IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

Plaintiff,

v.

UNITED STATES OF AMERICA and
UNITED STATES POSTAL SERVICE,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS and BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

RESPONSE TO STATEMENT OF THE ISSUES

(1) This Court should deny the United States' motion to dismiss DeKalb County's claims for failure to state a claim upon which relief can be granted because the stormwater utility fees at issue are reasonable charges--not a tax--for services provided to Defendants, for which Congress has waived sovereign immunity pursuant to both the Clean Water Act, 33 U.S.C. § 1323, and the Tucker Act, 28 U.S.C. § 1491.

(2) This Court should deny the United States' motion to dismiss DeKalb County's claims as being outside the statute of limitations because the claims for stormwater utility fees asserted in the Complaint did not accrue until December 31, 2005, within the six (6) year statute of limitations contained in 28 U.S.C. § 2501.

(3) Construing the undisputed material facts in the light most favorable to the United States, DeKalb County is entitled to entry of partial summary judgment in its favor finding that: (a) the sovereign immunity of the United States has been waived for reasonable service charges pursuant to the Clean Water Act, 33 U.S.C. § 1323(a), and the Tucker Act, 28 U.S.C. § 1491; and (b) DeKalb County's stormwater utility fees are reasonable service charges under 33 U.S.C. § 1323 for which Defendants are liable.

FACTUAL BACKGROUND

The Federal Water Pollution Control Act ("FWPCA"), generally known as the Clean Water Act ("CWA"), as amended by the Water Quality Act of 1987, and rules promulgated by the U.S. Environmental Protection Agency pursuant to the CWA, emphasize the role of local governments in developing and implementing stormwater programs to address water quality impacts of pollution and development. 33 U.S.C. § 1251 *et seq.* In addition, local governments such as DeKalb County must meet regulatory obligations imposed by the National Pollutant

Discharge Elimination System ("NPDES") program, 40 C.F.R. § 122 *et seq.*, and the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 *et seq.*

In order to achieve these federal objectives, DeKalb County undertook a comprehensive review by staff and professional consultants and concluded a stormwater utility program funded by user fees provided the most reasonable means of meeting the challenge of providing stormwater management services and facilities. Code of DeKalb County, as Revised 1988 ("DeKalb Code") § 25-360 (h), (i); *See generally* DeKalb Code § 25-360 *et seq.* (a copy of which was filed with the Complaint and is attached hereto as Exhibit A); Affidavit of Ted Rhinehart, Deputy Chief Operating Officer, Infrastructure, ¶¶ 3, 4. DeKalb County conducted a statistical analysis of the level of impervious surface presented by different types of properties and the anticipated cost of providing stormwater services and facilities to such users of the stormwater system in DeKalb County. Rhinehart Affidavit, ¶¶ 4, 7. Using that information to set rates that "fairly and reasonably [apportion] the costs" among users, DeKalb County established the stormwater fee for each "equivalent residential unit (ERU)" at $4.00 per month. DeKalb Code § 25-365.[1]

The Home Rule section of the Georgia Constitution, Ga. Const. 1983, Art. IX, Sec. II, Par. III (a)(6), grants Georgia local governments the power to provide the service of "storm water . . . collection and disposal systems" and to "prescribe, revise, and collect rates, fees, tolls

[1] Single family properties are charged for one ERU, multifamily properties are "charged the rate applicable to one (1) equivalent residential unit times the number of dwelling units located on the multiple dwelling unit property times an adjustment factor that adjust(s) the ERU to equal the median impervious coverage of a statistical sampling of a single dwelling unit within a multiple dwelling lot in DeKalb County, which has been determined to be 0.5," and all other developed lands are charged for one ERU "for each three thousand (3000) square feet of impervious surface or increment thereof on the property, rounded to the next highest tenth" of an ERU. *See* DeKalb Code § 25-365.

or charges for the services, facilities, or commodities furnished or made available by such undertaking." Thus, DeKalb County is authorized by the State of Georgia to provide stormwater systems and services and impose fees on users of those systems and services. This power was upheld and ratified by the Georgia Supreme Court in 2004, which concluded a stormwater utility charge based on the amount of impervious surface was a legitimate fee for services and not a tax. *McLeod v. Columbia County,* 278 Ga. 242, 245 (2004).

DeKalb County's stormwater utility "promotes an essential regulatory purpose by controlling where stormwater runoff flows and how it is disposed . . . thereby reducing flooding, erosion and water pollution caused by stormwater runoff." DeKalb Code § 25-360 (e); Rhinehart Affidavit, ¶ 5. The stormwater utility "provide[s] a specific service to property owners by assisting in the property owner's legal obligation to control stormwater runoff from their property and ensure that runoff does not flow upon their neighbors in greater quantities than it would if the property were in an undeveloped state." DeKalb Code § 25-360 (f); Rhinehart Affidavit, ¶ 5. The services and facilities provided by the stormwater utility are designed to mitigate "the impact of stormwater runoff from developed property" and help "prevent damage that would subject a property owner to civil liability." DeKalb Code § 25-360 (f); Rhinehart Affidavit, ¶ 5.

DeKalb County's ordinance only imposes a fee if service is provided: customers are exempt from the fee if they manage all of the stormwater runoff generated by their activities on site. DeKalb Code § 25-368 ("[a]ny property whereby one hundred (100) percent of the stormwater runoff is contained on the premises and no runoff enters into [DeKalb County's]

stormwater management system" is exempt).[2] Undeveloped land and public and railroad rights-of-way, where much if not all stormwater is absorbed into the ground, are similarly exempt. DeKalb Code § 25-368; *See generally* Sen. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3691, 3718-3719 (October 28, 1971) (undeveloped land does not pose the burden on stormwater systems that developed land does). In addition, users may receive "stormwater service charge credits" if they create or maintain on-site systems or facilities that reduce their use of DeKalb County's systems and facilities. DeKalb Code § 25-369 (outlining the availability of and standards for obtaining credits).[3]

DeKalb County's ordinance does not discriminate among fee payors, requiring every user of the stormwater system to pay fees for the services provided. This is exemplified by the fact that DeKalb County is itself billed for and remits to the stormwater utility fees for properties it owns that utilize the stormwater system. Affidavit of Joel Gottlieb, Director of Finance, DeKalb County ¶ 3-4.[4]

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[2] The United States' contention otherwise throughout its Motion to Dismiss is inaccurate. *E.g.,* Defendant's Motion, pp. 15, 18

[3] There is no evidence that the United States has applied for or otherwise claimed it is entitled to any exemption or credit provided for in DeKalb County's stormwater utility ordinance and no evidence the United States has any taken steps to reduce or eliminate its use of the DeKalb County stormwater systems during the years in question. This Court should consider Defendants' continued use of the stormwater services and facilities provided as acceptance of those services. *See, e.g., Matter of City of Ansonia, Connecticut, Sewer Services Claim,* 65 Comp. Gen. 692 (1986).

[4] For years 2005 to 2011, DeKalb County has paid the DeKalb County stormwater utility $2,546,217 for stormwater services and facilities provided to the County. Gottlieb Affidavit, ¶ 4. In addition, DeKalb County pays stormwater fees to other jurisdictions for DeKalb County properties that utilize stormwater systems owned by those jurisdictions. Gottlieb Affidavit, ¶ 5. DeKalb County is only asking Defendants to honor their obligations pursuant to the CWA in the same way DeKalb County itself does.

The stormwater utility fees collected by DeKalb County 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 Code § 25-264(a); Gottlieb Affidavit, ¶ 6. All stormwater utility fees must be deposited in the enterprise fund and used to pay expenses of the stormwater utility. DeKalb Code § 25-364 (a), (b); Gottlieb Affidavit, ¶¶ 6-7; Rhinehart Affidavit, ¶ 6; Affidavit of Andrew Booth, Deputy Tax Commissioner and Director of Delinquent Collections, DeKalb County Tax Commissioner, ¶ 8. DeKalb County's stormwater utility fee was structured to produce revenues that would approximate the total cost of the benefits provided to users, with the ordinance allowing DeKalb County to supplement stormwater utility fees with other revenues, receipts and resources, if needed. DeKalb Code § 25-364 (b); Rhinehart Affidavit, ¶¶ 3-4, 7.

