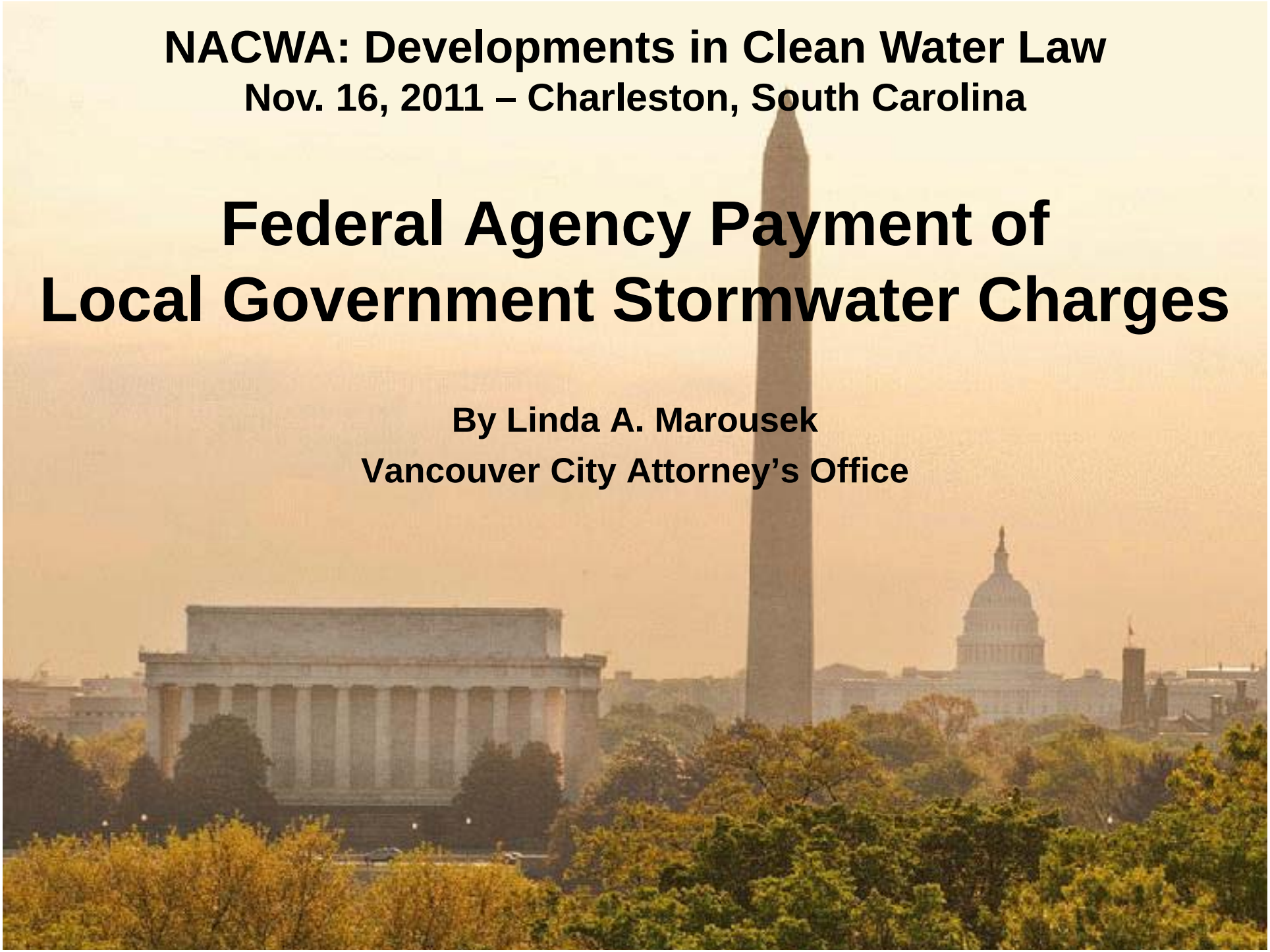


NACWA: Developments in Clean Water Law

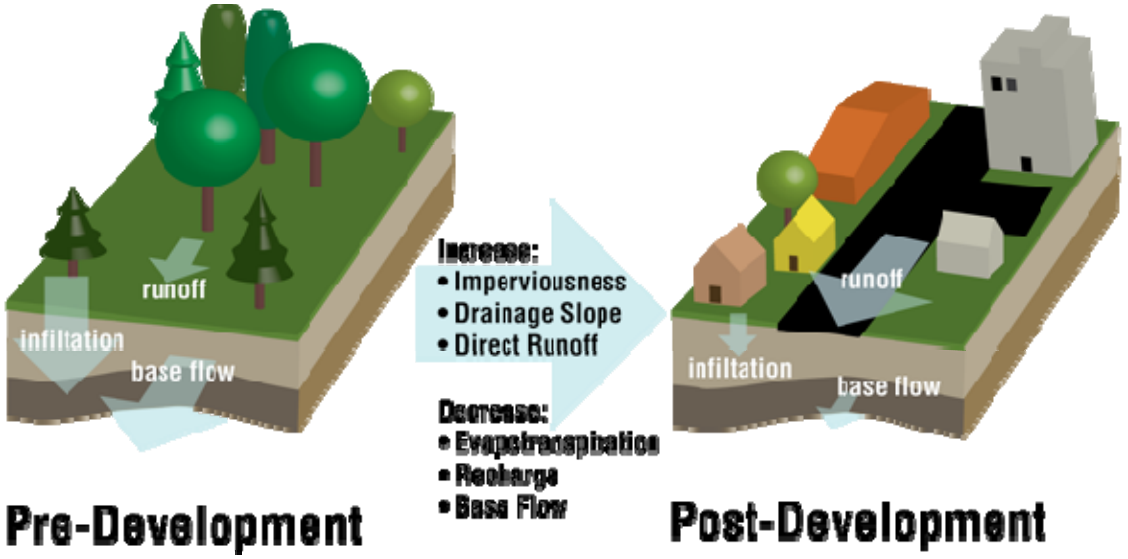
