



GAO

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Forest Service—Surface Water Management Fees

File: B-306666

Date: June 5, 2006

DIGEST

Appropriated funds are not available to pay surface water management fees assessed by King County, Washington, against national forest lands and other Forest Service properties because those fees constitute a tax. The federal government is constitutionally immune from state and local taxation. Although section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), waives sovereign immunity from certain state and local environmental regulations and fees, it does not waive immunity from taxation. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

DECISION

The Chief Financial Officer of the Forest Service, United States Department of Agriculture, has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying surface water management fees assessed by King County, Washington, against federal lands located within its jurisdiction. Letter from Jesse L. King, Associate Deputy Chief for Business Operations/Chief Financial Officer, Forest Service, to David M. Walker, Comptroller General, GAO, Oct. 11, 2005 (King Letter). The Forest Service believes that it is constitutionally immune from paying the fee, which the agency considers a tax. As we explain below, we agree that the United States is constitutionally immune from surface water management fees assessed by King County and find that appropriated funds are not available to pay such assessments. Furthermore, although section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), requires federal agencies to comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges, that provision does not waive the federal government's sovereign immunity from taxation by state and local government. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

BACKGROUND

The National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States, including rivers, lakes, and streams. 33 U.S.C. § 1342.¹ Under the NPDES program, the U.S. Environmental Protection Agency (EPA) and EPA-authorized states issue and enforce permits to regulate pollution from specific entities, including, for example, industrial dischargers and municipal wastewater treatment facilities, known as “point sources.” *Id. See, e.g.,* GAO, *Clean Water Act: Improved Resource Planning Would Help EPA Better Respond to Changing Needs and Fiscal Constraints*, GAO-05-721 (Washington, D.C.: July 22, 2005), at 5–6. Section 319 of the CWA also requires states to implement management programs for controlling pollution from diffuse or “nonpoint” sources, such as agricultural runoff. 33 U.S.C. § 1329. *See, e.g.,* State of Washington, Department of Ecology, *Washington’s Water Quality Management Plan to Control Nonpoint Source Pollution*, Publ’n No. 99-26 (April 2000); Vol. 1, *Water Quality Summaries for Watersheds in Washington State*, Publ’n No. 04-10-063 (August 2004).²

Federal facilities are required under section 313(a) of the CWA to comply with all federal, state, interstate and local regulations respecting the control and abatement of water pollution, including the payment of reasonable service charges. 33 U.S.C. § 1323, quoted, in relevant part, *infra* p. 10. Accordingly, the Forest Service and the State of Washington have entered into an agreement whereby the Service agrees, among other things, to implement site specific “best management practices” on national forests in Washington to meet or exceed applicable state surface water quality laws and regulations. *Memorandum of Agreement between the USDA Forest Service, Region 6 and the Washington State Department of Ecology for Meeting Responsibilities under Federal and State Water Quality Laws*, Nov. 21, 2000.³

To implement the CWA, King County has also established a surface water management (SWM) program to fulfill its requirements under its NPDES municipal stormwater permit and to regulate nonpoint source pollution. *See generally* King

¹ The Clean Water Act is codified, as amended, in scattered sections of 33 U.S.C. §§ 1251–1387.

² Available at www.ecy.wa.gov/pubs.shtm (last visited Apr. 12, 2006).

³ *See also* State of Washington, Department of Ecology, *Washington State and U.S. Forest Service’s Forest Management Agreement*, Publ’n No. 00-10-048 (November 2000), available at www.ecy.wa.gov/biblio/0010048.html (last visited Apr. 12, 2006).

County, Wash., Code (hereafter K.C.C.) title 9 (2005); *see also* K.C.C. § 9.08.060(R) (findings of the county council regarding the county's implementation of the CWA).⁴ Counties in the state of Washington are authorized to raise revenues through rates and charges assessed against those served by, or receiving benefits from, any storm water control facility or contributing to an increase of surface water runoff. Wash. Rev. Code § 36.89.080(1) (2005). Under this authority, King County imposes an annual service charge, or "surface water management fee" (hereinafter "SWM fee"), on all developed parcels in unincorporated areas of the county, for surface and storm water management services provided by the SWM program. K.C.C. §§ 9.08.050(A), 9.08.070(C) (2005). These services include, but are not limited to:

"basin planning, facilities maintenance, regulation, financial administration, public involvement, drainage investigation and enforcement, aquatic resource restoration, surface and storm water quality and environmental monitoring, natural surface water drainage system planning, intergovernmental relations, and facility design and construction."