For many years DeKalb County has been seeking to obtain payment of its stormwater utility fees (alternatively referred to as "stormwater service charges") from the United States of America and the United States Postal Service (collectively, the "United States" or "Defendants").[5] Defendants have frustrated DeKalb County's efforts and treated stormwater utility fees inconsistently, paying the fees for some facilities and refusing to pay for other facilities. Booth Affidavit, ¶ 9. By way of correspondence and discussions with Defendants'

[5] It appears the Motion to Dismiss at issue was only filed on behalf of the United States, as it is styled as "Defendant's" motion and does not specifically address the claims against the United States Postal Service ("USPS") except in a footnote. *See* Defendant's Brief, at p. 15, n. 5. To the extent the Motion to Dismiss is construed as being asserted on behalf of the USPS, the same facts and arguments presented by DeKalb County to demonstrate the validity of its claims against the United States apply to the claims against the USPS, with the additional ground that 39 U.S.C. § 401 provides independent authorization for suit against the USPS. DeKalb County seeks entry of partial summary judgment against both the United States and the USPS.

counsel and letters dated March 9, 2010 and October 13, 2011, DeKalb County formally notified Defendants of its intention to sue to collect stormwater fees due, owed and unpaid.

ARGUMENT AND CITATION TO AUTHORITIES

This Court should deny the United States' motion to dismiss DeKalb County's claims for failure to state a claim upon which relief can be granted because DeKalb County's stormwater utility fees are reasonable charges--not a tax--for services provided to Defendants, for which Congress has waived sovereign immunity pursuant to both the CWA, 33 U.S.C. § 1323, and the Tucker Act, 28 U.S.C. § 1491. Further, this Court should deny the United States' motion to dismiss DeKalb County's claims as being outside the statute of limitations because the claims for stormwater utility fees asserted in the Complaint did not accrue until December 31, 2005, within the six (6) year statute of limitations contained in 28 U.S.C. § 2501.

Moreover, construing the material facts in the light most favorable to Defendants, DeKalb County is entitled to entry of partial summary judgment in its favor finding that: (a) the sovereign immunity of the United States has been waived for reasonable service charges pursuant to the Clean Water Act, 33 U.S.C. § 1323(a), and the Tucker Act, 28 U.S.C. § 1491; and (b) DeKalb County's stormwater utility fees are reasonable service charges under 33 U.S.C. § 1323 for which Defendants are liable.

1. Standard of Review on Motion to Dismiss Pursuant to RCFC 12(b)(1) and 12(b)(6) and Motion For Summary Judgment Pursuant to RCFC 56 and 83(a).

The United States has moved to dismiss DeKalb County's Complaint, basing its motion on Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"). Rule 12(b)(1) provides for dismissal of a claim for which the court has a "lack of jurisdiction over the

subject matter." RCFC 12(b)(1). Rule 12(b)(6) provides for dismissal when a plaintiff "fail[s] to state a claim upon which relief can be granted." RCFC 12(b)(6).

A court's subject matter jurisdiction depends on the "court's general power to adjudicate in specific areas of substantive law." *Palmer v. United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999). In weighing the evidence in a motion to dismiss, "whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Hamlet v. United States,* 873 F.2d 1414, 1416 (Fed. Cir. 1989); *LaMirage, Inc. v. United States,* 44 Fed. Cl. 192, 196 (1999). "Any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." *Wright v. United States*, 81 Fed. Cl. 369, 374 (2008). A court must presume that undisputed factual allegations in the complaint are true. *Miree v. DeKalb County,* 433 U.S. 25, 27 n. 2 (1977); *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed. Cir. 1988); *La Mirage, Inc.,* 44 Fed. Cl. at 196.

If, however, a party presents matters outside of the pleadings and such materials are not excluded, "a motion to dismiss must be treated as one for summary judgment under RCFC 56." RCFC 12(d). Under RCFC 56, a court may grant summary judgment only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Under RCFC 83(a), the same summary judgment standard applies as in the federal district courts, namely: summary judgment is proper if the evidence, viewed in the light most favorable to the non-moving party and resolving doubts against the movant, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. RCFC 56(c); Fed. R. Civ. P. 56(c); *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 247-48 (1986); *Helifix, Ltd. v. Blok-Lok, Ltd.,* 208 F.3d 1339, 1345-46 (Fed. Cir. 2000). Here, the United States has presented matters outside the pleadings and is essentially arguing the merits of the case in its motion to dismiss. *See* Defendant's Brief, at pp. 15-21 and Exhibits 1 and 2. Thus, under RCFC 12(d), the United States' motion to dismiss "must be treated" as a motion for summary judgment.

Under these standards, the United States' Motion should be denied. Construing the allegations of the Complaint and the undisputed material facts in DeKalb County's favor, DeKalb County's stormwater utility fees are reasonable service charges--not a tax--for which Congress has waived sovereign immunity in both the CWA, 33 U.S.C. § 1323(a), and the Tucker Act, 28 U.S.C. § 1491. Further, DeKalb County's claims to recover such fees have been timely filed.

Moreover, considering the undisputed material facts in the light most favorable to Defendants, partial summary judgment should be granted in favor of DeKalb County, and against Defendants, on the issues of: (a) whether the sovereign immunity of the United States has been waived for reasonable service charges; and (b) whether DeKalb County's stormwater utility fees are reasonable service charges under 33 U.S.C. § 1323(a) for which Defendants are liable.

2. DeKalb County's stormwater utility fee is a reasonable service charge–not a tax--for which Congress has waived the sovereign immunity of the United States under the CWA.

This Court should not dismiss DeKalb County's claims for failure to state a claim upon which relief can be granted because DeKalb County's stormwater utility fees are reasonable charges--not a tax--for services provided to Defendants, for which Congress has waived

sovereign immunity pursuant to both the CWA, 33 U.S.C. § 1323(a), and the Tucker Act, 28 U.S.C. § 1491.

(a) The immunity of the United States has been waived.

When Congress enacted Section 313 of the FWPCA in 1972, creating what is now generally known as the "Federal facilities pollution control" section of the CWA (codified at 33 U.S.C. § 1323), it was concerned about two sources of water pollution–federal facilities and nonpoint sources–that continue to contribute to water quality problems today. Evidence presented to Congress "disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities" and led Congress to acknowledge that "Federal facilities generate considerable water pollution." S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3733 and 3746 (Oct. 28, 1971). Congress acknowledged the "[l]ack of Federal leadership has been detrimental to the water pollution control effort," and that the "Federal government cannot expect private industry to abate pollution if the Federal Government continues to pollute." *Id.* The report of the Senate Committee on Public Works regarding § 1323 indicates an intent that federal facilities "meet all [water pollution] control requirements as if they were private citizens." 1972 U.S.Code Cong. & Admin.News p. 3734.

To address these concerns, Congress waived the United States' sovereign immunity in the CWA, providing that each federal agency shall be subject to, and comply with, "all local requirements, administrative authority and process and sanctions respecting the control and abatement of water pollution . . . *including the payment of reasonable service charges*." 33 U.S.C. § 1323(a) (emphasis added). Since 1977, the pertinent portion of § 1323(a) has read as follows:

Each department, agency, or instrumentality of the executive, legislative, and

> judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

See P.L. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598, 33 U.S.C. § 1323(a).[6] Thus, under the CWA, federal departments, agencies, or instrumentalities of any branch of the federal government having jurisdiction over any facility which has or may have polluted water runoff are subject to the requirements of § 1323(a) like any private entity, and any claims of immunity have been

[6] In 1977 Congress amended the CWA (and the Clean Air Act) in response to decisions of the United States Supreme Court in *Hancock v. Train,* 426 U.S. 167 (1976) and *EPA v. California ex rel. State Water Res. Control Bd.,* 426 U.S. 200 (1976). In response to those decisions, Congress stated:

> The Act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of the State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent. Since the substantive requirements of the act and of State and local law would be unenforceable unless procedural provisions were also met, Section 313 is amended to specify that, as in the case of air pollution, a Federal facility is subject to any Federal, State, and local requirement respecting the control or abatement of water pollution, both substantive and procedural, to the same extent as any other person is subject to those requirements. This includes, but is not limited to . . . the payment of reasonable service charges.

S. Rep. No. 370, 95th Cong., 1st Sess 67, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4392 (emphasis added).

waived thereby. *See City of Cincinnati v. United States,* 2007 WL 956432, 2007 U.S. Dist. LEXIS 26991, 5 (S.D. Oh. 2007)(finding city's stormwater charge based on each property's contribution to runoff "falls squarely within the waiver of sovereign immunity contained in [33 U.S.C. § 1323(a)]").

Moreover, the Tucker Act, 28 U.S.C. § 1491, waives sovereign immunity with respect to any claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act does not create substantive rights, but instead contains jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law, such as statutes like 33 U.S.C. § 1323(a). *See United States v. Testan*, 424 U.S. 392, 400 (1976); *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 538 (1980). "The other source of law need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it 'can be fairly interpreted as mandating compensation by the Federal Government.'" *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (internal citations omitted). This "fair interpretation" rule "demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *Wolfchild v. United States,* 96 Fed. Cl. 302, 325 (2010), *citing United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003); *see also United States v. Mitchell (Mitchell II),* 463 U.S. 206, 218–19 (1983)("Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity" . . . "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to

add to its rigor by refinement of construction where consent has been announced"). Accordingly, "[i]t is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *Wolfchild,* 96 Fed. Cl. at 325, *citing White Mountain Apache Tribe*, 537 U.S. at 473; *see Adair v. United States*, 497 F.3d 1244, 1250 (Fed. Cir. 2007) ("Tucker Act jurisdiction requires merely that the statute be fairly interpreted or reasonably amenable to the interpretation that it mandates a right of recovery in damages.") (citations and internal quotations omitted). "[A] fair inference will do." *White Mountain Apache Tribe*, 537 U.S. at 473.