Nov. 16, 2011 – Charleston, South Carolina

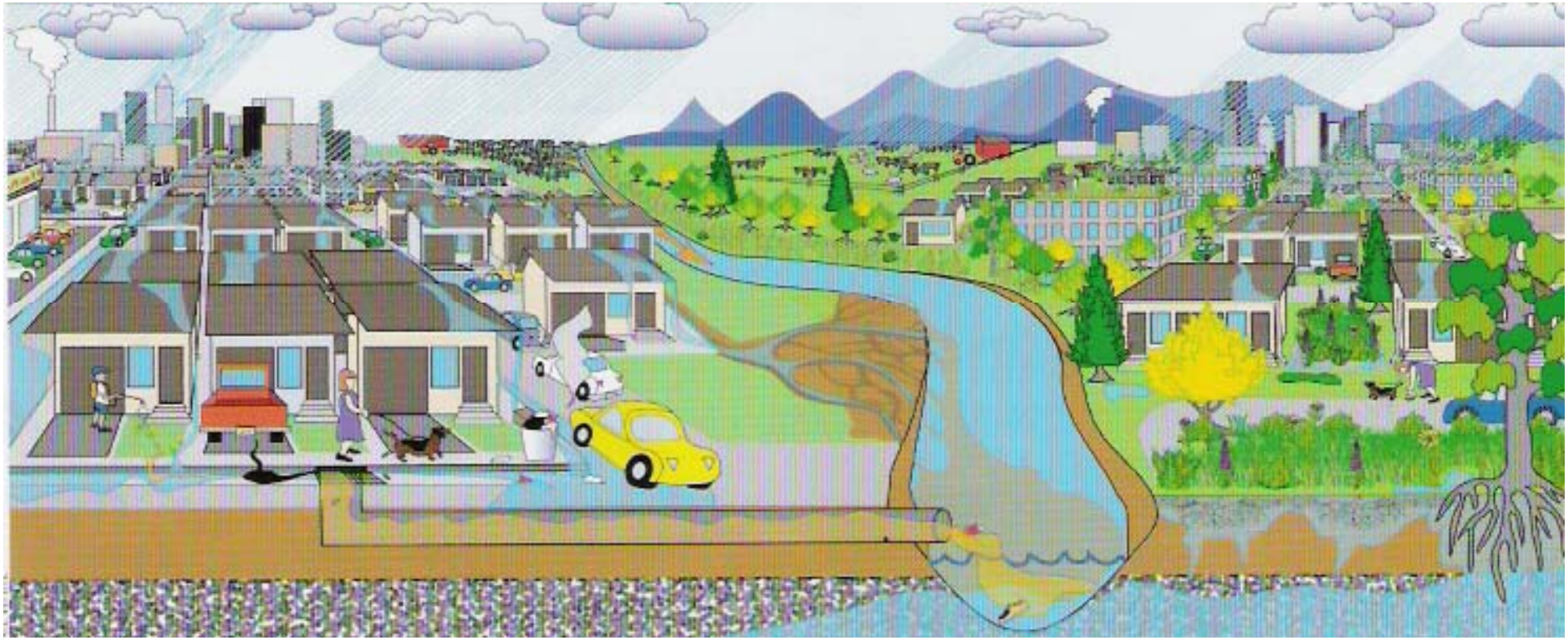
Federal Agency Payment of Local Government Stormwater Charges

