No. 11-761C
(Senior Judge Futey)

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.

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to Rules 5.4(a)(5)(B) and 7.2 of the Rules of the United States Court of Federal Claims (RCFC), and this Court's orders dated May 15, 2012 and June 5, 2012, defendant, the United States, respectfully submits this combined reply and response to Plaintiff's Response to Defendant's Motion to Dismiss and Motion For Partial Summary Judgment, filed by plaintiff DeKalb County, Georgia (DeKalb) on April 30, 2012.

INTRODUCTION

DeKalb seeks a money judgment against the United States in the amount of $281,553.12, plus undefined prejudgment interest, for unpaid stormwater utility fees that were assessed upon various Federal Government properties or facilities in DeKalb County, pursuant to the Code of DeKalb County § 25-360 *et seq.* (DeKalb Code), during the period from 2005 until January 4, 2011. DeKalb alleges that the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (CWA)), 33 U.S.C. § 1323(a), is a money-mandating statute within the scope of the Tucker Act, 28 U.S.C. § 1491. DeKalb alleges that section 1323(a) requires Federal agencies

to pay "reasonable service charges" and that the stormwater utility fees established in the DeKalb Code are, in fact, reasonable service charges that Federal agencies are statutorily required to pay.

In our motion to dismiss, we established that DeKalb's complaint should be dismissed in part, pursuant to RCFC 12(b)(1), for lack of subject matter jurisdiction because a portion (presumably, half) of DeKalb's claims for unpaid 2005 stormwater utility fees accrued prior to November 14, 2005, and, as such, are barred by the applicable six-year statute of limitations, 28 U.S.C. § 2501. In addition, we established that the remainder of DeKalb's claims should be dismissed, pursuant to RCFC 12(b)(6), for failure to state claims upon which relief can be granted. However they are characterized by DeKalb or the Georgia state courts for purposes of state law, the stormwater utility fees at issue are *taxes* for purposes of Federal law and the Supremecy Clause that could not be imposed upon Federal agencies until January 4, 2011, when an unambiguous statutory waiver of sovereign immunity for stormwater charges that are also *taxes* first became effective. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Supremacy Clause of the Constitution prohibits state taxation of Federal Government); *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 276 (1997) (rejecting argument that stormwater service charge based upon "the square footage of the Government's property and the intensity of property's development" was a user fee, holding that it was instead a tax that could not be imposed against the Federal Government), *aff'd upon other grounds*, 153 F.3d 1375 (Fed. Cir. 1998). We also established that the 2011 amendment to 33 U.S.C. § 1323, which waived the United States' sovereign immunity to stormwater charges that are also taxes, cannot be applied retroactively.

In its response to our motion to dismiss (which incorporates its motion for partial summary judgment), DeKalb argues that none of its claims are time-barred, alleging that the

2005 stormwater utility fees were not actually "owed" by property owners until December 31, 2005, and that fees are not "*considered* 'delinquent' . . . until January 1st of the calendar year following the year in which they are billed." DeKalb Resp. 20 (emphasis added). Regarding the merits, DeKalb effectively concedes that the 2011 CWA amendment itself is *not* retroactive. DeKalb Resp. at 19 n.11 ("This Court need not apply the Stormwater Amendment retroactively in order to find in favor of DeKalb County."). DeKalb insists, however, that the amendment was unnecessary, arguing that the only required waiver of sovereign immunity was contained in the 1977 version of 33 U.S.C. § 1323, which requires the United States to pay "reasonable service charges" respecting control and abatement of water pollution.[1] *Id.* DeKalb then argues that its stormwater utility fee satisfies the three-prong test that the Supreme Court established in *Massachusetts v. United States*, 435 U.S. 444 (1978), and that its stormwater utility fee is a reasonable service charge and not a tax. In furtherance of its argument that the stormwater utility fee is not a tax, DeKalb asserts that property owners may apply to receive credits against the fee – and may even apply for a *total* exemption – if they manage their own stormwater runoff in a manner deemed acceptable to DeKalb. DeKalb Resp. at 17.

For the reasons explained in our moving brief and below, the Court should reject DeKalb's arguments and dismiss its complaint. DeKalb's argument that, for statute of limitations purposes, the *entirety* of its stormwater utility fee claim for 2005 accrued on December 31, 2005, is contradicted by the simple fact that DeKalb issued bills that were due on

[1] In their brief filed in support of DeKalb, the *amici* parties (*i.e.*, The National Association of Clean Water Agencies, The National Association of Flood and Stormwater Management Agencies and The American Public Works Association) largely make the same point, but from a slightly different angle. *Amici* argue that the 2011 CWA amendment was nothing more than a "clarification" of what the 1977 version of the statute always required, and, thus, compels the result that the United States is liable for stormwater utility fees for periods prior to 2011. As we explain below, this contention is unsupported by the 1977 statute.

August 15, 2005, which the United States did not pay. Moreover, DeKalb's stormwater utility fee is a classic tax for purposes of Federal law and the Supremacy Clause: the stormwater utility fee is imposed upon the basis of the *status* of the United States as a property owner, and is not incident to any *voluntary* act taken by the United States in compensation for a separately identifiable benefit from DeKalb County. *See National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340-41 (1974). This conclusion is not undermined in the least by DeKalb's suggestion that the Federal agencies could apply for an exemption from the involuntary "fee." Taxes are frequently subject to exemptions and credits; this does not convert a tax into a fee. To be a user fee, the charge must be incident to an affirmative request for a service, and DeKalb does not allege that the Federal agencies at issue in this case had *requested* stormwater utility services from DeKalb.