Based on the statutory language, legislative history and case law, the inescapable conclusion is that U.S.C. § 1323(a) should be fairly interpreted as requiring the United States to pay reasonable service charges imposed against the United States. The Tucker Act, 28 U.S.C. § 1491(a)(1), provides a procedural method for enforcing the right to collect such charges, irrespective of any claims of immunity.

DeKalb County seeks damages for the failure of Defendants to pay reasonable service charges authorized under the CWA. It has brought its claims under both the CWA and the Tucker Act. As discussed above, sovereign immunity for such damages has been waived under both the CWA and the Tucker Act. Notably, the United States does not appear to contest that 28 U.S.C. § 1491(a)(1) and 33 U.S.C. § 1323(a) operate to waive the sovereign immunity of the United States for reasonable service charges. Defendants' Brief, pp. 15-16 (arguing DeKalb's stormwater charges are not "reasonable service charges" pursuant to 33 U.S.C. § 1323, but impermissible "taxes," and conceding the United States is "obligated to pay fees that arise from its purchase of services for its property."). Instead, the United States' argument is that this Court should find DeKalb County's stormwater utility fee to be a "tax" from which the United States is

immune. Defendant's Brief, pp. 15-18. As discussed more fully in the following subsection, DeKalb County's stormwater utility fee is a reasonable service charge for which sovereign immunity has been waived pursuant to the CWA *and* the provisions of the Tucker Act.

(b) DeKalb County's stormwater utility fee is a reasonable service charge–not a tax–for which Defendants are liable.

This Court is empowered to apply the rules of statutory construction and make a determination of whether DeKalb County's stormwater utility fee is a "reasonable service charge" under 33 U.S.C. § 1323(a) for which Defendants are liable. The answer to that inquiry turns on whether DeKalb County's stormwater utility ordinance establishes a legitimate fee or, as the United States argues, an invalid tax.

Courts have applied varied standards when evaluating whether a charge constitutes a fee or a tax, some general and others more specific.[7] They all share a common theme–evaluating

[7] A "tax" has been described as "an enforced contribution to provide for the support of government." *United States v. LaFranca*, 282 U.S. 568, 572 (1931) (holding that a charge was a penalty rather than a tax, and reasoning that "[n]o mere exercise of the art of lexicography can alter the essential nature of an act or a thing; if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such). "The classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 957 F.2d 683, 685 (1st Cir. 1992) (citations omitted). "A fee, however, is incident to a voluntary act . . . [t]he 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 Assn. v. United States,* 415 U.S. 336, 340-41 (1974). "User fees are payments given in return for a government-provided benefit." *United States v. City of Huntington*, West Virginia, 999 F.2d 71, 74 (4th Cir. 1993). The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. *See New England Power Co. v. U.S. Nuclear Regulatory Commission,* 683 F.2d 12, 14 (1st Cir. 1982). Such a fee may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. *See, e.g., South Carolina ex rel. Tindal v. Block,* 717 F.2d 874, 887 (4th Cir.1983). Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

"all the facts and circumstances of record in the case . . . to determine the essential nature" of the contested charge. *United States v. City of Columbia, Mo.,* 914 F.2d 151, 153-154 (8th Cir. 1990) (holding charge called "payment in lieu of taxes" placed in general revenue fund was profit component of water and electricity bill and did not constitute an invalid tax on the federal government). What must be considered is "the real nature of the tax and its effect upon the federal right asserted." *United States v. City of Huntington, West Virginia,* 999 F.2d at 73 (finding city's fire service and flood protection fee based on the square footage of buildings was an invalid tax because it was not linked to use but, instead, the mere status of the United States and United States Postal Service as property owners). "The implied immunity of one government and its agencies from taxation by the other should as a principle of statutory construction be narrowly restricted." *United States v. Maryland*, 471 F.Supp. 1030, 1039 (D. Md. 1979), citing *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 483 (1939).

The Supreme Court has established a three-pronged test for determining whether a charge is a legitimate fee or a tax. *See Massachusetts v. United States*, 435 U.S. 444, 464-67 (1978). Under the *Massachusetts* test, a charge is a valid fee where it is:

> (1) imposed in a nondiscriminatory manner;
>
> (2) based on a "fair approximation of the use of the system" (such as the cost of that use); and
>
> (3) is "structured to produce revenues that will not exceed the total cost to the [government] of the benefits being supplied."

435 U.S. at 467 (finding a federal aircraft registration charge that adjusted upward for larger

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See, e.g., Union Pacific Railroad Co. v. Public Utility Commission, 899 F.2d 854, 856 (9th Cir. 1990); *see also Nat'l Cable Television Assn.,* 415 U.S. at 343-344.

aircraft was a valid fee, although labeled a tax and used to provide benefits to all air traffic). The *Massachusetts* test has been applied by many courts to evaluate whether a state charge constitutes a valid fee or invalid tax. *E.g., United States v. Maine*, 524 F. Supp. 1056, 1059 (D. Me. 1981)(holding charge on federal credit unions funding general consumer protection efforts and providing at most an "incidental" benefit to the credit unions was invalid); *New York Dep't of Envtl. Conservation v. United States Dept. of Energy,* 850 F. Supp. 132, 135, 141-143 (N.D. N.Y. 1994) (applying *Massachusetts* test*,* state charges "constitute reasonable fees, not tax-like exactions"); *Nat'l R.R. Passenger Corp. v. City of N.Y.,* 695 F. Supp. 1570, 1575-1577 (S.D.N.Y. 1988) (applying *Massachusetts* test and finding rental payments challenged by Amtrak were not taxes); *Maine v. Dep't of Navy*, 973 F.2d 1007, 1011-1015 (1st Cir. 1992)(applying *Massachusetts* test to state environmental charge imposed against Navy); *United States v. City of Columbia, Mo.,* 914 F.2d at 153 (United States argued three-part *Massachusetts* test should be used to evaluate state charge against federal credit unions); *see generally* Federal Facility Payment of State Environmental Fees, 38 Naval L. Rev. 149, 157-161 (1989).[8]

[8] Moreover, the *Massachusetts* test was adopted by Congress when it enacted the Stormwater Amendment, S. 3841, U.S.C. § 1323(c), subtitled "An Act to amend the Federal Water Pollution Control Act to ***clarify*** Federal responsibility for stormwater pollution," signed by President Barack Obama on January 4, 2011 (emphasis added). The Stormwater Amendment, enacted in response to some federal agencies disputing their responsibility to pay reasonable service charges for stormwater services and facilities, amended § 313 of the CWA, 33 U.S.C. § 1323, by adding subsection (c):

> (c) REASONABLE SERVICE CHARGES. –
>
> (1) IN GENERAL. – For 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

When all the facts and circumstances of record are examined, it becomes apparent the "essential nature" of DeKalb County's stormwater charge is that of a "reasonable service charge" under 33 U.S.C. § 1323(a). It is not an enforced contribution to provide for the general support of government, and does not raise money that is contributed to a general fund to be spent for the benefit of the entire community. *Cf. United States v. LaFranca*, 282 U.S. 568, 572 (1931)(a tax is an "enforced contribution to provide for the support of government"); *Nat'l Cable Television Ass'n. v. United States,* 415 U.S. at 340-41 (1974) (a classic tax "raises money, contributed to a general fund, and spent for the benefit of the entire community").

Moreover, DeKalb County's stormwater utility fee satisfies each of the three prongs of the *Massachusetts* test.[9] DeKalb County's stormwater utility fee qualifies as being imposed in a nondiscriminatory manner because it is applicable to all users of the system (including DeKalb County itself). *See* DeKalb Code §§ 25-365; Gottlieb Affidavit, ¶¶ 3-4. The stormwater utility fee is based on a fair approximation of the cost of benefits provided to each user of the system considering that the stormwater utility fee rate formula was constructed based on a statistical

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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 as a tax.