K.C.C. § 9.08.010(Y).⁵

According to the county ordinance, SWM fees are necessary for various reasons: (1) to promote the public health, safety, and welfare by minimizing uncontrolled surface and storm water, erosion, and water pollution; (2) to preserve and utilize the many values of the county's natural drainage system including water quality, open space, fish and wildlife habitat, recreation, education, urban separation and drainage facilities; and (3) to provide for the comprehensive management and administration of surface and storm water. K.C.C. § 9.08.040.

SWM fees must be based on the relative contribution of increased surface and storm water runoff from a given parcel to the surface and storm water management system.⁶ K.C.C. § 9.08.070(A). The SWM fee structure consists of seven classes of

⁴ Available at www.metrokc.gov/mkcc/Code/index.htm (last visited Apr. 12, 2006). *See further* King County, Water and Land Resources Division, *Stormwater Management Program, 1996–2000* (Mar. 28, 1997), available at www.dnr.metrokc.gov/wlr/stormwater/SWMPDocument.htm (last visited Apr. 12, 2006).

⁵ *See also* King County, Water and Land Resources Division, *King County's Surface Water Management Fee—Services We Provide*, available at www.dnr.metrokc.gov/wlr/surface-water-mgt-fee/ (last visited Apr. 12, 2006) (additional information and history of the SWM program).

⁶ "Surface and storm water management system" means constructed drainage facilities and any natural surface water drainage features that do any combination of
(continued...)

developed parcels based on the parcel's relative percentage of impervious surfaces:⁷ (1) residential, (2) very light, (3) light, (4) moderate, (5) moderately heavy, (6) heavy, and (7) very heavy. K.C.C. § 9.08.070(C). Residential and very lightly developed properties are assessed a flat annual fee of \$102 per parcel, while light to very heavily developed parcels are assessed various per acre rates ranging from \$255.01 per acre for lightly developed parcels to \$1,598.06 per acre for very heavily developed parcels. *Id.* See also King County, Washington, *SWM Fee Protocols* (January 2004), at 3.⁸

The Forest Service maintains approximately 363,543 acres of federal land within the jurisdictional boundary of King County, including the Mount Baker-Snoqualmie National Forest (MBS), roads, campgrounds, trailheads, and picnic areas. King Letter, Attachment. In 2001, the King County Treasury Division began assessing SWM fees against several parcels of Forest Service land. *Id.* The MBS Supervisor's Office questioned the applicability of the fee because no services were provided to the Forest Service and requested that the King County Treasury Division remove Forest Service properties from its tax rolls. Letter from Larry Donovan, Recreation Special Uses Coordinator, MBS National Forest Supervisor's Office, to King County Treasury, Mar. 28, 2001. The county treasury division informed the MBS financial manager that the SWM fee is not a tax assessment, but a fee, and that the U.S. government was not exempt from paying fees. King Letter, Attachment. Despite informing the King County Treasury Division on several occasions that the Forest Service believes it is exempt from the SWM fee, the MBS financial manager continues to receive "official property value notices" and "delinquent real estate tax statements" from King County. Letter from Mary E. Wells, Financial Manager, MBS National Forest Supervisor's Office, to King County Treasury Division, Oct. 15, 2001.

(...continued)

collection, storing, controlling, treating, or conveying surface and storm water. K.C.C. § 9.08.010(BB).

⁷ An impervious surface is a hard surface area which either prevents or retards the entry of water into the soil causing water to run off the surface in greater quantities than under natural conditions prior to development. Common impervious surfaces include roofs, walkways, patios, driveways, parking lots, storage areas, areas which are paved, graveled, or made of packed or oiled earthen materials, or other surfaces which similarly impede the natural infiltration of surface and storm water. See K.C.C. § 9.08.010(K).

