit, alleging that various Federal agencies and the United States Postal Service had refused to pay DeKalb County its stormwater fees prior to January 4, 2011. Complaint at ¶ 2. DeKalb alleged that the amendments to 33 U.S.C. § 1323 were retroactive and, therefore, required Federal agencies to pay reasonable and non-discriminatory stormwater fees such as those contained within the DeKalb County Stormwater law. Complaint at ¶¶ 7-8. DeKalb sought payment for fees from various facilities, including fees accrued in 2005. *See, e.g.*, Complaint at ¶¶ 33, 37, 41. The amounts sought for 2005 did not differ from the amounts sought in the other years. *See id*.

SUMMARY OF THE ARGUMENT

This Court does not possess jurisdiction to adjudicate DeKalb's claims for damages that accrued prior to November 14, 2005. According to Section 25-366 of the DeKalb Stormwater Law, charges for a year began accruing on January 1, 2004. Any charges that accrued before November 14, 2005, therefore, are beyond the six-year statute of limitations found at 28 U.S.C. § 2501 and must be dismissed for lack of jurisdicton.

The remainder of DeKalb's claims should be dismissed for failure to state claims upon which relief can be granted. The charges at issue in this case accrued prior to January 4, 2011 and must be dismissed, because they are a tax, not a "reasonable service fee." Nothing within the amendments to the statute indicates that Congress intended this waiver to be retroactive. The Supreme Court has held that statutes are presumed not to be retroactive unless there is a clearly

expressed congressional intent to the contrary. Courts particularly disfavor retroactive application of laws when a waiver of sovereign immunity is involved. Because nothing within the amendment text or the legislative history indicates that Congress thought that the amendments would cause agencies to pay for past stormwater fees, this Court should decline to apply the amendments retroactively.

Prior to January 4, 2011, the United States had not waived its sovereign immunity with regards to stormwater taxes. DeKalb's stormwater charges meet the definition of taxes, not least because the United States agencies are not procuring any services from DeKalb by paying the "fee." The payment of this "fee" is not a voluntary act for a benefit of service provided by the government to a specific payor, but instead a mandatory contribution for the general support of the government. DeKalb's stormwater charges were for a general public good and were assessed on the county tax bill. Unlike electricity or permits, the county cannot deprive a non-paying property owner of stormwater disposal. Because the stormwater charge went to providing an overall public good, it was a tax which the United States had not consented to pay. This Court, therefore, should dismiss DeKalb's claims.

ARGUMENT

I. Standards For A Motion To Dismiss Pursuant To RCFC 12(b)(1) And 12(b)(6)

In ruling upon a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), the Court accepts as true the undisputed allegations in the complaint, and draws all inferences in favor of the plaintiff. *Lavezzo v. United States*, 74 Fed. Cl. 502, 507 (Fed. Cl. 2006) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). If the undisputed facts reveal any possible basis upon which the non-moving party might prevail, the Court must deny the motion.

Id. If, however, the motion challenges the truth of the jurisdictional facts alleged in the complaint, the Court may consider relevant evidence in order to resolve the factual dispute. *Harbuck v. United States*, 58 Fed. Cl. 266, 267 (2003) (citing *Rocovich v. United States*, 933 F.2d 991, 994 (Fed. Cir. 1991)); *Lewis v. United States*, 32 Fed. Cl. 59, 62 (1994)), *aff'd*, 378 F.3d 1324 (Fed. Cir. 2004).

The Supreme Court, in *Bell Atl. Corp. v. Twombly*, definitively established the standard of review for motions based on RCFC 12(b)(6).[3] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (quotation marks, citations, and brackets omitted). The plaintiff's factual allegations, when assumed to be true, "must be enough to raise a right to relief above the speculative level." *Id.* In addition, where a plaintiff has attached materials to his complaint, these materials may be considered as part of the complaint on a motion to dismiss. *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334 1342 n. 6 (Fed. Cir. 2006).

[3] Although *Bell Atl. Corp. v. Twombley* dealt with the Federal Rules of Civil Procedure, the applicable language in that rule mirrors the language in RCFC 12(b)(6). *See* RCFC 83(a).

II. DeKalb's Claims For Periods Prior To November 14, 2005 Should Be Dismissed For Lack Of Jurisdiction, Because They Accrued More Than Six Years Prior To The Filing Of The Complaint

Pursuant to DeKalb Code Section 25-366, the stormwater fees began to "accrue" on January 1, 2004. DeKalb Cty. Code § 25-366. Pursuant to 28 U.S.C. § 2501, this Court only possesses jurisdiction to adjudicate claims that are filed "within six years after such claim first accrues." 28 U.S.C. § 2501. This Court, therefore, should dismiss DeKalb's claims that accrued prior to November 14, 2005.

