

Original

No. 35608-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STOREDAHL PROPERTIES, LLC,

Appellant,

v.

CLARK COUNTY,

Respondent.

**BRIEF OF APPELLANT
STOREDAHL PROPERTIES, LLC**

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COURT OF APPEALS
DIVISION II

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ASSIGNMENT OF ERROR

The trial court erred in denying Storedahl's motion for summary judgment and granting summary judgment to Clark County.

ISSUE PRESENTED

Whether Clark County's Clean Water Charge ("CWC") is a property tax under the test established by the Washington Supreme Court in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), for distinguishing between taxes and fees?

STATEMENT OF THE CASE

1. The genesis of Clark County's clean water charge.

Clark County uses tax dollars from its general fund and road fund to pay for the various governmental activities it has historically performed to protect and enhance water quality throughout the County. CP 633-34. Those activities include sweeping public roads, mowing roadside ditches, cleaning catch basins and various educational activities such as "River Rangers," a program aimed at elementary school children (though River Rangers was cut due to budgetary constraints). *See* CP 693.

Concerned about the cost of funding increased levels of water quality management activities required under the federal Clean Water Act (33 U.S.C. §1251, *et. seq*), the County failed to apply for a National Pollution Discharge Elimination System ("NPDES") permit as mandated

by the Act until it was sued. *Waste Action Project v. Clark County*, 45 F. Supp.2d 1049, 1051 (1999); CP 689. After being held liable for violating the Clean Water Act, Clark County entered into a Consent Decree obligating the County to, among other things: obtain the necessary NPDES permit; sweep streets more frequently, improve its catch basin maintenance program; amend its development code; hire an additional code enforcement officer; and spend at least \$20,000 on a “supplemental environmental project” agreeable to the plaintiffs and focused on “the improvement of water quality or aquatic habitat.” CP 784-85.

Consistent with the objective of the Clean Water Act – to protect water bodies for beneficial uses (33 U.S.C. §1313(c)(1)-(2)) – the NPDES permit issued to the County requires the County “to undertake a number of activities designed to improve surface and ground water quality” (Admission No. 16, CP 632) to “protect the general health, safety and welfare of the citizens of Clark County.” Admission No. 19, CP 633.¹

Water quality activities the County was performing prior to obtaining its NPDES permit are described by the County as “current activities” while new and increased levels of activities are described by the

¹ In explaining the purpose of those activities, the County notes that the beneficial uses of water promoted by the Clean Water Act include “stock watering; salmonid migration, rearing, spawning and harvesting; ... wildlife habitat ... swimming, fishing, boating and aesthetic enjoyment.” CP 706.

County as “additional activities.” CP 634. The County had been spending about \$2.5 million per year on “current” road maintenance activities related to water quality, including: (1) sweeping residential and arterial streets, (2) mowing roadside ditches “*as needed*,” (3) cleaning catch basins “*in emergencies* and about once every three years” and (4) mowing biofiltration swales and detention/retention facilities “*as requested* to satisfy public’s expectation.” CP 780 (emphasis added). This level of “current activity” was and continues to be paid out of the County’s Road Fund, with gasoline tax and property tax revenue. CP 657, 685.

The County’s NPDES permit application proposed “additional” road maintenance activities to promote clean water including: (1) actually complying with the County’s existing catch basin maintenance policy; (2) actually complying with the County’s biofiltration swale and detention pond maintenance policies (mowing them on a scheduled basis rather than a citizen complaint basis); (3) more frequent, scheduled mowing of roadside ditches; and (4) more frequent street sweeping. CP 780.² The cost of these “additional” road maintenance activities was estimated to be over \$1 million per year. *Id.* Other proposed “additional activities,”

² As the County noted in its plan: “*Budget constraints limit many activities* such as catch basin and drywell cleaning *to being performed less often than called for by County standards.*” County SWMP at 47 (emphasis added); see also CP 684 “funding is not sufficient for routine inspection and maintenance.”

included: (1) re-starting the River Rangers program; (2) amending the building code to adopt current design standards for development and redevelopment projects; (3) hiring additional building inspectors, and (4) promoting natural lawn care. CP 685, 687-88. The total estimated cost of all proposed “additional activities” was three to four million dollars per year, with the County planning to only implement “the minimum” level of additional activities “agreeable to Ecology” for issuance of the NPDES permit. CP 793.