⁸ Available at www.dnr.metrokc.gov/wlr/surface-water-mgt-fee/pdf/swm-fee-protocols.pdf (last visited Apr. 12, 2006).

DISCUSSION

The issue before us is whether the Forest Service is constitutionally immune from paying the King County surface water management fee or whether the Forest Service may pay that fee as a “reasonable service charge” under the Clean Water Act’s sovereign immunity waiver, 33 U.S.C. § 1323(a).

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The Supreme Court has described a tax as “an enforced contribution to provide for the support of government.” *United States v. La Franca*, 282 U.S. 568, 572 (1931). A fee charged by a state or political subdivision for a service rendered or convenience provided, however, is not a tax. *See Packet Co. v. Keokuk*, 95 U.S. 80, 84 (1877) (wharf fee levied only on those using the wharf is not a tax); 73 Comp. Gen. 1 (1993) (federal agencies receive a tangible benefit from use of city sewer and may pay sewer service charges so long as they reflect the fair and reasonable value of service received by United States); 70 Comp. Gen. 687 (1991) (county landfill user fee is a reasonable, nondiscriminatory service charge based on level of service provided). *See also* 50 Comp. Gen. 343 (1970) (county per-ton incinerator service charge not a tax against United States but a reasonable charge based on the *quantum* of direct service furnished). Taxation is a legislative function while a fee “is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.” *National Cable Television Ass’n v. United States*, 415 U.S. 336, 340 (1974).

Distinguishing a tax from a fee requires careful analysis because the line between “tax” and “fee” can be a blurry one. *Collins Holding Corp. v. Jasper County, South Carolina*, 123 F.3d 797, 800 (4th Cir. 1997). In determining whether a charge is a “tax” or “fee,” the nomenclature is not determinative, and the inquiry must focus on explicit factual circumstances. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000). *See also United States v. Columbia, Missouri*, 914 F.2d 151, 154 (8th Cir. 1990) (applying a “facts and circumstances” test rather than “reduc[ing] the] case to a question of pure semantics” in finding that city utility rate was not a tax). One court has described a “classic” tax as one meeting a three-part inquiry—an assessment that (1) is imposed by a legislature upon many, or all, citizens, (2) raises money, and (3) is spent for the benefit of the entire community.⁹ *San Juan Cellular*

⁹ In two cases, courts have applied a test based on *Massachusetts v. United States*, 435 U.S. 444, 466–67 (1978), to determine whether certain state environmental regulatory assessments were “taxes” or “fees.” *See New York State Department of Environmental Conservation v. United States Department of Energy*, 772 F. Supp. 91, 98–99 (N.D.N.Y. 1991), *aff’d* 218 F.3d 96 (2nd Cir. 2000) (applying *Massachusetts* test to determine whether New York’s water regulatory charge was an impermissible tax or a permissible fee or regulatory charge under the CWA); *Maine v. Department of*

(continued...)

Tel. Co. v. Public Service Comm'n of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992). On the other hand, a classic “regulatory fee” is imposed by an agency upon those subject to its regulation, may serve regulatory purposes, and may raise money to be placed in a special fund to help defray the agency’s regulation-related expenses. *Id.* See also B-288161, Apr. 8, 2002, n.1 at 4, and cases cited therein, *aff’d on reconsideration*, B-302230, Dec. 30, 2003 (applying *Valero* and *San Juan Cellular* in tax versus fee analysis).