By Linda A. Marousek

Vancouver City Attorney's Office

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





Washington cities and counties provide stormwater service, as they provide other utilities. State law permits cities to impose stormwater drainage fees. RCW 35.92.020(1) and RCW 35.67.010(3) authorize Washington cities to construct, operate, and then to set the “price of service” for stormwater facilities.

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).]

City of Cincinnati v. United States

Case No. C-1-03-731 (S.D. OH 2007)

Not Reported in F.Supp.2d, 2007 WL 956432 (S.D.Ohio)

(pleadings available electronically on ECF)

- A ten year series of cases involving the City of Cincinnati's imposition of its stormwater fees on federal agencies resulted in a 2007 order from the federal district court of the Southern District of Ohio, requiring the federal agencies to pay the City's stormwater rate as a "reasonable service charge," based upon the Clean Water Act's explicit waiver of sovereign immunity for such reasonable service charges.

- Federal government paid $17,000 "in complete and final satisfaction of any and all claims the City has against the United States for unpaid Past Alleged Stormwater Fees." (Nov., 15, 2007, Consent Decree)

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.”

General Accounting Office (GAO) Memo & *San Juan Cellular*

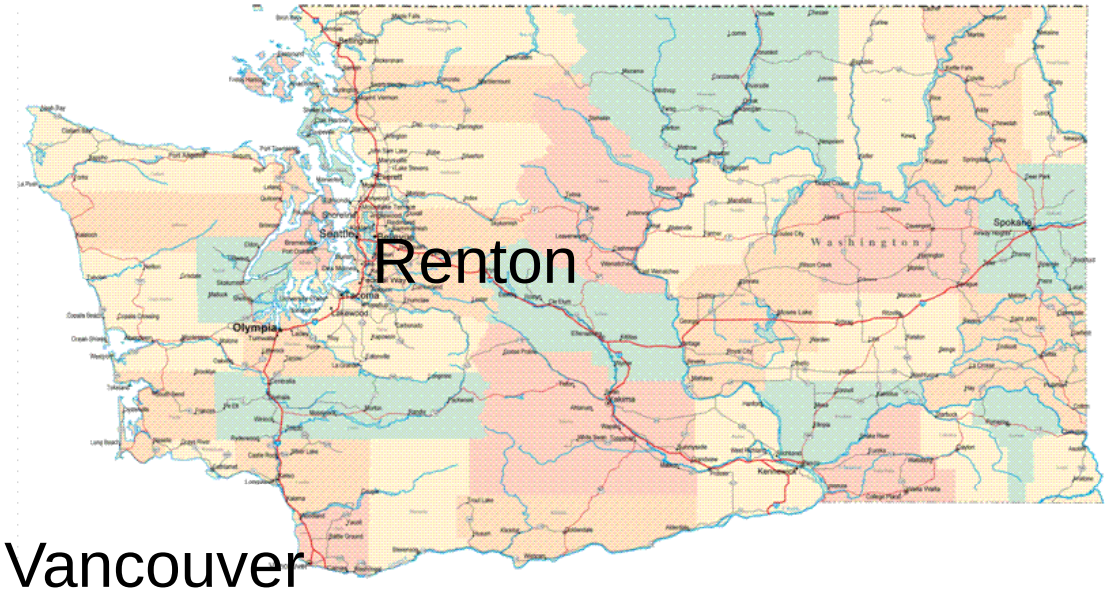
- GAO Memo B-306666: Forest Service – Surface Water Management Fees in King County (June 5, 2006) citing the test from *San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992) that a tax is an assessment that is (1) imposed by a legislature upon many, or all, citizens (2) raises money, and (3) is spent to benefit the entire community." When the assessment has characteristics of both "fees" and taxes" the most important factor becomes the purpose behind the statute or regulation that imposes the charge.