Because of budgetary constraints, the plan submitted by the County as part of its NPDES permit application expressly notes that its ability to implement the proposed additional activities “is contingent on the level of new funding.” CP 694.³ Consequently, “establishing a source of revenue” for the additional activities was “the main priority of the county at the start of the NPDES term.” CP 683. Thus, the County formed an advisory “Clean Water Funding Task Force” to recommend a proposed funding source for the additional activities. The Funding task force was specifically instructed by the County to “stay focused on the goal – funding plan and fee structure recommendation”; they were “not here to review the” proposed additional activities. CP 793. Funding

³ The County also noted that “Overall County priorities may require allocation of funds to” other programs. CP 694.

options considered by the Funding task force included raising local sales, gasoline and/or property taxes. CP 800-802; Admission No. 24, CP 635. Concerns raised by County staff about constitutional limitations on property taxes had a major impact on the Funding task force's ultimate omission of an explicit property tax component from the recommended funding scheme. CP 800.⁴ Citizens recognized the funding plan for what it is – a new tax. Three of the five most frequent public comments received by the Funding task force were “no to this tax,” “this is a tax (or property tax)” and “does this mean I pay another tax.” CP 795.

The County Commissioners ultimately adopted Ordinance No. 1999-11-09 (codified at Ch. 13.30A CCC) creating the Clean Water Charge (“CWC”) to generate revenue for the additional activities. The CWC is imposed on all real property in unincorporated Clark County that contains at least \$10,000 of improvements. CCC 13.30A.050; CP 628. The amount of CWC assessed against each parcel is calculated based on the amount of impervious surface on the property. *Id.* The CWC is assessed without regard to whether the property is undergoing any development or redevelopment regulated by the County's building code.

⁴ In fact, County staff prepared an extensive presentation about property tax limitations, which presentation estimated the amount of additional revenue the County could raise through property taxes before those limitations would kick in. CP 800-01.

Id.. Failure to pay the CWC results in a lien against the assessed property that the County may foreclose under Washington's property tax lien foreclosure statute. CCC 13.30A.090.

2. Procedural history.

Storedahl owns property in Clark County that has historically been the site of a sand and gravel mine and processing facility commonly known as the Daybreak Mine. Because of the activity on the property, the Storedahl property has its own NPDES permit. CP 628. Storedahl spends a significant amount of money on water quality management activities required under its NPDES permit. CP 804. Like all other improved property in the County, the Storedahl property has also been assessed CWC. Believing the CWC to be an unlawful property tax under *Covell* (and therefore an improper method for the County to fund its "additional activities") Storedahl brought suit seeking a refund of CWC it has paid and declaratory relief to prevent the County from collecting on unpaid assessments.

On cross-motions for summary judgment, the trial court dismissed Storedahl's complaint, reasoning that how the County chooses to spend funds raised by the CWC is purely discretionary. RP at 80. This appeal follows.

SUMMARY OF ARGUMENT

The CWC is an unavoidable charge on real property. It was enacted to generate additional revenue to pay for increased levels of tax-funded governmental activities including: (1) more frequent street sweeping, (2) drafting amendments to the City's development code, (3) hiring additional building inspectors and (4) educating farmers about the impact of livestock on riparian habitats. These activities are designed to improve water quality throughout the County for the benefit of the general public. The "additional activities" do not provide a targeted service to those assessed – owners of property containing improvements. Nor are these activities directed at alleviating burdens created by assessed property owners' existing impervious surfaces. Consequently, the CWC is a property tax under the test established by *Covell v. City of Seattle* for distinguishing between taxes and fees. While there are a variety of legitimate funding mechanisms available to the County to generate the desired revenue – several of which it considered before adopting the CWC – this particular funding method is a "tax in fees" clothing" that violates the "all important" uniformity requirement of the Washington Constitution that the Courts have so vigorously defended through *Covell* and its progeny.