When the three-part inquiry yields a result that places the charge somewhere in the middle of the *San Juan Cellular* descriptions, that is, when assessments have characteristics of both “taxes” and “fees,” the most important factor becomes the purpose behind the statute or regulation that imposes the charge. See *Valero*, 205 F.3d at 134 (citing *South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983)). In those circumstances, if the ultimate use of the revenue benefits the general public, then the

(...continued)

Navy, 973 F.2d 1007 (1st Cir. 1992) (applying *Massachusetts* test in analyzing state waste regulatory fee *vis-à-vis* the Resource Conservation and Recovery Act’s sovereign immunity waiver provision). We view the *Massachusetts* test as factually and conceptually inapposite, and accordingly we do not apply it to analyze the constitutionality of King County’s SWM fee as assessed against the federal government. The Supreme Court articulated the *Massachusetts* test in the situation where the United States was assessing a federal aircraft registration tax *against* a state. The test asks whether the charges (1) discriminate against *state* 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 *federal* government of the benefits to be supplied. *Massachusetts*, 435 U.S. at 466–67 (emphasis added). The Supreme Court declined to apply the *Massachusetts* test in *United States v. United States Shoe Corporation*, 523 U.S. 360, 367–68 (1998) (Harbor Maintenance Tax is unconstitutional as applied to exported goods under the Export Clause of the U.S. Constitution, art. I, § 9, cl. 5). It explained that the test involved a different constitutional provision than the Export Clause. *Id.* The Fourth and Eighth Circuits used the same logic to reject the *Massachusetts* test in the context of *federal* immunity from *state* taxation. *United States v. Huntington, West Virginia*, 999 F.2d 71, 73 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (“Inasmuch as the states’ immunity from federal taxation is more limited than the federal government’s immunity from state taxation, and is based on a different constitutional source . . . the [*Massachusetts*] test is inapplicable here.”), citing *Columbia, Missouri*, 914 F.2d at 153–54 (Eighth Circuit refusing to adopt the *Massachusetts* test in holding that a Veterans Administration Hospital is not constitutionally immune from Columbia, Missouri’s “payment in lieu of taxes” assessment). See also *Massachusetts*, 435 U.S. at 455 (plurality opinion) (“The immunity of the Federal Government from state taxation is bottomed on the Supremacy Clause [art. VI, cl. 2], but the States’ immunity from federal taxes was judicially implied from the States’ role in the constitutional scheme.”).

charge will qualify as a “tax,” while if the benefits are more narrowly circumscribed, then the charge will more likely qualify as a “fee.” *Id.* (citing *San Juan Cellular*, 967 F.2d at 685).

In *United States v. Huntington, West Virginia*, the Fourth Circuit considered whether a “municipal service fee” was indeed a fee or a tax, and whether the federal government (in this case, the General Services Administration and the U.S. Postal Service) was immune from its assessment. *United States v. Huntington, West Virginia*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994). A provision of the West Virginia Code authorizes any city furnishing an essential or a special municipal service to impose upon the users of such service reasonable rates, fees, and charges. W. Va. Code § 8-13-13 (2005). The city of Huntington, West Virginia, imposed a “municipal service fee” for fire and flood protection and street maintenance based on the square footage of buildings owned in the city. *Huntington*, 999 F.2d 71. The court found that liability for Huntington’s municipal service fee arose not from any use of city services but from the federal government’s status as property owner. *Id.* at 74.

Further, rejecting the city’s argument that any assessment tied to some state-provided benefit is a user fee, the court added: “Under the theory advanced by the City, virtually all of what now are considered ‘taxes’ could be transmuted into ‘user fees’ by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a ‘police fee.’” *Id.* at 74. The court concluded that an assessment for such core government services is in fact a “thinly disguised tax” from which the General Services Administration and the U.S. Postal Service were constitutionally immune. *Id.* See also 20 Op. Off. Legal Counsel 12 (1996) (applying *Huntington* to conclude that District of Columbia clean air fee is not a user or service fee because revenue from the fee is used to provide an undifferentiated benefit to the entire public).