In addition, Congress did not, prior to 2011, waive the sovereign immunity of the United States to involuntary taxes of this sort. DeKalb's argument that the 1977 version of 33 U.S.C. § 1323 itself waived sovereign immunity for taxes is contrary to well-settled law establishing that a waiver of sovereign immunity must be unambiguous, and will be construed as narrowly as possible in favor of the United States. For similar reasons, the Court should reject *amici's* "clarification" argument. While it would seem doubtful that an earlier statute that expressly waived the sovereign immunity of the United States *ever* could be "clarified" by a future Congress in a manner that would retroactively expand the scope of an earlier waiver, *amici's* suggestion that Congress intended such a result here is not supported by the language of the amendment or its legislative history.

ARGUMENT

I. The United States' Motion To Dismiss Should Not Be Converted To A Motion For Summary Judgment

In its response, DeKalb argues that this Court is required to convert the United States' motion to dismiss to a motion for summary judgment. DeKalb Resp. at 8 ("[t]he United States has presented matters outside the pleadings and is essentially arguing the merits of the case in its motion to dismiss . . . . Thus, under RCFC 12(d), the United States' motion to dismiss 'must be treated' as a motion for summary judgment."). DeKalb is wrong.

As an initial matter, in raising this argument, DeKalb simply ignores the fact that our motion to dismiss is based upon both RCFC 12(b)(1) and RCFC 12(b)(6). Def. Mot. at 1. To the extent that our motion to dismiss elements of DeKalb's complaint is based upon RCFC 12(b)(1), the plain language of RCFC 12(d) actually precludes the Court from converting our motion into a motion for summary judgment. RCFC 12(d) states, in part: "If, ***on a motion under RCFC 12(b)(6) or 12(c)***, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. . . ." (emphasis added). It is well settled that "[c]onversion of a 12(b)(1) motion to dismiss into a summary judgment motion is not provided for by RCFC 12(b)." *North Hartland, L.L.C. v. United States*, 78 Fed. Cl. 172, 178 (2007), *aff'd*, 309 F. App'x 389 (Fed. Cir. 2009). Accordingly, our RCFC 12(b)(1) motion is proper as filed and should not (indeed, can not) be converted into a motion for summary judgment. DeKalb's argument is contradicted by the plain language of the rule and must be rejected.

In addition, with respect to our RCFC 12(b)(6) motion to dismiss elements of DeKalb's complaint (*i.e.*, DeKalb's claims for stormwater utility fees that accrued after November 14, 2005), we presented no materials outside the pleadings that would require conversion of the

motion into a motion for summary judgment. Our motion was filed with two exhibits, and both of those exhibits were merely printouts of the content of DeKalb's own public website as it relates to stormwater utility fees. Def. Mot. at Exh. 1 and 2. This Court is permitted to take judicial notice of the content of DeKalb County's public website. *See, e.g., Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) ("[W]e fail to see any merit to an objection to the panel taking judicial notice of the state agency's own website."). Moreover, taking judicial notice of public records does not require the court to treat a motion to dismiss as one for summary judgment. *See, e.g., Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999) ("In deciding whether to dismiss a complaint under Rule 12(b)(6), the court may consider matters of public record."). Accordingly, the Court can and should take judicial notice of DeKalb's stormwater utility website without converting our RCFC 12(b)(6) motion into a motion for summary judgment.

II. The Court Should Reject DeKalb's Argument That All Of Its Claims Relating To The 2005 Stormwater Utility Fee Accrued After November 14, 2005

In our moving brief, we established that DeKalb is improperly seeking stormwater utility fees for the entirety of 2005 despite the fact that its claims that accrued prior to November 14, 2005 are barred by the jurisdictional six-year statute of limitations, 28 U.S.C. § 2501. Def. Mot. at 11. In its response, DeKalb mistakenly argues that the 2005 year stormwater utility fees did not "accrue" until December 31, 2005.

As an initial matter, DeKalb misstates the applicable law. As we established in our moving brief, it is well settled 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, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998). In its response, DeKalb, relying upon *Empire Institute of Tailoring, Inc. v. United States*, 161 F. Supp. 409, 411 (Ct. Cl. 1958), argues that "a claim for services rendered 'accrues,' and the six

year statute of limitations begins to run, 'when the last services were rendered.'" DeKalb Resp. at 19. DeKalb's argument is based upon a misreading of *Empire Institute*.

In *Empire Institute*, the plaintiff had filed suit on June 27, 1957, seeking a money judgment for the difference between the amount of monthly tuition that the Veterans Administration had paid it for its services in operating a trade school and the amount it asserted to be a "customary rate of tuition" that the VA was allegedly required to it pay pursuant to a Federal statute. *Id.* at 410. The period for which the services had been performed was January 1, 1950, through March 31, 1951, and at all times during that period the VA had refused to pay the higher amounts sought by the plaintiff. *Id.* at 411. In dismissing the plaintiff's complaint as barred by the six-year statute of limitations, the Court of Claims held that, because the Government had refused to recognize plaintiff's claim "at all times" during the period of performance, plaintiff could have sued as the services were completed. The Court stated that the statute of limitations would begin to run "at the latest" on March 31, 1951. That statement merely reflects that, in a case which involved a dispute about a monthly fee, the plaintiff's claim relating to March 1951 would accrue at the end of that month. The plaintiff's claims relating to *other* months of the period at issue would accrue (and the statute of limitations would begin to run upon those claims) on a monthly basis. *Empire Institute* does not support DeKalb's broader argument that *all* claims related to services accrue "when the *last* services were rendered" regardless of when the *first* services were performed and invoiced.