S. 3841, 11TH Cong. (Dec. 21, 2010), P.L. 11-378, § 1, 124 Stat. 4128.

[9] The United States/USPS appear to concede that DeKalb County's stormwater utility fee satisfies the requirements of 33 U.S.C. § 1323(c) and, consequently, the *Massachusetts* test, because they have paid the majority of such fees incurred since § 1323(c) became law on January 4, 2011. Booth Affidavit, ¶ 9.

analysis of the level of impervious surface presented by different types of properties and the anticipated cost of providing stormwater services and facilities to such users of DeKalb County's stormwater system. DeKalb Code §§ 25-360(h), 25-365(a); Rhinehart Affidavit, ¶¶ 3-4, 7. To further ensure that the fee charged fairly approximates the cost of the services provided to the user, DeKalb County's ordinance only imposes a fee if service is provided: Customers are exempt from the fee if they manage all stormwater runoff generated by their activities on site, DeKalb Code § 25-368 ("[a]ny property whereby one hundred (100) percent of the stormwater runoff is contained on the premises and no runoff enters into [DeKalb County's] stormwater management system" is exempt), and users can obtain "stormwater service charge credits" if they create or maintain on-site systems or facilities that reduce their use of DeKalb County's stormwater system. DeKalb Code § 25-369 (outlining the availability of and standards for obtaining credits).[10]

[10] Unlike the ordinance considered by this Court and the U.S. Court of Appeals for the Federal Circuit in the *City of Cincinatti v. United States* matters, 39 Fed. Cl. 271 (1997) and 153 F.3d 1375 (Fed. Cir. 1998), DeKalb County's ordinance does not establish an inescapable charge based solely upon the mere fact of property ownership. *See* DeKalb Code §§ 25-368, 369 (exemptions and credits available if a person does not use the stormwater system). The United States' contention otherwise at pages 15 and 18 of its Motion is erroneous. DeKalb's fee is more analogous to the City of Seattle monthly sewage disposal surcharge, *Sewers – Service Charges – Sewage Disposal Surcharge,* 42 Comp. Gen. 246 (1962) (finding sewage disposal surcharge based on the amount of water used and imposed equally on all users of the system was a "reasonable service charge" and "not an assessment constituting an involuntary exaction"), the City of Ansonia's sewer fee, *Matter of City of Ansonia, Connecticut, Sewer Services Claim*, 65 Comp. Gen. 692 (1986) (sewer assessment based on flat rate per linear frontage foot was a reasonable estimate of the construction cost payable by the United States, and continued use by Army after notification of the charge constituted acceptance), or the City of Columbia's utility fee, *U.S. v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990) (charge denominated as a "payment in lieu of taxes" and earmarked for the City's general revenue fund was not, after considering the facts in light of the economic realities, an invalid tax but instead a profit component of the rate payable by the United States), all of which have been upheld by the Comptroller General or the Courts.

DeKalb County's stormwater utility fee is designed to produce revenues that will approximate the total cost of the benefits provided to users. Rhinehart Affidavit, ¶¶ 3-4, 7. In fact, the stormwater utility fees collected by DeKalb County 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 Code § 25-264(a); Gottlieb Affidavit, ¶ 6; Rhinehart Affidavit, ¶ 6. All stormwater utility fees must be deposited in the enterprise fund and used to pay expenses of the stormwater utility, DeKalb Code § 25-364 (a), (b); Booth Affidavit, ¶ 8; Gottlieb Affidavit, ¶¶ 6-7; Rhinehart Affidavit ¶ 6-7, with DeKalb County authorized to fill any gaps in funding the stormwater services and facilities provided with other revenues, receipts and resources. DeKalb Code § 25-364 (b).

The United States' contention that DeKalb County's stormwater utility charge should be considered a tax is based, at least in part, on the *factually incorrect* assertion that the stormwater utility charge constitutes an inescapable charge against real property. *Compare* the United States' Motion, pp. 15-18 with DeKalb Code § 25-368 (describing exempt properties). Similarly, the United States' reliance upon a test from the *San Juan Cellular* decision is misplaced. *See* United States' Motion, at p. 17, citing *San Juan Cellular Telephone Co. v. Pub. Srvc. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992). In *San Juan Cellular* the Court was analyzing a charge under the Tax Injuction Act ("TIA"), which involves applying a very broad standard designed to err on the side of "impeding federal court interference with state tax systems." *See McLeod v. Columbia County, Ga.,* 254 F. Supp.2d 1340, 1345 (S.D. Ga. 2003), citing *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 670 (11th Cir. 1984). Moreover, although federal law governs what constitutes a tax under the TIA, "state law determinations as to whether a fee is a tax may still be pertinent or instructive." *McLeod*, 254 F. Supp.2d at 1345. Since the time of the *McLeod* TIA

decision, the Georgia Supreme Court in *McLeod v. Columbia County* held the same stormwater utility charge linked to the amount of impervious surface was a legitimate fee for services and not a tax. 278 Ga. at 245. This Court should reject the United States' claim that DeKalb County's stormwater utility fee is an invalid tax.[11]

3. DeKalb County's claims have all been asserted within the six year limitations period of 28 U.S.C. § 2501 because the earliest claim did not "accrue" until December 31, 2005.

Congress has restricted the authority of this Court to adjudication of those claims brought within the six-year statute of limitations: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. A claim "first accrues" for purposes of § 2501 when "all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action," "although a claim does not accrue until the claimant has suffered damages." *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998). This Court has held that a claim for services rendered "accrues," and the six year statute of limitations begins to run, "when the last services were rendered." *Empire Institute of Tailoring, Inc. v. United States*, 142 Ct. Cl. 165, 161 F. Supp. 409, 411 (1958). As the plaintiff in this action,

[11] The United States appears to contend DeKalb County cannot prevail unless it demonstrates the Stormwater Amendment, S. 3841, U.S.C. § 1323(c), subtitled "An Act to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution,"contains a retroactive waiver of sovereign immunity. *See* United States' Motion, at pp. 11-15. DeKalb County disagrees because Congress waived sovereign immunity for reasonable services charges such as DeKalb County's stormwater utility fee in the 1972 and 1977 amendments to the CWA. This Court need not apply the Stormwater Amendment retroactively in order to find in favor of DeKalb County. DeKalb County shows the Stormwater Amendment is instructive in this matter in two respects: (1) it demonstrates the consistent desire of Congress that federal facilities pay reasonable service charges such as DeKalb County's stormwater utility fee; and (2) it demonstrates that the proper test for discerning a legitimate fee from an invalid tax is that contained in *Massachusetts v. United States*.

DeKalb County has the burden of establishing that its claims have been timely filed. *Alder Terrace, Inc.*, 161 F.3d at 1377.

DeKalb County can meet its burden of demonstrating that the claims alleged in its Complaint have been timely filed. DeKalb County's stormwater fee is an annual fee that is imposed for the calendar year period beginning January 1st and ending December 31st. *See* DeKalb Code 25-366; Booth Affidavit, ¶ 4; Rhinehart Affidavit, ¶ 8. Similarly, stormwater services are provided throughout the year, with the service period ending each December 31. Rhinehart Affidavit, ¶ 8. Unpaid stormwater utility fees are not considered "delinquent" for purposes of DeKalb Code 25-371(b) until January 1st of the calendar year following the year in which they are billed. Booth Affidavit, ¶ 5. No late charges are imposed and no collection efforts are undertaken until on or after that date. *Id.* Thus, DeKalb County's claims for year 2005 stormwater utility fees did not accrue for purposes of 28 U.S.C. § 2501 until December 31, 2005, when the last services were rendered and the last day such charges could be paid before becoming delinquent.[12] For these reasons, this Court should deny the United States' motion to dismiss certain of DeKalb County's claims as being outside the statute of limitations because the

[12] DeKalb County's ordinance permits stormwater utility fees to "be billed separately, or on a customer statement and collected along with other fees for services, at the County's sole discretion, provided that in no instance shall the service charge constitute a direct lien against property." DeKalb Code § 25-371 (in contrast, pursuant to O.C.G.A. § 48-2-56 (d)(1) ad valorem taxes do constitute a direct lien against property). While in many instances the stormwater utility fees are included, for administrative convenience, on the annual bill that includes other fees and ad valorem taxes, in the case of the United States and other tax exempt entities the fees are billed on a separate "Stormwater Utility Notice." *See, e.g.,* Booth Affidavit, ¶ 6 and Exhibit 1 (DeKalb County Stormwater Utility Notice). For administrative convenience and the convenience of customers, stormwater utility fee payments may be made in two installments aligned with the due dates for other charges and ad valorem taxes, which for 2005 was August 15 and November 15. Booth Affidavit, ¶ 7. The option of pre-paying stormwater utility fees in installments does not change the character of the charge, which remains an annual fee that becomes delinquent at the close of the calendar year. *Id.*

claims for stormwater utility fees asserted in the Complaint did not accrue until December 31, 2005, within the six (6) year statute of limitations contained in 28 U.S.C. § 2501.