- The GAO found the assessment was a tax imposed on all owners of undeveloped parcels in unincorporated areas of the county to raise money for the entire community. No direct tangible service or benefit provided in exchange for the fee was found. The fact that the fees could only be deposited in a special fund for maintaining and operating storm water control facilities did not alter their determination.

Renton and Vancouver

The Cities of Vancouver (~162,000 residents) and Renton (~91,000), like other Washington local government entities, have implemented stormwater control programs in compliance with requirements of the Clean Water Act and the 2007 Washington State NPDES municipal separate stormwater permits.

The Bonneville Power Administration had been paying for many years, until they stopped based on the 2006 GAO memo that used the "tax or fee" analysis from the *San Juan Cellular* case.



The amounts per month are significant, with federal agencies in Vancouver (under)billed for more than $8,000 per month. BPA has claimed a $443,148 reimbursement due from Vancouver and $38,606 from Renton.

U.S.A. v. City of Renton & City of Vancouver

C11-01156 (W. D. WA)

- Renton and Vancouver initiated water shutoff as allowed under utility code for nonpayment.
- Litigation initiated to resolve the issues.
- Parties have agreed to resolve by US filing declaratory judgment actions, expected to be bifurcated between the legal issues and the monetary payments owed.

BONNEVILLE POWER ADMINISTRATION

City of VANCOUVER WASHINGTON

CITY OF RENTON

Tax or Fee ?
The United States' Theory

"The 'classic tax' is imposed by the legislature upon a large segment of society, and is spent to benefit the community at large. The 'classic fee' is imposed by an administrative agency upon only those persons, or entities, subject to its regulation for regulatory purposes, or to raise 'money placed in a special fund to defray the agency's regulation-related expenses.'

Accordingly, we consider three factors: (1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge. When this inquiry places the charge somewhere between the 'classic tax' and the 'classic fee,' it is the purpose behind the statute that imposes the charge, as reflected in the ultimate use of its proceeds, that is the most important factor." *DIRECTV, Inc. v. Tolson,* 513 F.3d 11, 15-16 (4th Cir. 2008), citing *Valero Terrestrial Corp. v. Caffrey,* 205 F.3d 130, 134 (4th Cir. 2000), citing *San Juan Cellular Tel. Co. v. PSC,* 967 F.2d 683 (1st. Cir. 1992).

The Cities' Legal Theories

I. Reasonable service charges are fees, not taxes, for which the BPA's sovereign immunity has been waived.

II. The caselaw standards that determine whether the charge is a reasonable service charge are now clearly stated in statute.
   - The service charges are non-discriminatory.
   - The service charges are a fair approximation of the use of the system.
   - The service charges are used to pay or reimburse the cost of the cities' stormwater programs.

III. The legislative history of 33 U.S.C. § 1323 clarifies that intent back to the 1972 amendment. The 1977 amendment makes it explicitly clear. The 2011 amendment is a clarification of an already-existing obligation.