Indeed, DeKalb's argument in this regard is in conflict with the principles underlying the "continuing claims doctrine." "Under those general principles the cause of action for pay or compensation accrues as soon as the payor fails or refuses to pay what the law (or the contract) requires; there is no other condition precedent to the accrual of the cause of action. . . . *And*

where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought." *Friedman v. United States*, 310 F.2d 381, 385 (Ct. Cl. 1962) (emphasis added). Thus, DeKalb is wrong in arguing that the statute of limitations runs from the *end* of the period of services. Instead, for each individual demand for payment, the statute of limitations began to run upon the due date for the payment that the United States failed to pay.

Applying the proper rule of law, DeKalb's stormwater utility fee claims that relate to the first half of 2005 are barred by the statute of limitations and should be dismissed for lack of jurisdiction. DeKalb issued stormwater bills to the United States for which payment was due on August 15, 2005. DeKalb Resp. Booth Aff., Exhibit 1. The United States did not pay the bills by the deadline. DeKalb then filed suit to recover the amount of the bills, but it delayed filing the suit until November 14, 2011 – more than six years later. Accordingly, DeKalb's claims for the stormwater charges that were due on August 15, 2005, are barred by the six-year statute of limitations.

The Court should reject DeKalb's argument that – notwithstanding the plain language of the bills that were presented to the United States – these bills were really not due on August 15, 2005. DeKalb bears the burden of establishing this Court's jurisdiction and it has not established (or even alleged) that it could not have filed suit against the United States as early as August 2005. DeKalb's argument that stormwater utility fees are not *considered* delinquent until January 1st of the calendar year following the year in which they are billed is not supported by any language in section 25-371(b), or any other section, of the DeKalb Code and it is flatly contradicted by the undisputed fact that DeKalb issued invoices to the Government that expressly demanded payment by August 15, 2005. Contrary to DeKalb's representation that this

was merely a method of pre-payment for the convenience of customers, *see* Booth Aff. at ¶ 5-7, the notices are clear: "This fee is ***due*** in two equal installments: August 15th and November 15." (emphasis added). Again, DeKalb bears the burden of proving that it could not file suit against the United States immediately after the deadline. It has not done so, and the Court should therefore grant our motion to dismiss DeKalb's complaint to the extent that DeKalb is suing to recover amounts payable by the August 15, 2005 deadline.

III. The DeKalb Stormwater Utility Fee Is A Tax For Which Congress Had Not Waived The United States' Sovereign Immunity In The 1977 Version Of 33 U.S.C. § 1323

In its response to our motion, DeKalb argues that the stormwater utility fee is not a tax, but is instead a "reasonable service charge," and that Congress had already obligated Federal agencies to pay reasonable stormwater service charges in the 1977 version of 33 U.S.C. § 1323. DeKalb failed to dispute our argument that the 2011 amendments to 33 U.S.C. § 1323 cannot be applied retroactively, stating only that the Court "need not apply the Stormwater Amendment retroactively in order to find in favor of DeKalb County." DeKalb Resp. at 19 n.11. Because it failed to respond, the Court should hold that DeKalb has effectively conceded that the 2011 amendments are *not* retroactive. *Hopkins v. Women's Div, General Bd. of Global Ministries*, 284 F. Supp.2d at 25 (D.D.C. 2003). Accordingly, the Court should reject both premises of DeKalb's argument and hold that (1) the stormwater utility fee is a tax for purposes of federal law and the Supremacy Clause; and (2) the 1977 version of 33 U.S.C. § 1323 did not waive the United States' sovereign immunity from state taxation.

A. The Stormwater Utility Fee Is A Tax

In our moving brief, we demonstrated that the DeKalb County stormwater utility fee is a tax because it is an involuntary charge assessed against all landowners to make improvements throughout the county relating to a traditional governmental function (flood control). DeKalb's

alleged "service" does not confer any greater benefit upon those who pay the charges than those who do not. We noted that, for most landowners in DeKalb County, the stormwater utility fee is a simply another item on the county tax bill. Def. Mot. at Exh. 2. DeKalb responds that the Supreme Court's test in *Massachusetts v. United States*, 435 U.S. 444 (1978), is the appropriate test to apply in determining whether its stormwater charge is a valid fee or a tax, and that application of that test demonstrates that the stormwater utility charge is a fee. DeKalb is wrong on both points.