4. DeKalb County is entitled to entry of partial summary judgment in its favor.

The undisputed material facts, considered in the light most favorable to the United States, demonstrate that no genuine issue exists on whether DeKalb County's stormwater utility fee is a reasonable service charge the United States must pay. DeKalb County's stormwater utility fee is structured as a reasonable fee for services provided to the United States that satisfies each of the three prongs of the *Massachusetts* test, and the essential nature of the stormwater charge is that of a "reasonable service charge" under the CWA. For all of the reasons set forth herein, DeKalb County's stormwater utility fee cannot properly be characterized as a tax. DeKalb County is entitled to entry of partial summary judgment in its favor finding that: (a) the sovereign immunity of the United States has been waived for reasonable service charges; and (b) DeKalb County's stormwater utility fees are reasonable service charges under 33 U.S.C. § 1323(a) for which Defendants are liable.

CONCLUSION

This Court should deny the United States' motion to dismiss DeKalb County's claims because DeKalb County's stormwater utility fees are reasonable charges--not a tax--for services provided to Defendants, for which Congress has waived sovereign immunity pursuant to both the CWA and the Tucker Act. Further, this Court should deny the United States' motion to dismiss DeKalb County's claims because the claims for stormwater utility fees asserted in the Complaint did not accrue until December 31, 2005, within the applicable six (6) year statute of limitations.

DeKalb County respectfully asserts that applying the law to the undisputed material facts, construed in the light most favorable to Defendants, DeKalb County is entitled to entry of partial

summary judgment in its favor finding that: (a) the sovereign immunity of the Defendants has been waived for reasonable service charges pursuant to the CWA, 33 U.S.C. § 1323(a), and the Tucker Act, 28 U.S.C. § 1491; and (b) DeKalb County's stormwater utility fees are reasonable service charges under 33 U.S.C. § 1323(a) for which Defendants are liable.

Respectfully submitted this 30th day of April, 2012.

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiff,

v.

UNITED STATES OF AMERICA and UNITED STATES POSTAL SERVICE,

Defendants.

CIVIL ACTION FILE NO. 11-761C

CERTIFICATE OF SERVICE

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

Franklin Elgin White , Jr.
Christopher A. Bowen
Commercial Litigation Branch, Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044

Dated this 30th day of April, 2012.

/s/ Sam L. Brannen, Jr.
Sam L. Brannen, Jr.
Senior Assistant County Attorney
Georgia Bar No. 077301

Person. The term "person" shall mean any person, firm, partnership or corporation.

Phosphorus. The term "phosphorus" shall mean elemental phosphorus.
(Ord. No. 89-21, § 1, 5-23-89)

Sec. 25-303. Sales prohibited.

It shall be unlawful for any person to sell at the retail level a household laundry detergent which contains greater than five-tenths (0.5) percent phosphorus by weight and is intended to be used for domestic clothes-cleaning purposes.
(Ord. No. 89-21, § 1, 5-23-89)

Sec. 25-304. Penalties for violation.

Any person who violates any provision of this division shall be subject to a fine not to exceed the maximum fine allowed under this Code. Each sales transaction shall constitute a separate offense.
(Ord. No. 89-21, § 1, 5-23-89)

Sec. 25-305. Civil action.

In addition to the penalty provided in section 25-304 above, the county may maintain an action or proceeding in any court of competent jurisdiction to compel compliance with or restrain any violation of this division.
(Ord. No. 89-21, § 1, 5-23-89)

Sec. 25-306. Individual right to damages.

Nothing in this division shall be construed to abridge, limit or otherwise impair the right of any person to damages or other relief on account of injuries to persons or property arising out of a violation of this division and to maintain any action or other appropriate proceeding thereof.
(Ord. No. 89-21, § 1, 5-23-89)

Secs. 25-307—25-359. Reserved.

ARTICLE V. STORMWATER UTILITY

Sec. 25-360. Findings.

The board of commissioners of DeKalb County, Georgia makes the following findings:

(a) The federal Clean Water Act, as amended by the Water Quality Act of 1987 (33 U.S.C. 1251 et seq.), and rules promulgated by the United States Environmental Protection Agency pursuant to the Act emphasizes the role of local governments in developing, implementing, conducting and funding stormwater programs which address water quality impacts of storm water runoff.

(b) Stormwater management services and facilities will assist the county in meeting the regulatory obligations imposed by its national pollutant discharge elimination system (NPDES) permit by reducing pollution and increasing water quality within the county.

(c) DeKalb County presently owns and operates stormwater management systems and facilities which have been developed over many years. The future usefulness of the existing stormwater systems owned and operated by the county, and of additions and improvements thereto, rests on the ability of the county to effectively manage, protect, control, regulate, use, and enhance stormwater systems and facilities in DeKalb County in concert with the management of other water resources in the county. In order to do so, the county must have adequate and stable funding for its stormwater management program's operating needs and capital.

(d) Stormwater management services and facilities are needed throughout the unincorporated areas of DeKalb County because most of those areas are developed. While specific service and facility demands may differ from area to area at any given point in time, a stormwater management service area encompassing all lands and water bodies within the unincorporated area of DeKalb County is consistent with the present and future needs of the community.

(e) The provision of stormwater management services and facilities in DeKalb County promotes an essential regulatory purpose by controlling where stormwater runoff

Exhibit "A"

flows and how it is disposed, and thereby reducing flooding, erosion and water pollution caused by stormwater runoff.

(f) Stormwater management services and facilities will provide a specific service to property owners by assisting in the property owner's legal obligation to control stormwater runoff from their property and ensure that runoff does not flow upon their neighbors in greater quantities than it would if the property were in an undeveloped state. By mitigating the impact of stormwater runoff from developed property, the stormwater management system helps prevent damage that would subject a property owner to civil liability.

(g) The board of commissioners is responsible for the protection and preservation of the public health, safety, and welfare of the community, and finds that it is in the best interest of the health, safety, and welfare of the citizens of the county and the community at large to proceed with the development, implementation, and operation of a utility for stormwater management accounted for in the county budget as a separate enterprise fund dedicated solely to stormwater management and to institute funding methods associated therewith.

(h) The county has undertaken a comprehensive review by staff and professional consultants of the need for, management of, and funding for, a stormwater utility. The county staff reports and the professional engineering and financing feasibility analysis submitted to the county properly assess and define the stormwater management problems, needs, goals, program priorities and funding opportunities of the county.

(i) As a result, the county's governing authority finds that a stormwater utility provides the most practical and appropriate means of properly delivering storm water management services and facilities, and the county's governing authority finds that a utility fee provides the most practical and appropriate means of funding stormwater management services in DeKalb County.

(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-361. Definitions.

The following definitions shall apply to this article. Any word or phrase not defined below but otherwise defined in the Code of Ordinances shall be given that meaning. All other words or phrases shall be given their common ordinary meaning unless the context clearly requires otherwise.

Channel protection shall have the same meaning as the term is defined in the Georgia Stormwater Manual, Volume 2, as amended hereafter.

Credit shall mean a conditional reduction in the amount of a stormwater service charge to an individual property based upon the terms and conditions of this article.

Customer shall mean all persons, properties, and entities served by the utility's acquisition, management, maintenance, extension, and improvement of the public storm water management systems and facilities and regulation of public and private stormwater systems, facilities, and activities related thereto, and persons, properties, and entities which will ultimately be served or benefited as a result of the stormwater management program.

Developed land shall mean all property not deemed as undeveloped land.

Direct lien shall mean a lien enforced against an individual or property prior to obtaining a judgment against the individual or property, such as liens established by operation of law for unpaid taxes.

Equivalent residential unit (ERU) shall mean the unit of measure which provides the basis for comparing the runoff generated by one parcel with that generated by another. An ERU shall be the median impervious coverage of a statistical sampling of single detached dwelling lots in DeKalb County, which has been determined to be three thousand (3,000) square feet of impervious area.

Impervious surfaces shall mean those areas, which prevent or impede the infiltration of stormwater into the soil as it entered in natural conditions prior to development. Common impervious surfaces include, but are not limited to, rooftops, sidewalks, walkways, patio areas, driveways, parking lots, storage areas, compacted gravel and soil surfaces, awnings and other fabric or plastic coverings.

Multiple dwelling lot shall mean a developed lot where on more than one (1) attached or detached residential dwelling units are located. Multiple dwelling lots include, but are not limited to, apartments, condominiums, duplexes and triplexes.

Other developed land shall mean, but shall not be limited to, commercial and office buildings, industrial and manufacturing buildings, storage buildings and storage areas covered with impervious surfaces, parking lots, parks, recreation properties, public and private schools and universities, research stations, hospitals and convalescent centers, airports, and agricultural uses covered by impervious surfaces.

Overbank flood protection shall have the same meaning as the term is defined in the Georgia Stormwater Manual, Volume 2, as amended hereafter.

Service fees shall mean the stormwater management service fees applicable to a parcel of developed land, which charge shall be used only for the purpose of funding the DeKalb County stormwater utility's cost of providing stormwater management services and facilities.