I. Tax or Fee ?
The Cities' Theory

Massachusetts v. United States, 435 U.S. 444, 466 (1978) test:

"[The Federal Government] can have no constitutional objection to a revenue measure that satisfies the three-prong test of *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.,* [405 U.S. 707 (1972)]… So long as:

[1] the charges do not discriminate against [Federal] functions,

[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 [State] Government of the benefits to be supplied,

there can be no substantial basis for a claim that the [State] Government will be using its taxing powers to control, unduly interfere with, or destroy [the United States'] ability to perform essential services. The requirement that total revenues not exceed expenditures places a natural ceiling on the total amount that such charges may generate and the further requirement that the measure be reasonable and nondiscriminatory precludes the adoption of a charge that will unduly burden state activities."

Applying the *Massachusetts* Test

- ***State of Maine v. Dept. of the Navy***, 973 F.2d 1007 (1st Cir. 1992)
  - Decided by Chief Justice Breyer, author of the *San Juan Cellular* opinion 3 months earlier; upheld the hazardous waste fee as a reasonable and permissible fee.
  - Used the *Massachussetts* test and concluded that "a rough relation between state regulatory costs and the fees charged… is sufficient to show that a state regulatory charge is a reasonable and permissible fee, and not an impermissible "tax" on a federal installation."

- ***NY State Dep't of Envtl. Cons. v. U.S. DOE***, 850 F. Supp 132 (N.D.N.Y. 1994)
  - Case involved "waste regulatory charges" and "water regulatory charges" imposed on 10 federal facilities in New York State, including West Point and Brookhaven.
  - Applied the *Massachusetts* case, noting that the Supreme Court very clearly stated that the second prong of the test is not failed even when a particular entity receives no specific service. Even though the United States demonstrated that there was not a 1:1 relationship between the cost of the services actually provided to its facilities and the amount of fees assessed to these same facilities, such proof was not dispositive of the issue of whether the regulatory charges were based upon a fair approximation of the use of the system.
  - The Court held that the regulatory charges met all three prongs of the *Massachusetts* test and constituted reasonable fees, not tax-like exactions. The United States had waived its sovereign immunity under the CWA and RCRA to imposition of such fees and was liable for their payment.

Tax or Fee - State Law

Check your state caselaw to see if there is any help.

Washington is fortunate to have very good state caselaw affirming local jurisdiction action as to almost every aspect of a stormwater fee that might be challenged.

For the purposes of the pending lawsuit, it is even more fortunate that most of the good cases come from Clark County and Vancouver.