A failure to comply with this deadline deprives this Court of jurisdiction. *See Soriano v. United States*, 352 U.S. 270 (1957); *Wright v. United States*, 81 Fed. Cl. 369 (2008). The burden of establishing jurisdiction rests upon the plaintiff. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998). The Federal Circuit has held that a claim accrues for purposes of 28 U.S.C. § 2501 "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Alder Terrace*, 161 F.3d at 1377.

The complaint does not indicate when the stormwater charges were billed to these facilities or agencies. According to DeKalb's website, the charges appear annually on the county tax bill, but there is no indication when these bills would have been mailed out to the individual facilities. *See* Exhibit 2; *see also* DeKalb Cty. Code § 25-366 (the "stormwater fee . . . shall be billed annually."). It is incumbent upon the plaintiff, however, to allege the facts in the complaint to permit this Court to determine if jurisdiction is present. *Empire Institute of Tailoring, Inc. v. United States*, 161 F. Supp. 409, 411 (Ct. Cl. 1958) (facts not alleged in the complaint were not properly before the court in challenge brought pursuant to 28 U.S.C. § 2501).

The relevant date from the complaint, therefore, is the date on which the fees accrued, which, for 2005, was the first of that year. DeKalb Cty. Code § 25-366.

In its complaint, DeKalb seeks damages for the non-payment of stormwater charges in 2005 at certain Federal properties. *See* Complaint at ¶¶ 33, 37, 41. The amounts DeKalb seeks for 2005 are the same as the amounts that DeKalb seeks for the other years for those facilities. *See id*. DeKalb, therefore, is seeking money for the entirety of 2005 at those facilities, not limiting its claims to those payments that would have accrued after November 14, 2005. Because any stormwater charges accrued more than six years prior to the filing of the complaint, this Court does not possess jurisdiction to adjudicate the challenge to their non-payment.

This Court, therefore, should dismiss the claims in the complaint that accrued prior to November 14, 2005 for lack of jurisdiction.

III. DeKalb's Claims That Accrued Prior To January 4, 2011 Should Be Dismissed, Because DeKalb's "Fee" Was A Tax And Congress Had Not Waived Sovereign Immunity Of The United States Until Then

DeKalb seeks payments from 2005 to January 4, 2011 for its stormwater charges, relying upon the amendments to 28 U.S.C. § 1323 enacted on January 4, 2011. DeKalb faces two problems with its claims for fees prior to January 4, 2011. First, nothing within 33 U.S.C. § 1323 indicated that Congress intended for its waiver of sovereign immunity with respect to stormwater charges to be retroactive. Second, DeKalb's stormwater charges were "taxes" under the precedent of this Court and the Supreme Court, and, prior to the amendments, could not be levied upon the United States. DeKalb's complaint, therefore, should be dismissed, because it impermissibly seeks to recover taxes from the United States.

A. The Amendments To 33 U.S.C. § 1323 Are Not Retroactive, Because Nothing Within The Statute Indicates That Congress Intended The Waiver Of Sovereign Immunity To Apply To Already Accrued Taxes

The Supreme Court has held that there is a presumption against retroactive application of statutes. *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). "The presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic." *Id*. To overcome this presumption, the statute must clearly express an intent to "impose new duties with respect to transactions already completed." *Id*. at 280. The Federal Circuit has followed this principle, noting that "retroactivity is not favored in the law." *LaPuh v. M.S.P.B.*, 284 F.3d 1277, 1281 (Fed. Cir. 2002); *see also Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1382 (Fed. Cir. 2011) ("we read *Landgraf* as emphasizing a requirement of clear Congressional intent for retroactive application."); *American Permac, Inc. v. United States*, 191 F.3d 1380, 1381 (Fed. Cir. 1999) ("legislation will be construed to operate only prospectively unless Congress has clearly expressed a contrary intention.") (quoting *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 752 (Fed. Cir. 1997)). Statutes have been held to be retroactive only where the congressional intent was clear, such as where the statute expressly provided that jurisdiction is "without regard to whether the complaint accrued before, on, or after October 13, 1994." *Williams v. Dep't of the Army*, 83 M.S.P.B. 109, 114 (1999) (citing 38 U.S.C. § 4324(c)).