King County’s Surface Water Management Fee

When subjected to the three-part inquiry of *San Juan Cellular*, King County’s SWM fee has the classic attributes of a tax. The SWM fee is (1) imposed by the county council, under authority granted by the Washington State legislature, on all owners of developed parcels in unincorporated areas of the county (2) to raise money that is (3) spent to benefit the entire community. See *Valero*, 205 F.3d at 134; *San Juan Cellular*, 967 F.2d at 685. Though denominated a “service charge” or “fee,” the facts and circumstances surrounding King County’s assessment of SWM fees, *Columbia, Missouri*, 914 F.2d at 154, disclose that the county provides no direct, tangible

service or convenience in exchange for payment of the SWM fee.¹⁰ *See Packet Co.*, 95 U.S. at 87–88; 73 Comp. Gen. 1; 50 Comp. Gen. 343. *Cf. Teter v. Clark*, 104 Wash. 2d 227, 233–34 (Wash. 1985) (fees imposed under Wash. Rev. Code § 36.89.080 are an exercise of general police power and valid under state constitution even though no specific service received). Unlike a fee to use a city wharf or sewer or a county incinerator or landfill, the benefits paid for by King County’s SWM fee—basin planning, facilities maintenance, regulation, drainage investigation, resource restoration, environmental monitoring, *etc.*—are not narrowly circumscribed but benefit the general population at large. *See Valero*, 205 F.3d at 134. Such broad benefits are more in the nature of core government services comparable to the provision of fire and flood protection and street maintenance financed through *Huntington’s* “municipal service fee,” 999 F.2d at 73, than a fee for a direct, tangible service or convenience provided.¹¹ 73 Comp. Gen. 1; 50 Comp. Gen. 343. Nor is assessment of the SWM fee incident to a voluntary act such as a request for a permit, *see National Cable Television*, 415 U.S. at 340; the assessment, rather, supports the provision of undifferentiated benefits to the entire public. *See* 20 Op. Off. Legal Counsel 12.

King County’s SWM fee, however, also shares some characteristics of a classic “regulatory fee.” *See San Juan Cellular*, 967 F.2d at 685. The assessment, for example, serves regulatory purposes under the county’s implementation of its municipal NPDES permit under the CWA. *See* K.C.C. § 9.08.060(R). Ascribing a regulatory purpose to a tax, however, does not convert it into a “fee.” 20 Op. Off. Legal Counsel 12. Taxes, like fees or service charges, may also serve regulatory purposes. *See Massachusetts v. United States*, 435 U.S. 444, 455–56 (1978) (“[A] tax is a powerful regulatory device; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise”). SWM fees must also be deposited in a special fund to be used only for maintaining and operating storm water control facilities; planning, designing, establishing, acquiring, developing, constructing, and improving such facilities; or to

¹⁰ The assessment is variously called a “service charge” or “surface water management fee.” *Compare* K.C.C. § 9.08.070 *with SWM Fee Protocols*. The terms “service charge” and “fee,” however, are synonymous. *See* B-301126, Oct. 22, 2003, n.4 (citing *Black’s Law Dictionary* 629 (7th ed. 1999) (defining “fee” as a charge for labor or services)).

¹¹ Further, the SWM fee structure, based on a parcel’s relative percentage of impervious surfaces, is also similar to *Huntington’s* square footage-based “municipal service fee.” 999 F.2d at 72. *See also* 49 Comp. Gen. 72 (1969) (a claim for an amount representing the fair and reasonable value of services provided in rehabilitation of a drainage ditch is payable, while an invoice assessing the government a fee for the drainage ditch calculated in the manner that taxes are assessed is a tax and may not be paid).

pay or secure the payment of general obligation or revenue bonds issued for such purpose. Wash. Rev. Code § 36.89.080(4); K.C.C. § 9.08.110. That fact, however, “is not enough reason on its own to warrant characterizing a charge as a ‘fee.’” *Valero*, 205 F.3d at 135 (internal citation omitted). “If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial.” *Id.* at 135.