ARGUMENT

A. Whether a municipal charge is a tax or a fee is an issue of law subject to *de novo* review.

The trial court erroneously believed that evaluation of the tax versus fee test under *Covell* was subject to an arbitrary and capricious standard: “I would have to say ... what they are doing is arbitrary and capricious before I can be involved in telling government how to exercise their governmental functions.” RP 80, ll. 11-14. However, the Washington Supreme Court has expressly held that whether a municipal charge is a tax or a fee “pertains to constitutional limitations ... and so are issues of law to be determined *de novo* by this court.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003). As the Court explained, when governmental activities are being funded “we must determine if [the] [o]rdinance ... imposed a tax or a fee to pay for those costs.” *Id.* at 551.

B. The CWC is a tax under the Supreme Court's three-part test for distinguishing between taxes and fees.

The trial court failed to properly apply *Covell* and its progeny to the undisputed facts in this case. In this case, as in *Covell*, the dispositive issue is whether the contested municipal charge is a property tax or a regulatory fee. *Covell* established a three-part test for distinguishing valid regulatory fees from invalid, non-uniform property taxes. To qualify as a

regulatory fee, a municipal charge must satisfy *all three* of the following criteria:

- 1) “the *primary purpose* of the ... County” must be to *regulate the fee payers*, rather than to generate revenue “to accomplish desired public benefits” (“if the primary purpose of the charges is to raise revenue, rather than to regulate, then the charges are a tax”);
- 2) “the money collected must be allocated *only to the* authorized *regulatory purpose*”; and
- 3) there must be a “*direct relationship between the*” charge and either the “*services received*” or the “*burden produced*” by the entities assessed.

Covell, 127 Wn.2d at 879 (emphasis added). Failure to satisfy any one of *Covell*'s three parts means that the disputed charge is a tax. The CWC fails all three parts, each of which independently establishes that the CWC is a tax.

1. The fundamental legislative impetus for adopting the CWC was to pay for increased levels of governmental activity, making it a tax under the first *Covell* test.

The first *Covell* test distinguishes between charges whose goal is to “accomplish desired public benefits which cost money” and those whose goal is to regulate the payers. *Covell*, 127 Wn.2d at 879. As the Court has explained:

First, one must consider whether the primary purpose of the legislation is to “regulate” the fee payers or to collect revenue to finance broad based public improvements that cost money.

Samis Land Co. v. County of Soap Lake, 143 Wn.2d 798, 806, 23 P.3d (2001). As with any issue of statutory construction, the purpose of a municipal charge is determined by “focusing on the legislative language found in the ordinances themselves.” *Samis*, 143 Wn.2d at 806. Thus, in both *Samis* and *Covell* the Supreme Court held that the municipal charge at issue was a tax because the language of the ordinance imposing the charge was “*devoted to fiscal planning* rather than toward the type of service or benefit for those who pay fees” *Samis*, 143 Wn.2d at 807, quoting *Covell*, 127 Wn.2d at 880 (emphasis added).

The same is true here. Like the ordinances at issue in *Samis* and *Covell*, Clark County Code Chapter 13.30A is devoted to fiscal matters: the rate structure, reduced rates for senior citizens; billing and collection, lien foreclosure procedures, etc. Even a cursory review of the ordinance confirms that “the thrust of the legislation is clearly on funding.” *Covell*, 127 Wn.2d at 881. Moreover, the Clark County ordinance is explicitly clear that the purpose of the CWC is to generate revenue for desired public programs; it states “charges collected pursuant to this chapter shall be used to fund the additional activities undertaken by Clark County as required by its NPDES permit.” CCC 13.30A.070. The revenue raising purpose of the CWC is also confirmed by the County’s admissions (No. 25, CP 635), an admission that doomed the charge at issue in *Samis*, 143 Wn.2d at 808.