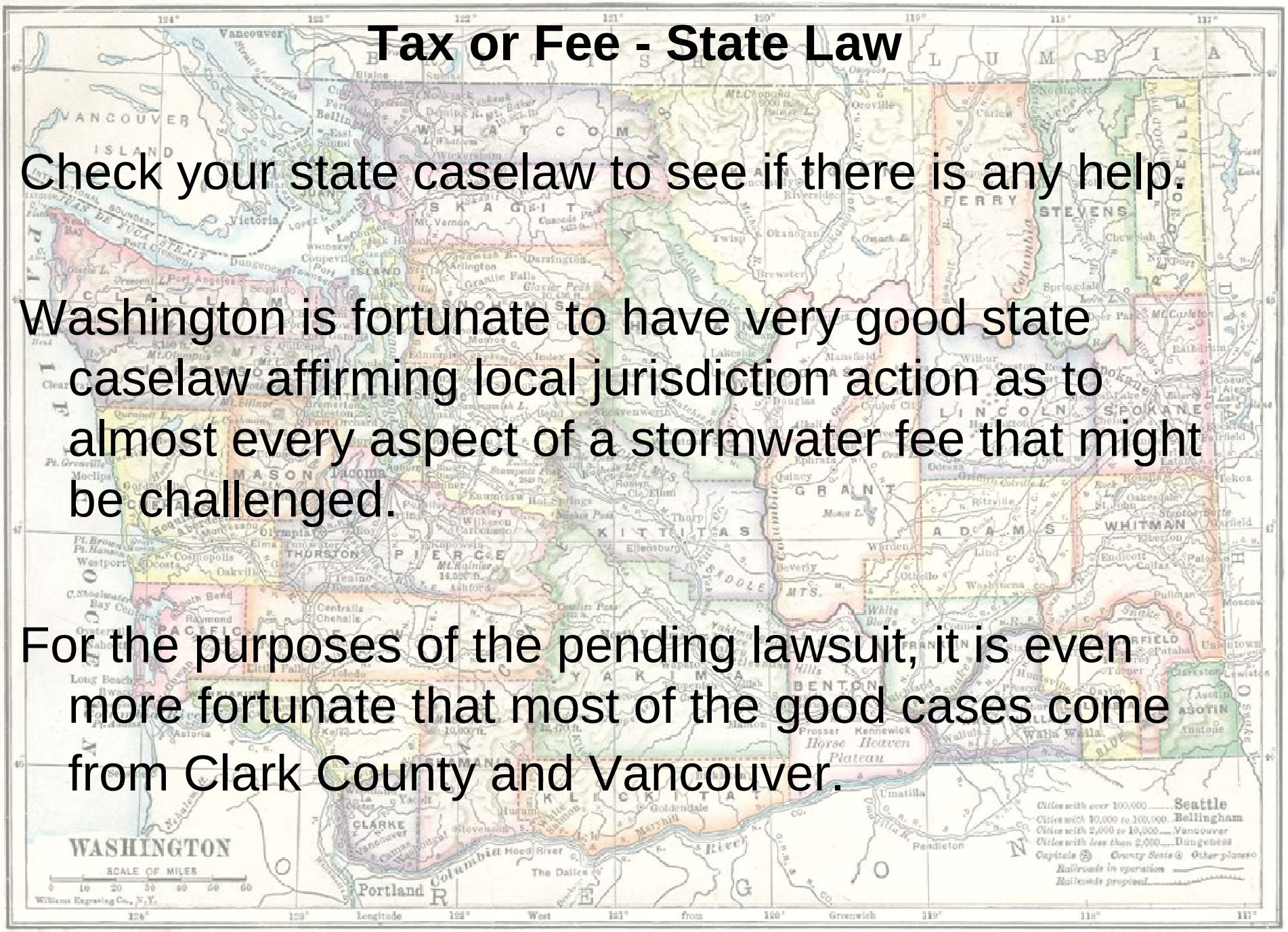


Fig. 1.

Tax or Fee – Washington Cases

- ***Teter v. Clark County***, 104 Wn.2d 227 (1985). Clark County landowners were assessed charges by the County and the City of Vancouver to finance storm water management. The landowners argued that the charges were unconstitutionally imposed because their properties received no special benefit from the stormwater management activities, and raised a number of tax/fee arguments. The trial court granted judgment for the County and City. The Washington Supreme Court affirmed.

- ***Covell v. City of Seattle***, 127 Wn.2d 874 (1995). Leading Washington case **followed *Teter*,** establishing 3 factors to decide whether a charge is a regulatory fee or a tax: (1) whether the primary purpose is to raise revenue (tax) or to regulate (regulatory fee); (2) whether the money collected must be allocated only to the authorized regulatory purpose; and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.

- ***Storedahl Properties v. Clark County,*** 143 Wn. App. 489 (2008). A Clark County gravel pit operator challenged the County's newly-increased stormwater fee, which was explicitly imposed based upon the need to comply with the Clean Water Act and the County's new NPDES permit. The Washington Court of Appeals held the fee was not an unconstitutional tax.