First, the Court should reject DeKalb's argument that the *Massachusetts* test is applicable here. In that case, the Supreme Court held that a Federal statute that imposed a registration tax on all civil aircraft (including those owned by the Commonwealth of Massachusetts) was also a "user fee" that did not violate the implied immunity of a state government from Federal taxation. The case is inapposite because it involved the reverse situation, where a state was challenging a Federal tax, unlike the situation here where the Federal Government is challenging a state tax. This is an important distinction because the Federal Government's immunity from state taxation is founded upon the Supremacy Clause of the Constitution. Although the states possess an *implied* immunity from certain Federal taxation, that immunity is not identical to the Federal Government's *absolute* immunity from state taxation and it is not based upon the Supremacy Clause. In *United States v. City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990), an early case holding the *Massachusetts* test inapplicable to state charges against the Federal Government, the court of appeals recognized that the states are only immune from Federal taxation "that would unduly burden essential state functions." *Id.* (citing *Massachusetts*, 435 U.S. at 459-60). Essentially, the *Massachusetts* test is used to measure whether a Federal tax threatens to unduly burden state functions. A Federal tax that is also a "user fee" will not generally unduly burden

state functions, and is permissible. The converse is not true however, as the states cannot tax the Federal Government at all. Therefore, application of a test which is intended to measure the burden of a tax upon government functions is inapplicable in this context.

Both the Supreme Court and the Federal Circuit have recognized that the *Massachusetts* test was dependent upon the particular constitutional provisions at issue in that case.[3] For example, in *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367-68 (1998), the Supreme Court rejected the United States' reliance upon *Massachusetts* in support of its argument that the Harbor Maintenance Tax (HMT) was a user fee, stating that *Massachusetts* "involved constitutional provisions other than the Export Clause, however, and thus do not govern here." *Id.*[4] This qualification of *Massachusetts* was recognized by both the Federal Circuit and the Comptroller General. *See Thomson Multimedia Inc. v. United States*, 340 F.3d 1355, 1361 (Fed. Cir. 2003) (In holding that, under *Massachusetts* test, HMT was a constitutional user fee in connection with *imports*, the Federal Circuit distinguished *U.S. Shoe*, stating that, in *U.S. Shoe*, the Supreme Court rejected the *Massachusetts* test and decided the case upon the basis of a more stringent standard specific to the Export Clause); Forest Service – Surface Water Management Fees, B-306666, 2006 WL 1550189 at *9 n.9 (Comp. Gen. June 5, 2006) ("We view the *Massachusetts* test as factually and conceptually inapposite, and accordingly we do not apply it to analyze the constitutionality of King County's SWM fee as assessed against the federal government."). Other courts have also decided that the *Massachusetts* test is inapplicable to the question whether a state charge against the Federal Government is a tax. *E.g., United States v.*

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[3] The *Massachusetts* test was largely derived from cases addressing the scope of Congress's authority under the Commerce Clause.

[4] The Export Clause, like the Federal Government's immunity from state taxes is absolute; beneficial purposes are irrelevant.

City of Huntington, West Virginia, 999 F.2d 71, 73 n.5 (4th Cir. 1993) (In holding that city could not impose a municipal services fee encompassing a "fire service fee" and a "flood protection fee" upon the United States, court of appeals held that test applied in *United States v. Maine*, 524 F. Supp. 1056 (D. Me. 1981) (which, in turn, had applied *Massachusetts v. United States*) was not applicable in suit involving Federal Government challenge to state charge).

Particularly in view of the *Federal Circuit's* acknowledgment that the *Massachusetts* test is *not* universally applicable to determining whether a charge is a fee or a tax, this Court should disregard the other cases upon which DeKalb relies (*e.g.*, *United States v. Maine*; *New York St. Dept. of Env. Cons. v. Dept. of Energy*, 850 F. Supp. 132 (N.D.N.Y. 1994); *National R.R. Passenger Corp. v. City of New York*, 695 F. Supp. 1570 (S.D.N.Y. 1988); *State of Me. v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992)), where a court applied the *Massachusetts* test in analyzing whether a charge against the Federal government was a fee or tax, as having incorrectly decided that issue.[5] In addition, the Court should reject DeKalb's suggestion, see DeKalb Resp. at 15 n.8, that the *Massachusetts* test should be applied because the 2011 amendments to 33 U.S.C. § 1323(c) included language similar to the *Massachusetts* test in the definition of "reasonable service charges." Given that the very definition that DeKalb references specifically acknowledges that "taxes" are *now* payable as "reasonable service charges," this

[5] In at least one of the cases relied upon by DeKalb, the Federal defendant did not contest the court's application of the *Massachusetts* test and the application of the test should be considered *dicta*. *See New York St. Dept. of Env. Cons. v. Dept. of Energy*, 772 F. Supp. 91, 99 (N.D.N.Y. 1991). Moreover, when the Second Circuit affirmed the district court decision in *National R.R. Passenger Corp.*, the court expressly applied the *National Cable* test and *not* the *Massachusetts* test. *See National R.R. Passenger Corp. v. City of New York*, 882 F.2d 710 (2nd Cir. 1989) ("The payments in question fit precisely within the meaning of non-tax fees developed in *National Cable*. They are voluntary payments made to the City in return for a benefit, the use of City property, received by Amtrak."). Thus, *National R.R. Passenger Corp.* actually supports our argument that that *Massachusetts* test is inapplicable to any analysis of a state charge against the Federal Government.

definition actually supports our argument that the *Massachusetts* test is inappropriate in cases not covered by the 2011 amendment because that test blurs the distinction between fees and taxes. Congress has simply now decided that Federal agencies should – prospectively – pay certain stormwater charges that are also taxes.