In contrast, to qualify as a fee under the first *Covell* test the primary purpose of the ordinance must be “to regulate the payers – by providing them with a targeted service or alleviating a burden to which they contribute” *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 371, 89 P.3d 217 (2004) (citing *Samis* and *Covell*).⁵ Thus the Court – in each of *Arborwood*, *Samis* and *Covell* – also contrasted the fiscal focus of the ordinances with the absence of language providing either a targeted service to payers or establishing a regulatory scheme directed at payers. *Arborwood*, 151 Wn.2d at 371 (“the language ... is lacking an overall plan for regulating emergency and ambulance services.”); *Samis*, 143 Wn.2d at 809 (“nowhere ... is there a reference to any utility service or burden applicable to the properties charged here.”); *Covell*, 127 Wn.2d at 881 (the “ordinances make no attempt to regulate residential housing or even to regulate the use of city streets by residential occupants.”). As with those cases, there is nothing in the CWC ordinance identifying any targeted service the County is providing to CWC payers – owners of properties containing existing impervious surfaces. Nor does the ordinance identify any regulations governing property owners as “the entity or activity being

⁵ Most recently, in *Okeson*, the Court explained: “a tax raises revenue for the general public welfare, while a regulatory fee raises money to pay for or regulate the service that those who pay will enjoy (or to pay for or regulate the burden that those who pay have created.” 150 Wn.2d at 553. The additional activities are conducted for the general public welfare, the CWC is a tax.

assessed.” *Covell*, 127 Wn.2d at 881. Thus the CWC is a tax under the first *Covell* test.

Furthermore, as previously noted, many of the additional activities funded by the CWC are increased levels of “current” road maintenance activities including street sweeping and mowing roadside ditches. *Covell* expressly held that a charge imposed on property owners to pay for underfunded street maintenance activities is “simply a tax.” 127 Wn.2d at 884.

2. The CWC is a tax under *Covell* because the activities funded by the CWC do not regulate the entities assessed (owners of improved land).

The second prong of the *Covell* test is focused on the actual use of the revenue raised. Specifically, the test asks whether the money is used *exclusively* to cover the costs of *regulating* fee payers. As the Court explained in *Samis*:

Simply because charges are allocated to some “broad category” of important public services does not necessarily mean they are “regulatory fees.” ***The second Covell factor requires that “regulatory fees” be “used to regulate the entity or activity being assessed.”***

Samis, 143 Wn.2d at 810 (emphasis added). CWC funds are not spent to cover the cost of “regulating” assessed property owners. Many of the additional activities, such as street sweeping and mowing roadside ditches, address water quality and public safety issues associated with people

driving on public roadways. Other activities, such as revising, updating and amending the development code and paying for more building inspectors, regulate the conduct of persons who chose to engage in regulated development or redevelopment activities (with respect to which they must apply for a permit and pay the appropriate permit fees). However, the CWC is an unavoidable recurring assessment against owners of improved property regardless of whether any regulated development activities are being conducted on the property.

In addition to the building code, the County's code enforcement officers also enforce the ordinance prohibiting "illicit discharges," an ordinance for which drafting costs were charged to the CWC. CP 724. As the County admits that ordinance applies to "all persons, not just persons who own property" subject to the CWC. Admission No. 39, CP 640.⁶ Moreover, it is enforced without regard to whether the code enforcement officer involved is filling a "current" or "additional" position and therefore without regard to the source of funding. Using the CWC to pay for the cost of enforcing ordinances of general applicability violates the Supreme Court's oft repeated warning that taxes cannot be transmuted into fees "by

⁶ Moreover, discharges made pursuant to industrial NPDES permits such as Storedahl's are expressly defined as "authorized" discharges. CP 668. In fact, the County refers any issues regarding discharges from properties subject to industrial NPDES permits (such as Storedahl's property) to the state Department of Ecology for investigation. CP 715.

the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a ‘police fee.’” *Covell*, 127 Wn.2d at 888, quoting *U.S. v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993), cert den’d 510 U.S. 1109 (1994). As in *Okeson*, *Samis*, and *Covell*, the above undisputed facts establish that CWC monies are used to cover the costs of these activities for the benefit of the general public and “by definition” are not “used exclusively” to regulate the “entities assessed” the CWC – here the owners of properties containing improvements valued above \$10,000.