II. What's a "reasonable service charge"?

33 U.S.C. 1323(c)(1):

Reasonable service charges … 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…

The Army Corps Approach

US ARMY
CORPS OF ENGINEERS

US ARMY
CORPS OF ENGINEERS

From: Kimball, William D Mr USAR 88TH RSC SJA [

Sent: Monday, April 11, 2011 1:25 PM

To: Ambion, Eloida

Subject: Legal Opinion re Use of Appropriated Funds to Pay Stormwater Charge Assessed by the City of Seattle, Washington, Against US Army Reserve Property in Seattle (UNCLASSIFIED)

Classification: UNCLASSIFIED

TO: Ms. Eloida Ambion, Key Accounts Analyst, Seattle Public Utilities, P.O. Box 34018, Seattle, WA 98124-4018

Dear Ms. Ambion:…

I am a legal advisor in the Office of the Staff Judge Advocate of the 88th Regional Support Command, U.S. Army Reserve. As such, it is my job to review the attached, above-referenced property tax bill to see if this command can legally pay it in view of the fact that, as a general rule, Federal Government agencies are constitutionally prohibited from using their appropriations to pay state taxes. …

The City of Seattle enacted Chapter 21.33 (Storm Drainage Utility Rates and Charges) of the Seattle Municipal Code (copy attached), which imposes this stormwater charge (called a "surface water management fee"). **I see nothing in this code section that strikes me as unreasonable or discriminatory. Moreover, the charge seems to be based on a fair approximation of the proportionate contribution of the property or facility to stormwater pollution, and, according to the Code, the proceeds of the charge must be used to pay or reimburse the costs associated with the stormwater management program. Therefore, I would conclude that this command is liable to pay the charge.**

The Department of Defense Approach

Office of General Counsel Memorandum re Stormwater Charges and the Waiver of Sovereign Immunity Under the Clean Water Act (April 11, 2011)

Because the amendment to the Clean Water Act Section 313(a), 33 U.S.C. § 1323(a) adds detail to what would otherwise constitute a reasonable service charge under section 313(a), there are more criteria to apply than is typical in determining whether a specific stormwater charge is a reasonable service charge and payable.

These additional criteria require that the reasonable service charge

1. relate to the control and abatement of water pollution;
2. be reasonable;
3. be nondiscriminatory;
4. be based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution;
5. be measured in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility;
6. be 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); and
7. may include 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.

III. Clarification

One Hundred Eleventh Congress
of the
United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,
the fifth day of January, two thousand and ten

An Act

To amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution.

Clarification – Caselaw

- ***United States v. Sanders***, 67 F.3d 855, 856 (1995) - The Ninth Circuit has consistently stated that when an amendment is a clarification, rather than an alteration, of existing law, then it should be used in interpreting the provision in question retroactively. See, e.g., *United States v. Quinn*, 18 F.3d 1461, 1467 (9th Cir.); *United States v. Carrillo,* 991 F.2d 590, 591-92 (9th Cir.).

- ***Fishing Co. v. United States***, 195 F. Supp. 2d 1239, 1255 (2002) (W. Dist. WA) - When an amendment enacts new substantive law it should not be applied retroactively, but when an amendment merely clarifies existing law no such problems arise and it may be given retroactive effect. *See Beverly Community Hosp. Ass'n v. Belshe,* 132 F.3d 1259, 1265 (9th Cir. 1997). The Eleventh Circuit has identified two factors in determining whether an amendment clarifies or whether it enacts substantive law: (1) whether statutory language is ambiguous and therefore in need of clarification, and (2) whether Congress declared its intent to clarify. citing *Piamba Cortes v. American Airlines, Inc*., 177 F.3d 1272, 1283-84 (11th Cir. 1999).

Implications

- What you think the implications could be from the case for other MS4 utilities?
- There is a need for a consistent federal agency approach to payment of these fees. Within individual local government jurisdiction, some federal agencies are paying the stormwater fees, and some are not. Within Washington State, some federal agencies (the Post Office and the Army, for examples) are paying in one local jurisdiction, but not in others.
- Impact on future federal environmental regulation?

- Linda A. Marousek
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  - 360-487-8500
- Assistant City Attorney, City of Vancouver, WA 2006-present – general municipal law, land use and “the stormwater lawyer.”
- City Attorney, City of Des Moines, WA 2001-2006
- State Administrative Law Judge, 1985-2001
- University of South Dakota School of Law, J.D. 1981
- Antioch College, Yellow Springs, Ohio B.A 1977
  Environmental Studies
- Vegetable gardener; backpacker; herder of chickens, old horses, and cats; theology student