Holland & Knight

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
Developments in Clean Water Law
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Federal Court Litigation Involving Municipal Stormwater Fee Programs

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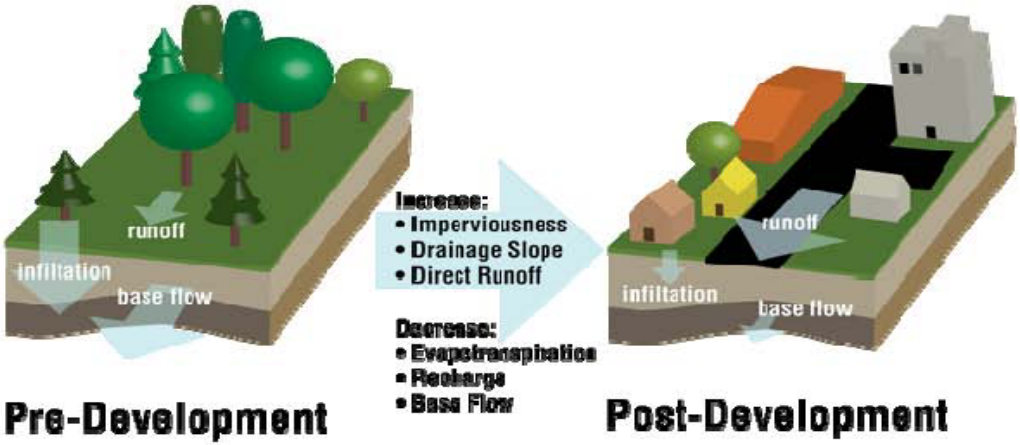
Stormwater runoff is caused by development, affects the environment, and is required to be ameliorated by federal, state & local legislation & regulations.



Clean Water Act

33 U.S.C. § 1323(a)

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government … 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.***

Legislative History I:
Federal Water Pollution Control Act Amendments of 1972
Federal Facilities Pollution Control

- **SEC 313.** Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government … shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution **to the same extent that any person is subject to such requirements, including the payment of reasonable service charges…**

- Senate Report 92-414 (Oct. 28, 1971). "This section, **similar to one in existing law**, requires that Federal facilities meet the same effluent limitations as private sources of pollutions, unless the Federal facility is specifically exempted by the President…The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. **This section requires that Federal facilities meet all control requirements as if they were private citizens.**

Legislative History II:
Clean Water Act of 1977 Amendment

- "SEC 313. Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government … **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."**
- Senate Report 95-370. **"The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent."** [See *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976), contra *California ex rel. State Water Resources Control Bd. v. Environme...*, 511 F.2d 963 (1975).]

Legislative History III: "The Stormwater Amendment:"

S. 3841 - An Act to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution (Jan. 4, 2011, P.L. 111-378)

- Section 313 of the Federal Water Pollution Control Act (33 U.S.C. 1323) is amended by adding at the end the following:
- (c) REASONABLE SERVICE CHARGES.—

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

(A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and

(B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

Legislative history of S. 3481 sponsored by Senator Cardin

- On introduction of this bill, Senator Cardin said: "I believe that this administration recognizes its responsibility to manage the stormwater pollution that comes off Federal properties. But that responsibility needs to translate into payments to the local governments that are forced to deal with this pollution. That commitment needs to be more than an Executive order. Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees." *Congressional Record* S4856 (June 10, 2010)

- Senator Cardin's Record Statement on Passage: "Mr. President, today the Congress stands ready to approve S. 3481, a bill to clarify federal responsibility to pay for stormwater pollution. This legislation, which will soon become law, requires the federal government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties. At stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the federal government."

United States v. Cities of Renton and Vancouver, 2012 WL 1903429 (W.D. Washington) (5/25/12)

- Cities of Vancouver (162,000 residents) and Renton (91,000), had implemented storm water fee programs based on sq., ft of impervious surfaces. Fees collected used solely for expenditures to maintain and improve municipal separate storm sewer systems
- After paying for many years, Bonneville Power Administration (BPA) stopped paying in late 2010 based on a 2006 General Accountability Office (GAO) memo claiming that the fee was a tax and did not fall under the CWA's waiver of sovereign immunity.
- GAO had found that the IAC in King County Wash. was a tax on all owners of undeveloped parcels in unincorporated areas of the County to raise money for the entire community and provided no direct tangible service or benefit.

United States v. Cities of Renton and Vancouver, 2012 WL 1903429 (W.D. Washington) (5/25/12) Cont'd

- GAO relied on the San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico, 967 F.2d. 683 (1st Cir. 1992) (when the assessment has characteristic of both "fees" and taxes , the most important factor becomes the purpose behind the statute or regulation that imposes that charge.").
- GAO did not follow Massachusetts v. United States, 435 U.S. 444 (1978) test that an assessment is not a tax if (1) the charges do not discriminate (2) are based on a fair approximation of use of the system and (3) are structured to produce revenues that will not exceed the total cost to the government of the benefits to be supplied.
- The Cities initiated water shutoff as allowed under the utility code for non payment

United States v. Cities of Renton and Vancouver, 2012 WL 1903429 (W.D. Washington) (5/25/12) Cont'd

- The United States then sued both cities claiming $443, 148 reimbursement due BPA from Vancouver and $38,606 from Renton. The U.S argued that the federal government was under no obligation to pay under S. 3481 arguing that the legislation was not retroactive and also that the cities fee programs amounted to an unconstitutional tax and seeking reimbursement of fees paid and the cities counterclaimed for approx. $36,000 in unpaid fees.
- NACWA, APA and NAFSMA submitted a joint amicus brief providing the legislative history of the Cardin amendment and pointing out the national policy issues at stake for local governments.