In addition, when a waiver of sovereign immunity is involved, the Courts particularly disfavour retroactive waivers. "A waiver of sovereign immunity must be strictly construed; it may not be applied retroactively unless the Congress clearly so intended." *Brown v. Sec'y of the Army*, 78 F.3d 645, 647 (D.C. Cir. 1996), *cert denied*, 519 U.S. 1040 (1997); *Trout v. Sec'y of*

Navy, 317 F.3d 286, 290 (D.C. Cir. 2003) (rule of strict construction does not allow for retroactive waivers of sovereign immunity and all doubts are resolved in favor of the United States); *Lumbermens Mut. Cas. Co. v. United States*, 654 F.3d 1305, 1311 (Fed. Cir. 2011) ("The government's waiver of sovereign immunity 'must be unequivocally expressed in statutory text' and 'will be strictly construed, in terms of its scope, in favor of the sovereign.'"); *United States v. Matson Nav. Co.*, 201 F.2d 610, 616 (9th Cir. 1953) ("waiver of sovereign immunity creates a new cause of action which has no retroactive effect unless specifically granted"); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-37 (1992). To hold that a statute waiving sovereign immunity applies to "a period of time not envisioned by Congress," risks "imposing upon the public fisc an unanticipated and potentially excessive liability." *Brown*, 78 F.3d at 650.

Nothing within the text of 33 U.S.C. § 1323 overcomes the presumption against retroactivity. Pursuant to a *Landgraf*, a statute is retroactive if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Here, DeKalb is alleging that the 2011 amendments to 33 U.S.C. § 1323 retroactively impose the obligation to pay upon the various agencies. Complaint at ¶ 8. The statutory text, however, simply states that " For the purposes of this Act, reasonable service charges described in subsection (a) include . . . . " 33 U.S.C. § 1323(c). Nothing within the act, therefore, indicates that this definition was to be applied retroactively.[4] Additionally, 33 U.S.C. § 1323(c)(2) requires that no agency shall be

[4] The Government has also not found any statement in the legislative history indicating that Congress expected the statute to be retroactive.

obliged to pay unless the appropriations for the fees are provided "in advance." The only mention of time, therefore, is prospective, rather than retrospective. *See Landgraf*, 511 U.S. at 272 (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988) as an example of where the Court refused to apply a statute retroactively in the absence of clear congressional intent to permit an agency to retroactively collect fees).

Further, as in *Landgraf*, Congress specifically refused to enact broader legislation that would have made a claim of retroactivity more plausible. *See* 511 U.S. at 261-63 (discussing failure of the 1990 version of the bill which had been retroactive). As noted above, the initial bill would have arguably prohibited the Government from asserting the defense of sovereign immunity when faced with a stormwater fee lawsuit. 156 Cong. Rec. S4851, 4855 ("A fee or assessment described in this section - (1) shall not be considered to be a tax or other levy subject to an assertion of sovereign immunity.") (original proposed legislation). As passed, however, the statute simply states that these fees are now to be paid if there are appropriations for stormwater fees provided in advance. 33 U.S.C. § 1323(c). Congress, therefore, rejected the version of the bill that could have prevented the assertion of sovereign immunity and chose much more restricted language.

Finally, none of the exceptions to the presumption against retroactivity apply in this case. Damages for past unpaid stormwater charges cannot be considered "prospective relief" (*Landgraf*, 511 U.S. at 273); 33 U.S.C. § 1323 is not a statute conferring jurisdiction (*id.* at 274); and the amendments were not a change in a procedural rule (*id*. at 275). Instead, DeKalb is asserting that the statute has altered any prior rights of agencies not to pay these fees, placing

this assertion firmly in the category of attempting to "increase a party's liability for past conduct." *Id*. at 280.

The statute at issue does not clearly indicate a congressional intent that the obligation to pay be applied retroactively. Additionally, none of the exceptions to the presumption against retroactivity apply. The 2011 amendments to 33 U.S.C. § 1323, therefore, are not retroactive.[5]

B. DeKalb's Stormwater Charge Is A Tax, Because It Funds A General Government Goal That Benefits All Residents Equally Rather Than A Specific Benefit For The Charge-Payer

A "fee" is a voluntary payment made to a government agency to obtain a benefit for the payor, not shared by other members of society. A tax is a mandatory exaction used to pay for the general support of government services. DeKalb's stormwater charge is properly categorized as a tax, rather than "reasonable service charges" pursuant to 33 U.S.C. § 1323(a), because the payment is involuntary and goes to benefitting the entire city by stopping stormwater run-off, rather than benefitting the payors particularly. Even were a developed property owner to completely abate its stormwater runoff, the DeKalb law would still require it to pay this charge.