Although the DeKalb stormwater utility fee is a tax regardless of whether it is evaluated under the *Massachusetts* test, as did the Court in *City of Cincinnati v. United States*, 39 Fed. Cl. 271 (1997), this Court should apply the principles stated by the Supreme Court in *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340-41 (1974) – namely, that a "fee" is incident to a *voluntary* act (such as a request by a Federal agency for a service) and given in return for a *benefit* to the user. As we demonstrated in our moving brief, DeKalb's stormwater utility fee is very similar to the stormwater charge that was rejected as a tax by this Court in *City of Cincinnati*, and DeKalb's stormwater charge should be rejected as a tax for the same reason.

DeKalb attempts to avoid this by arguing (1) that its stormwater utility fee is based upon a "fair approximation of the costs of benefits provided" to the United States and (2) "DeKalb County's ordinance only imposes a fee if service is provided." DeKalb Resp. at 16-18. The first argument is similar to the argument that this Court rejected in *City of Cincinnati*, where the Court stated:

> Under the system enacted by the City of Cincinnati, during a month of drought or a month of flooding, the federal government would be assessed the same amount of storm drainage service charges. Although the formula in plaintiff's Stormwater Management Code for calculating the storm drainage service charge describes the charge as a "storm drainage service charge," establishes a goal of basing the charges on runoff and usage, and details component charges, ultimately, it is assessed by the City of Cincinnati as a charge estimated on the square footage of the government's property and on the intensity of the property's development. The plaintiff's storm drainage service charges . . . therefore, are not user fees based on actual use. . . .

City of Cincinnati, 39 Fed. Cl. at 276. This same reasoning applies here. DeKalb's stormwater utility fee is similarly not based upon actual usage or an approximation of an actual benefit. It is an involuntary exaction of the sort that has always been considered a tax. *United States v. LaFranca*, 282 U.S. 568, 572 (1931); *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 707 (1884).

DeKalb's argument that its stormwater utility fees are not taxes because they are "segregated in an enterprise fund 'for the purpose of dedicating and protecting all funding applicable to the purposes and responsibilities of the utility,'" DeKalb Resp. at 18, is unavailing. As we established in our moving brief (see Def. Mot. at 19), segregation of DeKalb's stormwater collections in a separate "enterprise fund" would not, as a matter of law, compel a holding that the stormwater charge was not a tax. That argument has been routinely rejected by the courts. For example, in *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 135 (4th Cir. 2000), the Fourth Circuit held that the Solid Waste Assessment Fee imposed by the West Virginia Code was a tax for purposes of the Tax Injunction Act (TIA), notwithstanding the alleged segregation of funds collected pursuant to that "fee." The court stated:

> [T]he fact that revenue is placed in a special fund is not enough reason on its own to warrant characterizing a charge as a "fee." If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial. Thus, when revenue is placed in a special fund the further inquiry must be whether the money is used "to benefit regulated entities, ... to defray the cost of regulation" (making it resemble a "fee") or else to benefit the general public. As discussed above, the purpose of the special fund serves neither purpose that would render it a "fee" but falls squarely within the characterization of a "tax." Lastly, even though the revenue is placed in a special fund, it is nonetheless deposited into the State Treasury pursuant to West Virginia law, which further militates towards the widespread benefit of the charge.

Id. (internal citations omitted). As we demonstrated above and in our moving brief, DeKalb stormwater utility fees are intended to benefit the general public and they do not approximate any actual benefit provided to the United States.

In addition to its being irrelevant as a matter of law, DeKalb's factual premise that its stormwater utility fees are "segregated" is belied by the plain language of the DeKalb Code. We note that, although DeKalb concedes that the county is "authorized to fill any gaps in funding stormwater services . . . with other revenues, receipts and resources," DeKalb Resp. at 18 (citing DeKalb Code § 25-364(b), DeKalb ignores section 25-364(c), which provides authority for the county to "pledge all or any portion" of the stormwater charges to pay "revenue bonds or other obligations lawfully issued or otherwise contracted for by the county." In fact, it appears that the stormwater utility fee produces revenues that can be used by DeKalb County for purposes *unrelated* to the stormwater "service." This further confirms that the stormwater charge is a tax.

DeKalb's argument that it "only imposes a fee if service is provided" also should be considered fundamentally inconsistent with the nature of any "fee" that is itself not dependent upon the voluntary request for a service and receipt of a benefit based upon actual use of the service. The DeKalb Code would require that the stormwater utility fee be imposed, and in the same amount, during a hypothetical, year-long drought where not a drop of rain fell and no "service" was provided to any landowner. Thus, DeKalb's argument is not supported by the cases upon which it relies – *Matter of City of Ansonia, Connecticut, Sewer Services Claim*, 65 Comp. Gen. 692 (1986), and *United States v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990). In those cases, affirmative and intentional Government action was required in order to *use* the system. For example, in *City of Ansonia, Connecticut*, before the Army could use the city's sewer services a physical connection between the Army's housing and the city sewer system was

necessary.[6] Similarly, in *City of Columbia*, the Government did not contest its obligation to pay a basic user fee for the city's providing it water and electrical services. The dispute involved only a *particular element* of the user fee that the Government contended was a tax. These cases do not aid DeKalb, or provide any support for the proposition that a stormwater charge is similar to user fees imposed based upon voluntary and intentional use of a service.