Single dwelling lot shall mean a developed lot containing one (1) dwelling structure with its principal use being a residential dwelling. Single dwelling lots include, but are not limited to, single family homes and town homes characterized by fee simple ownership of both land and improved structures.

Stormwater management system means any one (1) or more of the various devices used in the collection, treatment, or disposition of storm, flood or surface drainage waters, including all manmade structures or natural watercourse for the conveyance or transportation of runoff, such as: detention areas, berms, swales, improved watercourses, open channels, bridges, gulches, streams, gullies, flumes, culverts, gutters, pumping stations, pipes, ditches, siphons, catch basins and street facilities; all inlets; collection, drainage or disposal lines; intercepting sewers; disposal plants; outfall sewers; all pumping, power, and other equipment and appurtenances; all extension, improvements, remodeling, additions, and alterations thereof; and any and all rights or interests in such stormwater facilities. Stormwater facilities expressly excludes any of the foregoing which exist for, or are used exclusively for the purpose of collection, treating, measuring, supplying, or distributing potable water within or as part of the county water supply and treatment system, or any of the foregoing which exist for or are used exclusively for the purpose of collecting, treating, or measuring effluent within or as part of the county sanitary sewer system.

Undeveloped land shall mean a lot in its unaltered natural state and which has no pavement, asphalt, or compacted gravel surfaces or structures which create an impervious surface that would prevent infiltration of stormwater or cause stormwater to collect, concentrate, or flow in a manner materially different than that which would occur if the land was in an unaltered natural state.

Water quality shall have the same meaning as the term is defined in the Georgia Stormwater Manual, Volume 2, as amended hereafter.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-362. Establishment of a utility.

(a) There is hereby established a stormwater utility within the public works department which shall be responsible for stormwater management throughout the county's jurisdictional limits, and shall provide for the management, protection, control, regulation, use, and enhancement of stormwater systems and facilities.

(b) The governing authority of DeKalb County hereby transfers to the stormwater utility operational control over the existing stormwater management systems and facilities owned and heretofore operated by the county and other related

assets, including but not limited to properties upon which such facilities are located, easements, rights-of-entry and access, and certain equipment.
(Ord. No. 40-02, Pt. I, 12-10-02)

Sec. 25-363. Scope of responsibility for the stormwater utility.

(a) The stormwater utility shall monitor the design, operation, maintenance, inspection, construction, and use of all stormwater systems in the county. The stormwater utility shall be responsible for the design and construction of public stormwater facilities owned by the county and shall inspect, operate, and maintain them as prescribed herein. The stormwater utility shall be responsible for plan approval and construction inspection of both private stormwater facilities and public stormwater facilities not owned by the county. Additionally, the stormwater utility may accept the responsibility for the operation and maintenance of private stormwater facilities only when such services have been agreed to, contracted for, and approved by the governing authority of the county.

(b) The stormwater utility shall provide for inspection of private facilities to ascertain that the stormwater facilities are functioning as designed and approved. The stormwater utility shall provide for remedial maintenance of facilities based upon the severity of stormwater problems and potential hazard to the public health, safety, and welfare, and in cases where such remedial maintenance is required the county may bill the owner of the private facility for the costs of such maintenance.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-364. Establishment of enterprise fund.

(a) The chief executive officer shall establish a stormwater enterprise fund in the county budget and accounting system for the purpose of dedicating and protecting all funding applicable to the purposes and responsibilities of the utility, including but not limited to rentals, rates, charges, fees, and licenses as may be established by the board of commissioners.

(b) Except as provided pursuant to section 24-364(c), any revenues and receipts of the stormwater utility shall be placed in the stormwater enterprise fund and all expenses of the utility shall be paid from the stormwater enterprise fund, except that other revenues, receipts, and resources not in the stormwater utility enterprise fund may be applied to stormwater management operations and capital investments as deemed appropriate by the board of commissioners, upon recommendation of the chief executive officer.

(c) The county may pledge all or any portion of all income and revenue of any nature derived from the operation of the stormwater management systems and facilities owned by the county, including periodic stormwater service charges and other charges for stormwater service, to the payment of principal of premium, if any, and interest on any revenue bonds or other obligations lawfully issued or otherwise contracted for by the county as may be provided in any resolution authorizing such bonds or obligations or in any trust instrument relating to such bonds or obligations.
(Ord. No. 40-02, Pt. I, 12-10-02)

Sec. 25-365. Stormwater service fees established.

(a) In order to recover the cost of providing stormwater services and facilities while fairly and reasonably apportioning the costs among developed properties throughout the unincorporated portion of the county based on the use of stormwater services and facilities, the following stormwater rates shall apply.

(b) The stormwater service charge per equivalent residential unit shall be four dollars ($4.00) per month or as amended by official action of the governing authority.

(c) All single detached dwelling lots shall be charged the rate applicable to one (1) equivalent residential unit.

(d) All multiple dwelling lots shall be charged the rate applicable to one (1) equivalent residential unit times the number of dwelling units located on the multiple dwelling unit property times an adjustment factor that adjust the ERU to equal the median impervious coverage of a statistical sampling of a single dwelling unit within a multiple dwelling lot in DeKalb County, which has been determined to be 0.5.

(e) All other developed lands shall be billed for one (1) equivalent residential unit for each three thousand (3000) square feet of impervious surface or increment thereof on the property, rounded to the next highest tenth of an equivalent residential unit.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-366. Effective date of stormwater service charges and termination of pond fees and other stormwater related fees in force prior to effective date.

The stormwater service fee shall accrue beginning January 1, 2004, and shall be billed annually thereafter.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 10-03, Pt. I, 5-27-03)

Sec. 25-367. Elimination of pond maintenance fees.

Beginning January 1, 2004, all fees collected for pond maintenance are hereby eliminated.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 10-03, Pt. I, 5-27-03)

Sec. 25-368. Exemptions.

The following properties are exempt from stormwater utility fees:

(1) Undeveloped land;

(2) All public rights-of-way; and

(3) Railroad rights-of-way (tracks). However, railroad stations, maintenance buildings, or other developed land used for railroad purposes shall not be exempt from stormwater service charges.

(4) Any property whereby one hundred (100) percent of the stormwater runoff is contained on the premises and no runoff enters into the stormwater management system.

(Ord. No. 40-02, Pt. I, 12-10-02)

Sec. 25-369. Credits.

(a) Property owners of developed land may receive a stormwater service charge credit for on-site systems or facilities. Stormwater service charge credits shall be determined based on the technical requirements design and performance standards contained in the Georgia Stormwater Management Manual as may be updated or amended from time to time. Stormwater service charge credits may total up to forty (40) percent of the service charge applicable to a property, and shall be granted upon a showing of any of the following:

(1) Ten (10) percent credit for on-site systems or facilities sized and functioning to meet water quality standards in accordance with the DeKalb County Code and the Georgia Stormwater Management Manual as may be updated or amended from time to time.

(2) Ten (10) percent credit for on-site systems or facilities properly sized and functioning to meet the channel protection standards in accordance with the DeKalb County Code and the Georgia Stormwater Management Manual as may be updated or amended from time to time.

(3) Ten (10) percent credit for on-site systems or facilities sized and functioning to meet the overbank flood protection standards in accordance with the DeKalb County Code and the Georgia Stormwater Management Manual as may be updated or amended from time to time.

(4) Ten (10) percent credit for on-site systems or facilities sized and functioning to meet the extreme flood protection standards in accordance with the DeKalb County Code and the Georgia Stormwater Management Manual as may be updated or amended from time to time.

(b) Property owners seeking service charge credits must apply for stormwater service charge credits through completion and submittal to the County of a stormwater service charge credit application prior to January 1st of the year in which stormwater service charges are to be billed by the county (except for 2004, in which applications must be received by March 1, 2004). Credits will only be granted through applications approved by the county for the remainder of the year in which stormwater service charges are to be billed by the county.

(c) Upon receipt of a timely filed completed application, the chief executive officer or his designee shall review the application and make a determination as to whether the applicable criteria for a credit has been met. All decisions regarding the approval or disapproval of a stormwater credit shall be made within forty-five (45) days of the date the completed application was submitted to the county.

(d) Any credit allowed against the service charge is conditioned on (1) continuing compliance with the county's design and performance standards as stated in the Georgia Stormwater Management Manual as may be updated or amended from time to time; and (2) upon continuing provision of the systems or facilities provided, operated, and maintained by the property owner or owners upon which the credit is based. The county may revoke any credit at any time for non-compliance with this article.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-370. Inspection of private facilities.