3. The CWC fails *Covell’s* direct relationship test.

The third factor is 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.

Arborwood, 151 Wn.2d at 372-73. These two aspects of the direct relationship requirement correspond with the two types of valid “regulatory fees” described in *Emerson College v. City of Boston*, 462 N.E.2d 1098 (Mass. 1984), and cited by *Covell*, 127 Wn.2d at 890:

Fees imposed by a governmental entity tend to fall into one of two principal categories: [1] user fees, based on the rights of the entity as proprietor ...or [2] regulatory fees ... founded on the police power to regulate particular businesses or activities. ... Such fees share *common traits* that distinguish them from taxes: they are charged in exchange for a particular *governmental service which benefits the party paying the fee in a manner not shared by other members of society* [and] *they are paid by choice*, in that the party paying the fee has the

option of not utilizing the governmental service and thereby avoiding the charge.

462 N.E. 2d at 1105 (emphasis added). The CWC is not a charge for the use of a proprietary service. The CWC does not finance the cost of regulating activities conducted by CWC payers. Thus the CWC is not related at all, let alone “directly related,” to either a targeted service or benefit received by CWC payors, or the cost of alleviating any “burden” resulting from CWC payors engaging in regulated activity.

a. The activities funded by the CWC promote clean water for beneficial use by the general public.

The County admits (as it must) that the benefit of cleaner public waters resulting from the additional activities funded by the CWC accrues to the general public, it is not limited to owners of CWC assessed properties. Admission No. 19, CP 633. In *Covell*, the Supreme Court held that the necessary direct relationship is not satisfied by charging some property owners to finance general public benefits. *Covell*, 127 Wn.2d at 888-89 (test not met when the fees “provide better service for the public at large, which includes [those not] paying the ... charge”).⁷ Properties assessed the CWC also benefit from streets, fire and police services, parks,

⁷ Other states’ courts have likewise held that “choice” and the receipt of a benefit “not shared by other members of society” are the “common traits” that distinguish fees from taxes. *Greater Franklin Developers Association, Inc. v. Town of Franklin*, 730 N.E.2d 900, 902 (Mass. Ct. App. 2000), citing *Emerson College v. Boston*, 462 N.E.2d 1098 (Mass. 1984).

libraries, public schools and national defense, among other public goods, but that would not authorize the imposition of “fees” on property owners to pay for such public goods. *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (“*Hillis Homes I*”) The fact that CWC payers share in the public benefit of clean water does not convert the compulsory charges on a portion of the public to fund additional activities designed to further improve water quality for beneficial uses. As the Supreme Court held in *Covell* when a charge is imposed to fund public goods, any relationship between the charge and the “benefit” received by the payor is “tangential indeed.” 127 Wn.2d at 889.

b. CWC funded activities address a variety of water quality issues.

The Supreme Court explained in *Samis* that, to survive scrutiny under this portion of the third *Covell* prong, a challenged municipal charge must be directly related to “alleviation of a burden to which the [fee payer] contribute[s].” *Samis*, 143 Wn.2d at 805. Here the wide array of additional activities funded by the CWC are not focused on alleviating burdens created by stormwater discharges from assessed properties. Stormwater discharges from Storedahl’s property are directly regulated by the Department of Ecology through Storedahl’s NPDES Permit. The County charge is not directly related to alleviating the “burden” of

stormwater runoff from Storedahl's property. The County's NPDES Permit specifically provides that discharges of stormwater from properties regulated by their own industrial NPDES Permits are "authorized discharges" into and from the County's' municipal stormwater system. CP 668. Since stormwater discharges from Storedahl's property are directly regulated by the state under Storedahl's own NPDES permit, the Storedahl property is not creating a burden being alleviated by the additional activities funded by the CWC.