The Court should reject DeKalb's argument that its stormwater utility fee is not a tax because DeKalb Code § 25-368 permits a landowner to apply for a *total exemption* from the fee – and not just the 40 percent credit that we acknowledged in our moving brief.[7] This exemption does not change the analysis. The bottom line is that the stormwater charge is not dependent upon a voluntary request for the provision of a service and it is not calculated upon any approximation of the actual use of a service or the provision of an actual benefit. That a landowner could theoretically obtain an exemption from the stormwater fee by submitting to onerous technical requirements[8] and obtaining a certification by "a professional engineer licensed in Georgia" does not convert an involuntary exaction into a user fee. The Internal Revenue Code contains numerous exemptions and credits, but they do not convert taxes into fees

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[6] In fact, in *City of Ansonia*, the GAO concluded that the Government did *not* become obligated to pay for sewer services at the time when the Government property was first connected to the city sewer system without the Government's knowledge or consent. It was only, later, when the Government was informed about the connection and *voluntarily* "accepted" the benefit, that the Government became obligated to pay for the "service."

[7] We acknowledge that in our moving brief we misstated that the 40 percent credit was the outer limit of relief from the fee permitted by the DeKalb Code and that there was no possibility that a landowner could avoid the fee altogether.

[8] *See* DeKalb County Stormwater Utility Fee Credit Manual, http://www.co.dekalb.ga.us/publicwrks/stormwater_mangmt/pdf/StormwaterUtilityCreditManual.pdf ("Onsite disposal of runoff on an annual as well as a 100-year storm event basis through storage, infiltration, and/or evaporation must be documented in a technical report.").

even when applicable. This Court should hold that DeKalb County stormwater utility fees are taxes.

Finally, for the reasons we demonstrated in our moving brief, Def. Mot. at 20, the Court should reject DeKalb's suggestion, DeKalb Resp. at 3, that its stormwater fee is not a tax because the Supreme Court of Georgia held, in *McLeod v. Columbia County*, 599 S.E. 2d 152 (Ga. 2004), that a similar stormwater fee imposed by another Georgia county was not a tax for state law purposes. As we noted in our brief, the only reason the Georgia Supreme Court addressed the issue was because a Federal district court had remanded the suit to that court after holding that the stormwater charge at issue was a "tax" for purposes of applying the TIA. *See McLeod v. Columbia Cty*, 254 F. Supp.2d 1340, 1348 (S.D. Ga. 2003) (court held that Federal law, not state law, determines whether a charge is a tax for purposes of the TIA, and that Georgia county's stormwater charge was a "tax").

To conclude that the DeKalb stormwater fee is a tax, this Court need not even consider whether the Georgia state court erred in *McLeod*. As we established in our moving brief, this Court is deciding an issue of *Federal* law under the Supremacy Clause. The issue under Federal law is different, and the 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 when deciding how to treat the charges under state law). In a different context, Federal courts applying the TIA have, for years, recognized and accepted that a particular charge might be determined to be a tax in a Federal court but a fee in a state court. Because the TIA was, in part, intended to further a congressional "desire to end the use of the federal courts to disrupt the collection of local revenues," *Tramel v. Schrader*, 505 F.2d 1310, 1316 (5th Cir. 1975), the Federal courts have often resisted overly narrow conceptions of a tax. In contrast, "state classifications of revenue

raising measures depended on the use to which the revenue would be put. Such distinctions as to use were deemed not relevant to the congressional purpose of comity underlying the Tax Injunction Act which was primarily directed to precluding federal judicial interference with the collection of the revenues, regardless of use." *Robinson Protective, Etc. v. City of Philadelphia*, 581 F.2d 371, 374 n.6 (3rd Cir. 1978). Moreover, as noted in *Tramel*, state court decisions that address whether a charge is a fee or a tax are generally decided as a matter of state law controlled by state constitutions, state statutes, and state court precedents. *See, e.g.*, *Tramel*, 505 F.2d at 1316 n.7 ("In their brief, plaintiffs cite numerous cases . . . in which Texas courts have said that special assessments are not taxes. These decisions deal only with the meaning of the term 'taxes' in the context of Texas statutes and the Texas Constitution. They are not controlling in determining what Congress meant by the term 'taxes' when it prohibited federal courts from interfering in the collection of taxes); *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So.2d 180 (Fla. 1995) (applying state law in determining stormwater charge to be a fee); *Bolt v. City of Lansing*, 587 N.W. 2d 264 (Mich. 1998) (applying state law in determining stormwater charge to be a tax); *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 264 P.3d 907 (Idaho 2011) (applying state law in determining stormwater charge to be a tax). These state cases are simply not relevant to the tax versus fee issue before this Court because the issue is not identical and the considerations are different.

In cases before the Court of Federal Claims, like this case and *City of Cincinnati*, where the plaintiff's money claims against the United States will necessarily implicate both the general limitations of the Tucker Act's waiver of sovereign immunity **and** the potential applicability of the Supremacy Clause to a tax verses fee question, the Court must be especially careful to avoid expanding the conception of a "user fee" in a manner that cannot be squared with well-settled

Supreme Court test – *i.e.*, *National Cable Television* – which has generally been used to distinguish taxes from fees in cases that potentially implicate the Supremacy Clause. Because, under that test, DeKalb's stormwater fee cannot be characterized as anything other than a tax, its complaint should be dismissed for failure to state claims upon which relief can be granted.

B. The 1977 CWA Did Not Waive The United States' Sovereign Immunity From State Taxation

In conceding that the 2011 CWA amendment was not retroactive, DeKalb argues that the 1977 version of 33 U.S.C. § 1323 waived the United States' sovereign immunity to its stormwater utility fees. DeKalb Resp. at 9-10, 19 n.11. This argument must be rejected as contrary to well established law regarding the interpretation of a waiver of sovereign immunity. Having established in our moving brief, and above, that DeKalb's stormwater utility fee is a *tax*, it should be beyond debate that there was no waiver of sovereign immunity that would cover this *tax* in the 1977 version of the statute.