When tax assessments also have some attributes of “fees,” an important factor in determining whether it is a tax or a fee is the purpose behind the assessments. *See Valero*, 205 F.3d at 134. Broadly stated in the county ordinance, SWM fees are assessed: (1) to promote the public health, safety, and welfare; (2) to preserve and utilize the county’s natural drainage system; and (3) to provide for the comprehensive management and administration of surface and storm water. K.C.C. § 9.08.040. As we discuss above, such broad purposes are more like core government services providing undifferentiated benefits to the entire public than narrowly circumscribed benefits incident to a voluntary act or a service or convenience provided. *See discussion supra pp. 7–8.*

Like *Huntington’s* “municipal service fee,” we conclude that the SWM fee is a “thinly disguised tax” for which liability arises from the United States’ status as a property owner and not from the United States’ use of any King County service. *See Huntington*, 999 F.2d at 73–74.¹²

¹² Were we to have found the opposite—that SWM assessments were “fees” or “service charges” and not “taxes”—we would still conclude that appropriated funds are not available to pay SWM fees. To be payable, such fees must not be manifestly unjust, unreasonable, or discriminatory. 70 Comp. Gen. 687 (1991) (county landfill user fee payable as a reasonable, nondiscriminatory service charge based on level of service provided); 67 Comp. Gen. 220 (1988) (rates charged for utility services are payable by federal agencies unless they are manifestly unjust, unreasonable, or discriminatory); 27 Comp. Gen. 580, 582–83 (1948). Examining the SWM fee, we find its assessment discriminatory. The Washington State Department of Transportation is only liable for 30 percent of fees imposed under section 36.89 of the Revised Code of Washington, the provision that authorizes counties to impose assessments such as King County’s SWM fee. Wash. Rev. Code § 90.03.525(1). *See also* K.C.C. § 9.08.060(O) (rate charged to county roads and state highways shall be calculated in accordance with Wash. Rev. Code § 90.03.525). No similar discount is afforded to federal agencies despite, for example, the federal facilities compliance mandate in section 313(a) of the CWA, 33 U.S.C. § 1323(a), and the Forest Service’s nonpoint source pollution mitigation efforts under its memorandum of agreement with the state of Washington (*supra* p. 2).

Clean Water Act and Federal Sovereign Immunity

The state of Washington has explicitly exempted the federal government from taxation, except as permitted by federal law. Wash. Rev. Code §§ 84.36.010(a); 84.40.315. In some instances Congress has waived sovereign immunity and permitted state and local taxation and/or regulation of certain federal activities, particularly in the field of environmental regulation. *See, e.g.*, 42 U.S.C. § 2021d(b)(1)(B) (federal low-level radioactive waste disposal at nonfederal disposal facilities subject to “fees, taxes, and surcharges”). *See also* 42 U.S.C. § 7418 (Clean Air Act provision waiving federal sovereign immunity from state, interstate, and local air pollution regulation, including requirements to pay fees or charges imposed to defray costs of air pollution regulatory programs). Section 313(a) of the Clean Water Act, commonly known as the “federal facilities provision,” subjects federal agencies to state, local, and interstate regulation of water pollution, including the payment of reasonable service charges. 33 U.S.C. § 1323(a). The question arises whether section 313(a) also waives federal immunity from state and local taxation and permits the Forest Service to use appropriated funds to pay the King County SWM fee.

Section 313(a) of the Clean Water Act provides, in pertinent part, that:

“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.”

Id. (Emphasis added). Laws such as the section 313(a) federal facilities provision must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (holding that absent some degree of success on the merits by a claimant, a federal court may not award attorneys fees under section 307(f) of the Clean Air Act). A

waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). While section 313 subjects federal agencies to state and local regulation of water pollution, state and local taxation is not one of the governmental powers to which federal agencies are subjected under section 313(a). *See United States Department of Energy v. Ohio*, 503 U.S. 607, 623 (1992). Nothing less than an act of Congress clearly and explicitly conferring the privilege of taxing the federal government will suffice. *Domenech v. National City Bank of New York*, 294 U.S. 199, 205 (1935). Section 313 does not expressly provide that federal agencies must pay state and local environmental taxes. *See id.* The provision “never even [mentions] the word ‘taxes’ when referring to the obligations of the United States.” *New York State Department of Environmental Conservation v. United States Department of Energy*, 772 F. Supp. at 98, *comparing* 42 U.S.C. § 2021d(b)(1)(B) (federal low-level radioactive waste disposal at nonfederal disposal facilities subject to “fees, taxes, and surcharges”) *with* 33 U.S.C. § 1323(a).