Not only are surface water discharges from Storedahl's property separately and wholly regulated by the Department of Ecology, the "additional activities" financed by the CWC are intended to address problems that are *unrelated to ownership of property with impervious surfaces*. For example, the County admits that maintenance and operation of county-owned catch basins "is necessitated, inter alia, by impacts caused by vehicles traveling on county roads." Admission No. 44, CP 642. In *Covell* the Court expressly held that the imposition of a municipal charge on property owners to cover the cost of maintenance activities necessitated by driving on public roads fails the direct relationship requirement. 127 Wn.2d at 888-89.

The County also admits that some of the additional activities funded by the CWC are intended to reduce livestock impacts on riparian

habitat, Admission No. 52, CP 645. The County concedes that its efforts to reduce livestock impacts on riparian habitat are not related to the operation of an NPDES permitted gravel processing facility on Storedahl's property. Admission Nos. 53-54, CP 645-46. Moreover, cattle grazing in riparian areas is entirely unrelated to impervious surfaces. In fact, the Clean Water Funding Task force, when evaluating funding alternatives, was specifically concerned that a "fee" based on impervious surface does *not* reflect the impact of agricultural land uses on stormwater pollution. CP 802.

The plan the County was required to prepare in connection with its NPDES permit notes that one of the reasons the County faced fiscal constraints in maintaining public stormwater infrastructure is that it had not historically inspected the condition of stormwater facilities developers built to serve residential developments before accepting transfer of the facilities to public ownership, thus resulting in acceptance of residential stormwater facilities that were in disrepair at the time of transfer. CP 692. Needless to say, this burden is also unrelated to the operation of an NPDES-permitted gravel processing facility on Storedahl's property or the ownership of CWC assessed property. In stark contrast, the County was advised that property owners who operate and maintain private facilities to

treat stormwater “make a good argument” that they should not be required to pay for the cost of maintaining public infrastructure. CP 797.⁸

The development of adequate legal authority to prohibit “illicit discharges” and the enforcement thereof are also “additional activities” funded by the CWC. Again the City admits that the ordinance regulates the conduct of the public at large, all persons are prohibited from making illicit discharges of pollutants into the County’s stormwater facilities not just owners of property in unincorporated Clark County, Admission No. 39, CP 640. Again the relationship between activities directed toward the public at large and the financing of those activities by imposing a charge on a small segment of the population fails to satisfy the requisite direct relationship. *Okeson*, 150 Wn.2d at 554 (cost of streetlights, which benefit the general public not directly related to use of electricity); *Samis*, 143 Wn.2d at 813-14 (no direct relationship between public expenditures and property ownership); and *Covell*, 127 Wn.2d at 888 (funding “better service for the public at large” not directly related to charge on property owners).

⁸ The same document asserts that the argument would not extend to other activities to be funded by the CWC, such as education and monitoring, because those activities address “*county wide needs not lessened*” by a property owner’s on-site management of stormwater. Whether the funds are used to pay for public infrastructure the payer does not use because the payer maintains private infrastructure at its own expense or because the activities address “county wide needs, the charges are unrelated to the payer’s ownership of assessed land.

As discussed above, the CWC is a compulsory charge on all property and is *not used* to cover the cost of regulating CWC payors but instead is used to finance “additional activities” the County is required to perform as a condition of its state-issued NPDES permit -- activities that benefit the public generally, not just property owners assessed the CWC. The CWC is, therefore, a tax under the third *Covell* test as well.

The numerous, varied governmental activities funded by the CWC are broad based public services addressing burdens created by payers and non-payers alike. As in *Covell*, the relationship between the fee assessed against improved property and the activities conducted throughout the County with those fees is “tangential indeed.” *Covell*, 127 Wn.2d at 889.

C. The federal government has recently held that a nearly identical King County charge is a tax.

The United States Government Accounting Office (“GAO”) has recently ruled that a nearly identical charge levied by King County to pay for activities that county is performing under its NPDES permit is a tax. GAO decision No. B-30666 (copy attached as Appendix A). The decision notes that the federal government is obligated to pay valid user or regulatory fees but is immune from local taxes. Consequently, the U.S. Forrest Service’s liability for the charge turned, as this case does, on the question of whether the charge is a tax or a fee.