Continuing compliance with the county's design and performance standards may be verified by county inspection of the systems or facilities upon which the credit is based. No credit shall be given under this article unless the property owner agrees in writing in its application that the county shall have the right for its designated officers, representatives, agents, and employees to enter upon private and public property, upon reasonable notice to the owner of such property, to inspect the property and conduct surveys and engineering testing on such property in order to assure compliance with the county's design and performance standards. On-site systems or facilities determined to no longer comply with the county's design and performance standards shall subject the property owner to revocation of all, or a portion of, stormwater service charge credits based on the county inspections' estimate of capacity reduction for a period of not less than one (1) year.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-371. Stormwater service charge, billing, delinquencies and collections.

(a) The stormwater utility service charge may be billed separately, or on a customer statement and collected along with other fees for services, at the county's sole discretion, provided that in no instance shall the service charge constitute a direct lien against the property. Unpaid stormwater service fees shall be collected by filing suit to collect on an unpaid account and by using all methods allowed by Georgia law to collect on any judgment obtained thereby.

(b) A stormwater utility service charge bill may be sent through the United States mail or by alternative means notifying the customer of the amount of the bill, the date the payment is due, and the date when past due. Failure to receive a bill is not justification for non-payment. Regardless of the party to whom the bill is initially directed, the owner of each parcel of developed land shall be ultimately obligated to pay such fee. If a customer is underbilled or if no bill is sent for developed land, the county may backbill for a period of up to one year, but shall not assess penalties for any delinquency due to the failure to send a bill or an under billing. A one (1) percent per month late charge shall be assessed against the owner for the unpaid balance of any stormwater utility service charge that becomes delinquent.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-372. Stormwater utility service inspections and enforcement.

Every owner of real property located in the unincorporated area of the county, and every

person who serves as a contractor or developer for the purpose of developing real property located in the unincorporated area of DeKalb County shall provide, manage, maintain, and operate on-site stormwater management systems and facilities sufficient to collect, convey, detain, control and discharge stormwater in a safe manner consistent with all DeKalb County ordinances and development regulations, and the laws of the State of Georgia and the United States of America. Any failure to meet this obligation shall constitute a nuisance and be subject to an abatement action filed by any damaged party or DeKalb County in any court of competent jurisdiction. In the event a public nuisance is found by the court to exist, which the owner fails to properly abate within such reasonable time as allowed by the court, the county may enter upon the property and cause such work as is reasonably necessary to abate the nuisance with the actual cost thereof assessed against the owner or developer, if any, on a joint and several basis. From the date of the filing of such action, the county shall have lien rights, which may be perfected, after judgment, by filing a notice of lien on the General Execution Docket of the Superior Court of DeKalb County. DeKalb County shall have the right, pursuant to the authority of this article, for its designated officers and employees to enter upon private and public property owned by entities other than the county, upon reasonable notice to the owner thereof, to inspect the property and conduct surveys and engineering tests thereon in order to assure compliance with this section.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-373. Appeals.

(a) Any customer who believes the provisions of this article have been applied in error may appeal in the following manner:

(1) An appeal must be filed in writing with the chief executive officer or designee within thirty (30) days of the decision that is appealed. In the case of service charge appeals, the appeal shall include a survey prepared by a registered land surveyor or professional engineer containing information on the total property area, the impervious surface area, and any other features or conditions which influence the hydrologic response of the property to rainfall events.

(2) The chief executive officer or his designee shall conduct a technical review of the conditions on the property and respond to the appeal in writing within thirty (30) days.

(3) In response to an appeal the chief executive officer or his designee may adjust the stormwater service charge applicable to a property in conformance with the general purpose and intent of this article.

(4) All decisions by the chief executive officer shall be final.

(b) The appeal process contained in this section shall be a condition precedent to an aggrieved customer seeking judicial relief. Any decision of the chief executive officer may be appealed by application for writ of certiorari in the Superior Court of DeKalb County, filed within thirty (30) days of the date of service of the decision of the chief executive officer.
(Ord. No. 40-02, Pt. I, 12-10-02)

Sec. 25-374. Effective date.

Article V of Chapter 25 of this Code shall become effective on January 1, 2004.
(Ord. No. 10-03, Pt. I, 5-27-03)

I, the undersigned, Barbara H. Sanders
Clerk of the Board of Commissioners, DeKalb County, Georgia, DO HEREBY CERTIFY that the foregoing is a true and correct copy of an ordinance adopted by said Board meeting lawfully assembled on this 10th day of Dec 2002, as amended
And same approved by the Chief Executive Officer of said Board this day of 10th Nov 2011
Barbara H. Sanders
Clerk of Commissioners
DeKalb County, Georgia

DEKALB COUNTY GEORGIA 1822

[The next page is 1875]

(b) Property owners seeking service charge credits must apply for stormwater service charge credits through completion and submittal to the County of a stormwater service charge credit application prior to January 1st of the year in which stormwater service charges are to be billed by the county (except for 2004, in which applications must be received by March 1, 2004). Credits will only be granted through applications approved by the county for the remainder of the year in which stormwater service charges are to be billed by the county.

(c) Upon receipt of a timely filed completed application, the chief executive officer or his designee shall review the application and make a determination as to whether the applicable criteria for a credit has been met. All decisions regarding the approval or disapproval of a stormwater credit shall be made within forty-five (45) days of the date the completed application was submitted to the county.

(d) Any credit allowed against the service charge is conditioned on (1) continuing compliance with the county's design and performance standards as stated in the Georgia Stormwater Management Manual as may be updated or amended from time to time; and (2) upon continuing provision of the systems or facilities provided, operated, and maintained by the property owner or owners upon which the credit is based. The county may revoke any credit at any time for non-compliance with this article.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-370. Inspection of private facilities.

Continuing compliance with the county's design and performance standards may be verified by county inspection of the systems or facilities upon which the credit is based. No credit shall be given under this article unless the property owner agrees in writing in its application that the county shall have the right for its designated officers, representatives, agents, and employees to enter upon private and public property, upon reasonable notice to the owner of such property, to inspect the property and conduct surveys and engineering testing on such property in order to assure compliance with the county's design and performance standards. On-site systems or facilities determined to no longer comply with the county's design and performance standards shall subject the property owner to revocation of all, or a portion of, stormwater service charge credits based on the county inspections' estimate of capacity reduction for a period of not less than one (1) year.
(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-371. Stormwater service charge, billing, delinquencies and collections.

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(Ord. No. 40-02, Pt. I, 12-10-02; Ord. No. 32-03, Pt. I, 12-23-03)

Sec. 25-372. Stormwater utility service inspections and enforcement.

Every owner of real property located in the unincorporated area of the county, and every

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiff,

v.

UNITED STATES OF AMERICA and UNITED STATES POSTAL SERVICE,

Defendants.

CIVIL ACTION FILE NO.
11-761C

AFFIDAVIT OF ANDREW G. BOOTH

I, Andrew G. Booth, pursuant to 28 U.S.C. § 1746, depose and declare as follows:

1. I am over the age of eighteen years. I am competent to testify on the matters set forth in this affidavit.

2. I serve as Deputy Tax Commissioner and Director of Delinquent Collections for the Office of the DeKalb County Tax Commissioner. The DeKalb County Tax Commissioner is a Constitutional officer separate and distinct from DeKalb County, Georgia. I make this affidavit based upon my personal knowledge. I understand this affidavit will be used to support DeKalb County's claims in the above-styled civil action.

3. As part of my duties I oversee collection of delinquent stormwater utility fees on behalf of DeKalb County, Georgia.

4. DeKalb County's stormwater utility fee is an annual fee that is imposed for the calendar year period beginning January 1st and ending December 31st.

5. Unpaid stormwater utility fees are not considered "delinquent" for purposes of the Code of DeKalb County, as Revised 1988, § 25-371(b) until January 1st of the calendar year following the year in which they are billed. No late charges are imposed and no collection efforts are undertaken until on or after January 1st of the calendar year following the year in which such fees are billed.

6. In many instances stormwater utility fees are included, for administrative convenience, on the annual bill sent during the summer that includes other fees and ad valorem taxes. In the case of the United States and other tax exempt entities, the fees are billed on a separate "Stormwater Utility Notice." *See, e.g.*, 2005 DeKalb County Stormwater Utility Notice, attached hereto as Exhibit 1.

7. For administrative convenience and the convenience of customers, stormwater utility fee payments may be made in two installments aligned with the due dates for other charges and ad valorem taxes collected by our Office, which for year 2005 was August 15 and November 15. The option of pre-paying stormwater utility fees in installments does not change the character of the charge, which is that of an annual fee that becomes delinquent at the close of the calendar year.

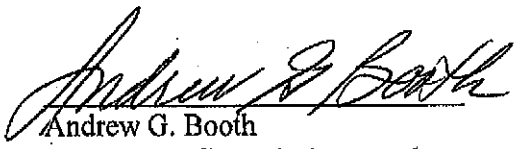
8. The stormwater utility fees collected by the Office of the Tax Commissioner on behalf of DeKalb County are deposited and designated for distribution into an enterprise fund called the Stormwater Utility Fund.