[5] We also note that, even were the amendments to be applied retroactively, they would not necessarily implicate the United States Postal Service. 33 U.S.C. § 1323(c)(2)(B) says "Each department, agency, or instrumentality [of the Federal Government] . . . 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." The United States Postal Service is an instrumentality of the United States, but does not receive appropriations from Congress except for $100 million in compensation for providing statutorily mandated free mailing privileges to the blind and overseas voters. Kevin R. Kosar, Cong. Research Service, *The U.S. Postal Service's Financial condition: Overview and Issues for Congress*, at 1 (Jan. 19, 2010) (available at www.postalmuseum.si.edu/industrywhitepapers/R41024_20100119.pdf). DeKalb, therefore, could not receive past stormwater charges from the USPS, even were the amendments be found to apply retroactively.

Prior to January 4, 2011, therefore, DeKalb's stormwater charges were not "reasonable service charges" pursuant to 33 U.S.C. § 1323, but impermissible taxes upon Federal ownership of land.

"It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of the State so long as title remains in the United States." *Lee v. Osceola & Little River Improvement Dist.*, 268 U.S. 643, 645 (1925). The United States, however, is obliged to pay fees that arise from its purchase of services for its property. *See United States v. City of Columbia*, 914 F.2d 151, 155-56 (8th Cir. 1990) (holding that United States obliged to pay fees for electricity and water usage). The Supreme Court has distinguished between fees and taxes by noting that "a fee, however, is incident to a voluntary act, ... The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974). The determination of whether an assessment is a fee or a tax is not determined by the label supplied by the state or municipality. *Carpenter v. Shaw*, 280 U.S. 363, 368-69 (1930).

With regards to local taxes upon property, the Supreme Court has held that "[a]ssessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes." *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 707 (1884). As the Fourth Circuit noted in rejecting a "fire service fee" and "flood protection fee," "not every assessment tied to some state-provided benefit is a user fee." *United States v. City of Huntington, West Virginia*, 999 F.2d 71, 72-73 (4th Cir. 1993). "User fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are 'enforced contribution[s] for the support of government.'" *Id*. at 74 (quoting *United States v. La*

Franca, 282 U.S. 568, 572 (1931)). Other courts have broken the inquiry into three parts: (1) whether a legislature or a regulatory agency imposes the charge; (2) whether the charge is assessed against the general public or a more narrow group; and (3) whether the general public or those upon whom the charge is imposed benefits from the charge. *San Juan Cellular Telephone Co. v. Pub. Srvc. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992).

This Court has previously held that stormwater assessments are "taxes" and therefore not collectible against the United States. *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 276 (1997). As in this case, Cincinnati determined the amount of the fee by multiplying the type of development by a measure of the intensity of the development by a predetermined factor to determine the assessment for each property. *Cincinnati*, 39 Fed. Cl. at 272-73; DeKalb Cty. Code § 25-365(e) (assessing fees against commercial property based upon a measure of impervious surface multiplied by a predetermined factor). Although the Federal Circuit later affirmed *City of Cincinnati* on alternative grounds, it noted that with regards to stormwater charges, "[w]hile the United States may be said to be a beneficiary of the storm drainage services provided by the city, it was not offered the opportunity to choose whether to accept those benefits, and it cannot be said to have taken any action (other than not moving out of Cincinnati when the charges were assessed) to indicate its willingness to pay the charges." 153 F.3d 1375, 1377-78 (Fed. Cir. 1998).[6] *See also* Comp. Gen. Dec. B-306666, Decision, Matter of Forest Service - Surface Water Management Fees (Jun. 5, 2006); Comp. Gen. Dec. B-320795,

[6] The Federal Circuit expressly stated that it was not deciding the question of whether a stormwater charge could ever be properly considered a "fee." 153 F.3d at 1378.

Decision, Use of GAO's Appropriations To Pay District of Columbia Stormwater Fee (Sept. 29, 2010).

The DeKalb stormwater assessment is a tax no matter how the issue is evaluated. The United States is assessed the "fee" simply upon the basis of it owning developed commercial property and the amount of impervious surface. DeKalb Cty. Code § 25-365(e). The payment of the fee, therefore, is not incident to the receipt of a service from the city, but, rather, an involuntary exaction. *Hagar*, 111 U.S. at 707. Although owners of developed properties may decrease their liability by taking certain mitigation actions (DeKalb Cty. Code § 25-369), they can only reduce their liability by 40 percent, meaning that they will always have some liability based solely upon their ownership of developed land. DeKalb Cty. Code § 25-369(a). Thus, even were the Federal Government to enact every remedial measure mentioned in section 25-369 and reduce the run-off from its property to that of undeveloped parcels of land, DeKalb would still assess a charge against the Government to pay for abating other stormwater. The charge, therefore, is a tax, because there is no means for a developed property owner to avoid paying it.