Moreover, we cannot imply a waiver of federal sovereign immunity from state and local taxation, despite legislative history suggesting the CWA’s federal facilities provision intended, “unequivocally,” to subject federal agencies to “*all* of the provisions of State and local pollution laws,” S. Rep. No. 95-370 at 67 (1977) (emphasis added). *Mitchell*, 445 U.S. at 538; *Lane v. Peña*, 518 U.S. 187, 192 (1996). The waiver of sovereign immunity must be expressed in the statutory text; a statute’s legislative history cannot supply a waiver that does not appear clearly in any statutory text. *Lane*, 518 U.S. at 192, *citing United States v. Nordic Village*, 503 U.S. 30, 37 (1992).

The Supreme Court has consistently viewed section 313, and its predecessors, narrowly. In 1976 the Supreme Court found that a prior, similar version of section 313 was not sufficiently clear and unambiguous as to require federal dischargers to obtain state NPDES permits.¹³ *EPA v. California*, 426 U.S. 200, 211–12 (1976). Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, that is, specific congressional action that makes this authorization of state regulation clear and unambiguous. *Id.* at 211, *citing Hancock v. Train*, 426 U.S. 167, 178 (1976).¹⁴ The Court held that section 313 did not expressly provide that federal

¹³ Then-section 313 provided, in relevant part, that federal agencies “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. . . .” 33 U.S.C. § 1323 (Supp. IV 1970).

¹⁴ *Hancock v. Train* and *EPA v. California* were companion cases decided on the same day. *Hancock* concerned the extent of the sovereign immunity waiver in the

(continued...)

dischargers must obtain state NPDES permits. *EPA v. California*, 426 U.S. at 212. Nor did the provision expressly state that obtaining a state NPDES permit was a “requirement respecting control and abatement of pollution,” as the language of then-section 313 provided. *Id.* at 212–13. In response to the Supreme Court’s holding in *EPA v. California*, Congress amended section 313 “to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws.” S. Rep. No. 95-370, at 67.

Despite such statements of congressional intent, the Supreme Court again narrowly construed the CWA’s waiver provision, holding that Congress had not waived the federal government’s sovereign immunity from liability for civil fines imposed by the state of Ohio for past CWA violations. *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992). Rejecting a broad reading of current section 313’s “all . . . requirements” language, the Court found that the language “can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures.” *Id.* at 627–28, quoting *Mitzelfelt v. Department of the Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990). Section 313(a)’s waiver provision, rather, only recognizes “three manifestations of governmental power to which the United States is subjected: substantive and procedural requirements; administrative authority; and ‘process and sanctions,’ whether ‘enforced’ in courts or otherwise.” *Id.* at 623.

Other federal courts also have construed the CWA’s section 313(a) waiver provision narrowly. *New York State Department of Environmental Conservation v. United States Department of Energy*, 772 F. Supp. at 98 (section 313 “not blanket [waiver] of the United States’ sovereign immunity from the imposition and assessment of taxes by a State”). See also *In re: Operation of the Missouri River System Litigation*, 418 F.3d 915 (8th Cir. 2005) (section 313 a limited waiver of sovereign immunity); *Sierra Club v. Lujan*, 972 F.2d 312 (10th Cir. 1992) (section 313 does not waive federal sovereign immunity from liability for punitive civil penalties).

CONCLUSION

The Forest Service is constitutionally immune from surface water management fees assessed by King County, and appropriated funds are not available to pay for such assessments. Notwithstanding the fact that King County labels these assessments “service fees,” the assessments, actually, are taxes. Furthermore, though section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), requires federal agencies to

(...continued)

Clean Air Act’s federal facilities provision, 42 U.S.C. § 7418. For a more detailed discussion of these cases and the legislative histories of the federal facilities provisions in the Clean Water Act, Clean Air Act, and Safe Drinking Water Act, see B-286951, Jan. 10, 2002.

comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges, that provision does not waive the federal government's sovereign immunity from taxation by state and local government. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.



Anthony H. Gamboa
General Counsel