The general rules for interpreting waivers of sovereign immunity were addressed in our moving brief. After our brief was filed, the Supreme Court, in *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (U.S. Mar. 28, 2012), again reaffirmed these rules in its decision that narrowly construed the scope of a waiver of sovereign immunity for "actual damages" contained in the Privacy Act as not including damages for mental or emotional distress. The Court stated:

> We have said on many occasions that a waiver of sovereign immunity must be "unequivocally expressed" in statutory text. *See, e.g., Lane v. Peña*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. *Lane*, *supra*, at 192, 116 S.Ct. 2092. Any ambiguities in the statutory language are to be construed in favor of immunity, *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131

> L.Ed.2d 608 (1995), so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–686, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) (citing *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 71 L.Ed. 472 (1927)). Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government. *Nordic Village*, *supra*, at 34, 37, 112 S.Ct. 1011.

Id.[9] In *Cooper*, the Supreme Court concluded that, because it was *plausible* that "actual damages" in the Privacy Act provision at issue was limited to *economic* loss, the statute could *not* be read to waive the Government's sovereign immunity to damages for mental and emotional distress. *Id.*, at 1453. Similarly, this Court should conclude that, because it is plausible that the 1977 statute waived the United States' sovereign immunity to certain state regulation of federal activities (including reasonable service charges) only with respect to charges that are *not* properly characterized as taxes, it cannot be read to waive sovereign immunity to state taxation. It would violate the rule that a waiver must be *unequivocal* to accept DeKalb's argument that the 1977 waiver extended to state taxation.[10] The Supreme Court has emphasized that "statutes placing the United States in the same position as a private party [are to be] read narrowly to

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[9] In addition to these general rules relating to interpreting waivers of sovereign immunity, DeKalb's claim for prejudgment interest also fails the "no interest rule," which requires that a waiver of sovereign immunity for pre-judgment or post-judgment interest be separate and distinct from the general waiver of sovereign immunity upon which the suit is based. *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1126 (Fed. Cir. 2004), *cert. denied sub nom. Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 544 U.S. 1031 (2005) (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 314-15 (1986)).

[10] Congress clearly knows how to waive the United States' immunity to state taxation, and even where it does waive sovereign immunity to state taxation, that waiver does not in itself waive the Government's sovereign immunity to interest or penalties. *See United States v. Lewis County*, 175 F.3d 671 (9th Cir. 1999) (court of appeals held that statute that provided that certain property of the Federal Government was generally "subject to taxation by State, territory, district, and local political subdivisions in the same manner and to the same extent as other property is taxed," did not waive sovereign immunity to interest or penalties).

preserve certain immunities that the United States has enjoyed historically." *Library of Congress v. Shaw*, 478 U.S. at 320.[11]

IV. The 2011 CWA Amendment Lacks Retroactive Effect As A "Clarification" Of The 1977 Version Of 33 U.S.C. § 1323

Although DeKalb itself does not argue that the 2011 CWA amendment has a retroactive effect, the *amici* parties, relying upon *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999), and *United States v. Sanders*, 67 F.3d 855 (9th Cir. 1995), argue that the legislative history of the 2011 amendment suggests that the amendment was a "clarification" of existing law and that, as such, "it should be used in interpreting the provision in question as if it had always been so clarified." *Amici* Br. at 9-10. In *United States v. City of Renton*, No. C11–1156JLR, 2012 WL 1903429 (W.D. Wash. May 25, 2012), a district court accepted this argument in concluding that the United States had waived sovereign immunity to pre-2011 stormwater charges imposed by two cities in the State of Washington. This Court should reject the argument because application of the clarification maxim in the manner asserted here is wholly incompatible with the well-settled rules applicable to interpreting a statute that waives the sovereign immunity of the United States.

As we noted above, the Supreme Court has consistently held that a waiver of sovereign immunity must be unequivocally expressed with any ambiguities resolved in favor of immunity. *Cooper*, 132 S. Ct. at 1448. The "clarification" test proposed by the *amici* would necessarily

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[11] DeKalb's suggestion that a waiver of sovereign immunity to stormwater charges that are taxes should be inferred from legislative history relating to the 1977 amendment to the CWA, DeKalb Resp. at 10 n.6, conflicts with Supreme Court precedent concerning the interaction of statutory amendments and preexisting provisions. *See, e.g., Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973) (Supreme Court held that – notwithstanding that Congress had amended Fair Labor Standards Act's preexisting definition of an "employer" subject to liability, to include state hospitals – the amendment did not waive states' immunity from Federal court suits brought by citizens of that state or another state).

violate these requirements because the application of the test generally requires a holding that the prior statute was *not* unequivocal, but was ambiguous. *See Amici* Br. at 9 (clarification test "requires an analysis of: (1) whether statutory language is ambiguous and therefore in need of clarification. . . ."); *Piamba*, 177 F.3d at 1283-84 ("A significant factor is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted. If such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law.").