9. Over past years the United States of America and the United States Post Office have treated DeKalb County's stormwater utility fees inconsistently, paying the fees for some facilities and refusing to pay for other facilities. This inconsistent treatment has continued

through 2011. No less than fifteen (15) federal facilities are now delinquent in paying stormwater utility fees due DeKalb County for calendar year 2011.

I declare under penalty of perjury that the foregoing affidavit, consisting of nine (9) numbered paragraphs, is true and correct.

This 30th day of April, 2012.



Andrew G. Booth
Deputy Tax Commissioner and
Director of Delinquent Collections
Office of the DeKalb County Tax Commissioner

2005 DEKALB COUNTY STORMWATER UTILITY NOTICE

PAY ONLINE AT NO ADDITIONAL FEE @ www.co.dekalb.ga.us/taxcommissioner OR BY PHONE AT 404-298-4000.

TOM SCOTT
TAX COMMISSIONER

OWNER	UNITED STATES OF AMERICA	PROPERTY ADDRESS	000000 BUFORD HWY
CO-OWNER		DISTRICT	24 CHAMBLEE
PARCEL I.D.	18 280 01 002	PIN	1404860

Tax exempt properties are NOT EXEMPT from this fee.

Stormwater Utility Fee		
NUMBER OF UNITS	UNIT RATE	TOTAL AMOUNT DUE
50.10	48.00	2,404.80

Important Information Concerning Your Stormwater Utility Bill

Beginning in 2004, all property owners in unincorporated DeKalb County were required to pay a Stormwater Utility Fee. For the year 2005, some local city governments began assessing a stormwater utility fee. This fee is due even though your property is presently exempt from ad valorem taxes. This fee applies to properties owned by religious, governmental and non-profit entities; and includes churches, schools, hospitals, government facilities and non-profit agencies.

A stormwater utility fee provides for drainage control and water protection services. The annual fee assessed by the County for unincorporated, nonresidential properties is calculated based on the actual impervious area of a property at a rate of $48 per year for each 3,000 sq. ft of impervious surface. The annual fee for incorporated, nonresidential properties varies according to the rate established by that City. The charge is a service fee, not a tax or direct lien against the property. Stormwater utility fees assessed by the County and cities are used for stormwater management projects. This fee is due in two equal installments: August 15th and November 15th.

For questions concerning stormwater utility fees, please contact the DeKalb County Tax Commissioner's Office at 404-298-4000. To learn more about the DeKalb County stormwater management program, please call the Roads & Drainage Division at 404-297-4598 or visit the County's website at http://www.co.dekalb.ga.us/

PLEASE DO NOT FOLD, STAPLE, OR CLIP REMITTANCE COUPONS TO PAYMENT

MAKE YOUR CHECK PAYABLE TO:
DEKALB COUNTY TAX COMMISSIONER
P. O. BOX 100004
DECATUR, GA 30031-7004

DUE DATE
NOVEMBER 15, 2005

PARCEL I.D.	18 280 01 002
TOTAL STORMWATER FEE	2,404.80
INSTALLMENT AMOUNT DUE	1,202.40

SECOND INSTALLMENT

02140486080000012024070000024048048

**********AUTO** 3-DIGIT 303
UNITED STATES OF AMERICA
730 PEACHTREE ST NE
ATLANTA GA 30308-1210 000712

#303081210309#

1404860

RETURN THIS COUPON WITH YOUR SECOND PAYMENT

ENTER AMOUNT PAID

PLEASE DO NOT FOLD, STAPLE, OR CLIP REMITTANCE COUPONS TO PAYMENT

MAKE YOUR CHECK PAYABLE TO:
DEKALB COUNTY TAX COMMISSIONER
P. O. BOX 100004
DECATUR, GA 30031-7004

DUE DATE
AUGUST 15, 2005

PARCEL I.D.	18 280 01 002
TOTAL STORMWATER FEE	2,404.80
INSTALLMENT AMOUNT DUE	1,202.40

FIRST INSTALLMENT

02140486080000012024070000024048048

**********AUTO** 3-DIGIT 303
UNITED STATES OF AMERICA
730 PEACHTREE ST NE
ATLANTA GA 30308-1210 000712

#303081210309#

1404860

RETURN THIS COUPON WITH YOUR FIRST PAYMENT

ENTER AMOUNT PAID

Exhibit "1"

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiff,

v.

UNITED STATES OF AMERICA and UNITED STATES POSTAL SERVICE,

Defendants.

CIVIL ACTION FILE NO.
11-761C

AFFIDAVIT OF JOEL GOTTLIEB

I, Joel Gottlieb, pursuant to 28 U.S.C. § 1746, depose and declare as follows:

1. I am over the age of eighteen years of age. I am competent to testify on the matters set forth in this affidavit.

2. I serve as Director of Finance for DeKalb County, Georgia. I make this affidavit based upon my personal knowledge. I understand this affidavit will be used to support DeKalb County's claims in the above-styled civil action.

3. DeKalb County pays the DeKalb County stormwater utility for stormwater utility fees charged properties owned by the County.

4. For years 2005 to 2011, DeKalb County paid and/or reimbursed the DeKalb County stormwater utility $2,546,217 for stormwater services and facilities provided to the County.

5. DeKalb County pays stormwater utility fees to other jurisdictions for DeKalb

County properties that utilize stormwater systems owned by those jurisdictions. Such jurisdictions include the City of Decatur, Gwinnett County, Henry County and Rockdale County. For years 2005 through 2011, the amount paid to those other jurisdictions by DeKalb County was $175,586.

6. Pursuant to DeKalb Code § 25-264(a), the stormwater utility fees collected by DeKalb County are segregated in an enterprise fund for the purpose of dedicating and protecting all funding applicable to the purposes and responsibilities of the utility.

7. All stormwater utility fees are used to pay or reimburse the DeKalb County stormwater utility for expenses it has incurred in providing stormwater services and facilities. Stormwater utility fees are not expended for other or general purposes.

I declare under penalty of perjury that the foregoing affidavit, consisting of seven (7) numbered paragraphs, is true and correct.

This 27th day of April, 2012.

Joel Gottlieb
Director of Finance
DeKalb County, Georgia

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiff,

v.

UNITED STATES OF AMERICA and UNITED STATES POSTAL SERVICE,

Defendants.

CIVIL ACTION FILE NO.
11-761C

AFFIDAVIT OF WILLIAM E. (TED) RHINEHART

I, William E. (Ted) Rhinehart, pursuant to 28 U.S.C. § 1746, depose and declare as follows:

1. I am over the age of eighteen years of age. I am competent to testify on the matters set forth in this affidavit.

2. I serve as the Deputy Chief Operating Officer for the Infrastructure Group of Departments for DeKalb County, Georgia. I make this affidavit based upon my personal knowledge. I understand this affidavit will be used to support DeKalb County's claims in the above-styled civil suit.

3. In response to federal objectives imposed by the Clean Water Act and the National Pollutant Discharge Elimination System program, DeKalb County undertook a comprehensive review by staff and professional consultants to determine how best to meet the challenges imposed by these federal objectives. That review concluded a stormwater utility

funded by user fees provided the most reasonable means of meeting such objectives.

4. Professional consultants engaged by DeKalb County conducted a statistical analysis of the level of impervious surface presented by different types of properties and the anticipated cost of providing stormwater services and facilities to such users of the stormwater system in DeKalb County. The information gathered from the statistical analysis was used to set the rates charged users of the DeKalb County stormwater system in DeKalb County's stormwater utility fee.

5. DeKalb County's stormwater utility promotes an essential regulatory purpose by controlling where stormwater runoff flows and how it is disposed. Further, the stormwater utility provides a specific service to property owners by assisting in the property owner's obligation to control stormwater runoff from their property and ensure that runoff does not flow upon their neighbors in greater quantities than it would if the property were in an undeveloped state. The services and facilities provided by the stormwater utility are designed to mitigate the impact of stormwater runoff from developed property and help prevent damage to property.

6. Stormwater utility fees collected by DeKalb County are segregated in an enterprise fund and used solely for the expenses of providing stormwater services and facilities.

7. DeKalb County's stormwater utility fee was structured to fairly and equitably apportion the cost of providing stormwater services and facilities to each user and produce revenues that would approximate the total cost of the benefits provided.

8. DeKalb County's stormwater utility fee is an annual fee that is imposed for the calendar year period beginning January 1st and ending December 31st. Stormwater services are provided to users of the stormwater utility throughout the year, with the service period ending

each December 31.

I declare under penalty of perjury that the foregoing affidavit, consisting of eight (8) numbered paragraphs, is true and correct.

This 30 day of April, 2012.

William E. (Ted) Rhinehart
Deputy Chief Operating Officer
Infrastructure Group
DeKalb County, Georgia