Additionally, the county uses the assessments to benefit the public generally by controlling the damage of stormwater, rather than bestowing a particular benefit upon the landowners who pay the fee. *See generally Nat'l Cable Television Ass'n*, 415 U.S. at 340-41. That is to say, the county cannot refuse to provide a non-paying developed-property owner with the service of stormwater management; it can only sue the property owner in court for the unpaid charge. DeKalb Cty. Code § 25-371. The charge is also not targeted at a specific group, but instead paid by all owners of developed property in the county. Emphasizing this connection to the mere ownership of developed property is the fact that the "fee" is actually collected by the

County Property Tax bill received by all landowners and then used to make improvements throughout the county. *See* Exhibit 2.

Further, although the law implies that the fees go into a separate fund, DeKalb County's own website notes that the management of the stormwater system is the shared responsibility of at least three separate divisions of the county, rather than a single utility. *See* Exhibit 1. Even were the funds to be completely segregated from the other funds, the determinative factor is "'whether [the use of the dispute revenue] provides a general benefit to the public of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays [an] agency's cost of regulation.'" *McLeod v. Columbia Cty*, 254 F. Supp.2d 1340, 1347-48 (S.D. Ga. 2003) (quoting *San Juan Cellular Telephone*, 967 F.2d at 685)). The fact that the county is using the fee to perform a traditional governmental function (flood control) that does not confer a greater benefit on those who pay the charges than those who do not demonstrates that this is a tax, not a fee. *See also Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981) (fact that motor vehicle fuels "fee"was segregated did not defeat the fact that it was a tax for purposes of the Tax Injunction Act, because state used the fee for highway construction, a traditional government function).

Finally, DeKalb's reliance upon the Supreme Court of Georgia's decision in *McLeod* is misplaced. First, the reason that the Supreme Court of Georgia heard the case was because a Federal district court had ruled that it did not possess jurisdiction, because the **stormwater assessment was a tax**, and thus subject to the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"). *McLeod*, 254 F. Supp.2d at 1348-49. For purposes of Federal law, therefore, the stormwater assessment was held to be a tax. *McLeod*, 254 F. Supp. 2d at 1348-49; *see McLeod v. Columbia*

Cty, Georgia, 278 Ga. 242, 245 (2004) (describing procedural posture of the case). A ruling by this Court that DeKalb's stormwater charge is a "tax," will not produce a conflict of interpretations, therefore, because a conflict already exists between the courts that have considered the issue of whether stormwater fees in Georgia are fees or taxes. Second, the issue faced by the Supreme Court of Georgia differs from the issue faced by this Court. Specifically, the *McLeod* issue was whether the stormwater assessment was an improper tax, because it was not imposed uniformly, not whether the charge was a tax impermissibly imposed upon the Federal Government. *Id.* at 243-44. As the Supreme Court of Georgia noted, the analysis of whether the charge was a tax for the Tax Injunction Act "clearly differs from state law determinations, because the concept of a tax under the TIA is broadly construed in light of the Act's overarching purpose of preventing federal court interference with state tax systems." *Id*. at 245. Just as the TIA is interpreted broadly in favor of the states, waivers of Federal sovereign immunity are construed strictly in favor of the Federal Government. *Lumbermens*, 654 F.3d at 1311. Thus, this Court is not bound by the decision of the Supreme Court of Georgia (nor would the Supreme Court of Georgia be bound by a determination of this Court), because this Court narrowly interprets purported waivers of sovereign immunity and uses a different test to distinguish between taxes and fees. The Supreme Court of Georgia *McLeod* decision on the Columbia County's stormwater fee, therefore, is not binding upon this Court regarding the issue of whether DeKalb's stormwater assessment is a fee or a tax for purposes of Federal sovereignty.

The DeKalb stormwater assessment was assessed against all owners of developed property for the benefit of the community as a whole. Because it was a not a voluntary fee paid

as an incident to a service, it is a tax, not a fee. The Federal Government, therefore, was not bound to pay it prior to January 4, 2011.

CONCLUSION

We respectfully ask this Court to grant our motion to dismiss DeKalb's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Franklin E. White, Jr.
FRANKLIN E. WHITE, JR.
Assistant Director

Of Counsel
Michael F. Kiely
United States Postal Service

James Misrahi
Department of Health & Human Services
Center for Disease Control

Harold Askins
Department of Veterans Affairs

February 27, 2012

s/ Christopher A. Bowen
CHRISTOPHER A. BOWEN
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. BOX 480
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 305-7594
Facsimile: (202) 353-0461

Attorneys for Defendant