A statute that had unequivocally and unambiguously waived the United States' sovereign immunity would, presumably, *never need clarification* from a subsequent Congress. Although, in *City of Renton*, the district court correctly noted that "[t]he Supreme Court has held 'that the sovereign immunity canon is a tool for interpreting the law and that it does not displace the other traditional tools of statutory construction," *City of Renton*, 2012 WL 1903429 at *5 (quoting *Cooper*, 132 S. Ct. at 1448), the district court's conclusion that the 2011 amendment supports interpreting the 1977 version of 33 U.S.C. § 1323 to include stormwater charges that are taxes is inconsistent with the Federal Circuit's statement that "[i]t is an error to suppose that the ordinary canons of statutory construction are to be applied in [determining the scope of a waiver of sovereign immunity], *if they would add anything to what Congress has expressly said.*" *Fidelity Const. Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983) (emphasis added).

In this regard, it is notable (but not surprising) that neither the *amici* nor the *City of Renton* court identified any prior instances of the legislative clarification maxim being used to retroactively expand the scope of a prior waiver of sovereign immunity. As have other courts, this Court should reject the idea that the sovereign immunity doctrine can be so easily evaded by

means of other rules of statutory construction. In a slightly different context, the District of Columbia Circuit stated this concept clearly:

> As they relate to the question whether a statute is retroactive, then, it would seem that the *Bradley* [*v. Richmond School Board*, 416 U.S. 696 (1974)] presumption and the rule of strict construction are antipodal. In the usual case – that is, the case in which no waiver of sovereign immunity is involved – *Bradley* requires the court to presume that the newly enacted provision is retroactive; only where manifest injustice would result, or where Congress can be seen to have intended otherwise, is that presumption rebutted. In the special case, however, in which the newly enacted statute is a waiver of sovereign immunity, the rule of strict construction requires the opposite: the statute is to be construed no more broadly than is required by its terms.

Brown v. Secretary of the Army, 78 F.3d 645, 650-51 (D.C. Cir. 1996). Here, regardless of whether the 2011 amendment would otherwise be considered a "clarification," that fact does not permit the Court to add the word "tax" to the waiver of sovereign immunity contained in the version of the statute that was applicable during the period at issue in this case. Accordingly, this Court should reject *amici's* argument and decline to follow the district court's erroneous decision in *City of Renton.*

In addition to the general invalidity of the "clarification" concept in this context, *amici's* argument that Congress intended that Federal agencies make *retroactive* payments of unpaid stormwater charges is not supported by the statute or the legislative history cited by *amici*. As we established in our moving brief, Def. Mot. at 13, there is nothing in the express language of the 2011 amendment, or in its legislative history, that obviously indicates that Congress intended the amendment to retroactively obligate Federal agencies to pay state taxes, such as the DeKalb stormwater charges at issue in this case. The legal standard is high. "The 'words used [in the statute must be] so clear, strong, and imperative that no other meaning can be annexed to them, or ... the intention of the legislature [must be such that it] cannot be otherwise satisfied.'" *See*

Ward v. Dixie Nat. Life Ins. Co., 595 F.3d 164, 174 (4th Cir. 2010) (quoting *U.S. Fid. & Guar. Co. v. United States*, 209 U.S. 306, 313-14 (1908)). Although the *amici* trumpet the title of the amendment, and cite several instances in which members of Congress stated that the amendment was intended to clarify that Federal agencies are required to pay reasonable service charges (regardless of whether they are properly characterized as taxes), *Amici* Br. at 11-12 nn.14-16, none of these statements is inconsistent with a more limited congressional intention that the clarifying language be applied only prospectively. And, because it is "presume[ed] that Congress is aware of the legal context in which it is legislating," *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979)), it should be presumed that Congress understood the legal context as implicating the well-settled rule that a waiver of sovereign immunity must be unequivocally expressed, such that any intention to expand the 1977 waiver of sovereign immunity to include taxes could not result from a "clarification" but would require specific language in the amendment sufficient to overcome the presumption against statutory retroactivity.

The amendment lacks the required language. There is simply no basis upon which to hold that Congress intended retroactive application of the amendment simply because the legislative history indicates that some members of Congress expressed disapproval of the actions of Federal agencies that had refused to pay stormwater charges and/or had expressed support for policies that might be advanced by applying the amendment retroactively. *See Landgraf v. USI Film Products*, 511 U.S. 244, 285-86 (1994) ("It will frequently be true, as petitioner and *amici* forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal, and compromises necessary to

their enactment may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute.") (footnote omitted).[12]

CONCLUSION

For the foregoing reasons and those stated in our moving brief, we respectfully request that the Court grant our motion to dismiss and deny DeKalb's motion for partial summary judgment.

Respectfully submitted,

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[12] *Amici's* assertion of a congressional intention to impose a retroactive obligation upon Federal agencies that had refused to pay stormwater charges also appears to be undermined by the "limitation on accounts" provision in the 2011 amendment, which expressly states that payment for stormwater charges "shall not be made using funds from any permanent authorization account in the Treasury." *See* 33 U.S.C. § 1323(c)(2)(A). Judgments of this Court are generally paid through the Judgment Fund, which is a permanent appropriation in the Treasury that is authorized by 31 U.S.C. § 1304. Thus, accepting *amici's* argument would require the Court to conclude that Congress imposed a retroactive liability for prior years while at the same time excluded the ordinary source of funds used to pay Court of Federal Claims' judgments and compromise settlements.

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CERTIFICATE OF FILING

I hereby certify that on July 20, 2012, a copy of the foregoing "DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Franklin E. White, Jr.