US v. Cities of Renton and Vancouver cont'd.

- On May 25, 2012, Judge James Robart ruled for the Cities finding that:
- The 1977 CWA Waiver of Sovereign Immunity "unambiguously includes any fee, charge or assessment."
- The 2011 Stormwater amendment was a clarification of Congress intent regarding federal responsibility to pay "reasonable service charges" and was not new substantive law.
- Judge quotes extensively from the Amendment's legislative history (e.g. "this bill simply clarifies current law, that the Federal Government has a responsibility to pay its normal and customary fees assessed by local governments for managing polluting storm water runoff from federal properties, just as private citizens pay." Statement of D.C. Del Eleanor Holmes Norton , Cong. Record H 8979 (Dec. 22, 2010)

US v. Cities of Renton and Vancouver cont'd.

- That " Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."
- That the reasonable service charge criteria in the amendment (non discriminatory, based on fair approx. of proportionate contribution and fees to be used to pay for costs of SW program) "parallel" the criteria of the Supreme Court in Massachusetts v. United States.
- That “program fees may be used for the “full range of costs” associated with the program and not limited only to deal with SW pollution attributable to that entity’s property”
- Did not resolve issue of whether BPA was responsible for the specific unpaid charges by cities since they had not unequivocally demonstrated that their fees fell under the SW amendment criteria. More discovery needed.

US v. Cities of Renton and Vancouver cont'd.

- But court provided clarifying guidance on whether the cities fee programs fell under the Act noting that the reasonableness of a charge should be considered in comparison to those assessed on nongovernmental entities, that the use of differing methods approximating a city's burden did not mean that the fee program was "discriminatory" and that the revenue from these fees may be used for the "full range of costs" associated with the program. **Significantly, Court also stated that "nowhere [does sec. 313 (c)] state that fees charged to each entity must be used solely for dealing with stormwater pollution attributable to that entity's property or for facilities near its property"**

Dekalb County , Ga. v. United States (US. Court of Federal Claims-- No. 11- 761C)

- Dekalb County Ga, located near Atlanta has a population of 691,893.
- The County sued to recover ($281,553.12) owed by the United States and the U.S. Postal Service for the costs of storm water management from federal properties under the County's SW Impervious Area SW ordinance that became effective on Jan 1, 2004.
- The case raised the same issues as in Renton and Vancouver-- namely whether the 2011 SW amendment covered fees assessed prior to Jan. 2011 and whether the County's ordinance was a fee for service and not a tax…NACWA, APA and NAFSMA also submitted amicus brief.
- Case currently pending on cross motions for S. J. Case was reassigned to Judge Lynn Bush after Judge Futey found a conflict due to son's representation of City of Cleveland

Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin, 2012 WL 3839570 (E.D. Wis. 9/5/12)

- Tribe sued the Village seeking declaratory and injunctive relief stemming from Hobart's attempts to enforce stormwater charges billed to Indian trust lands located in Hobart.
- Court ruled in favor of the Tribe addressing the primary legal issue of whether the storm water utility charge is a fee or a tax.
- The United States took no position on the tax/fee issue
- Court held that that Hobart's stormwater fees were taxes and could not be lawfully imposed on the Indian Trust lands.
- Court reasoned that "if the exaction is imposed by the legislature upon all, or almost all, of the cities or property to accomplish a general public purposed, it is more likely to be a tax."

Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin, 2012 WL 3839570 (E.D. Wis. 9/5/12)

- The Court was persuaded by the fact that (1) the assessments are "collected in the same way and using the same procedure as unpaid property taxes " and that (2) the stormwater charges support a general benefit to the public rather than a specific benefit to a property owner.
- Court rejected Hobart's argument that the three part test of Massachusetts v. U.S. was relevant, finding that the Mass was "analytically different" in that the fees there were assessed by the federal government against the state and not the reverse-- citing the Supremacy Clause of the Constitution.
- Notably, the court rejected the Village's argument that CWA section 313, including the 2011 SW amendment, applied holding that "nothing in the language of Section 313 of the CWA suggests that Congress intended to provide state or local governments authority to administer the CWA on Indian Trust Lands."

Implications for Stomwater Management Agencies

- Renton decision clearly established municipal agencies right to collect fees for federal facilities contributions to the expensive costs of storm water treatment under the CWA including fees assessed prior to the 2011 SW Legislation.
- Renton provides reasonable guidance on consistency with 2011 SW legislation criteria.
- Decision has become especially important for financially strapped local governments facing very expensive federal CWA storm water mandates.

Implications for Stomwater Management Agencies Cont'd

- The clarification in Renton is especially important for Jurisdictions with extensive Federal properties where the costs of meeting storm water reductions will be in the billions such as the Chesapeake Bay TMDL States.
- If the DeKalb court rules in favor of the United States, the issue could be "teed up" for court of appeals rulings possibly leading to a split in circuit and maybe Supreme Court review --
- Stay tuned!!!