Applying the same criteria as the Washington Supreme Court does, the GAO noted that “the most important factor becomes the purpose behind the statute or regulation that imposes the charge.” GAO opinion at 6. (Citing, *inter alia*, *United States v. Huntington*, 999 F.2d 71 (4th Cir. 1993), a case quoted in *Covell*).⁹ The GAO held that the charge is a tax because it is imposed “on all owners of developed parcels in unincorporated areas of the county to raise money that is spent for the benefit of the entire community.” GAO opinion at 7.

The Comptroller General explained that “unlike a fee ... the benefits paid for by King County’s [charge] ... are not narrowly circumscribed but benefit the general population at large.... *Nor is the assessment of the [charge] incidental to a voluntary act such as a request for a permit ... the assessment, rather, supports the provision of undifferentiated benefits to the entire public.*” *Id.* (emphasis added). The Washington Supreme Court has likewise recognized that true “fees” are incidental to a voluntary act and therefore “akin to charges for services rendered” *Covell*, 127 Wn.2d at 884.

Like the Washington Supreme Court, the Comptroller General on the actual use of the funds to determine whether the charge is a tax,

⁹ In fact, the quote is repeated by the Washington Supreme Court in *Samis*, 143 Wn.2d at 806 and *Okeson*, 150 Wn.2d at 552.

holding that when “revenue of the special fund is *used to benefit the population at large* then segregation of the revenue to a special fund is immaterial.” *Id.* at 9 quoting *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 135 (4th Cir. 2000) (emphasis added).

D. The CWC is a Non-Uniform Property Tax.

The Supreme Court explained in *Samis* why it is important to distinguish between taxes and regulatory fees:

Because such fees are not considered taxes, they are exempt from fundamental constitutional constraints on governmental taxation authority. There is thus an inherent danger that legislative bodies might circumvent constitutional constraints, such as *the all important tax uniformity requirement*.

Samis, 143 Wn.2d at 805 (emphasis added). As in *Samis* and *Covell*, the tax at issue in this case is unlawful and invalid because it does not comply with the uniformity requirement of the Washington Constitution. Wa. Const. Art. 7, § 1. That provision requires, among other things, that property taxes be imposed on an *ad valorem* basis, meaning that the tax be calculated based on the value of assessed property. *Id.* Yet the CWC is not imposed based on the value of the property assessed, it is instead based on the amount of impervious surface on the assessed property. The Court explained the difference between property taxes and excise taxes in *Covell*.

This court has distinguished a property tax from an excise tax, defining a property tax as a tax on things

tangible or intangible and an excise tax as the right to use or transfer things.

127 Wn.2d at 890. Because the CWC is imposed on real property located within the boundaries of Clark County without regard to any use or transfer of that property by the property owner, the tax is not imposed upon any voluntary act of the of the property owner but is an unavoidable demand that arises from the ownership of the property itself. Thus as in *Covell* and *Samis*, once it is determined that the CWC is a tax, it is a property tax rather than an excise tax and, therefore, is invalid because it violates the uniformity requirement of the Washington constitution.

CONCLUSION

The CWC is a tax under any of the three *Covell* tests; the primary purpose of the charge, indeed the fundamental legislative impetus for adopting it, is to pay for increased levels of governmental activities designed to improve water quality for the benefit of the general public. It is an unavoidable charge on the ownership of property without regard to whether the owner of the assessed property is engaged in any regulated activity. This is confirmed by the fact that Storedahl, like the U.S. Forrest Service in the GAO decision, is also directly required to engage in its own water management activities under a separate permit. As the Supreme Court noted in *Covell*, while the objective of funding additional activities to promote cleaner water is “honorable, [the] manner of assessment is

improper.” 127 Wn.2d at 891. The trial court’s ruling should be reversed and judgment entered in favor of Storedahl.

DATED: May 11, 2007

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**Comptroller General
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**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.

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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*

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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

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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

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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).

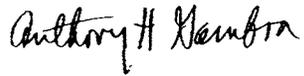
CONCLUSION

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

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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.



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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

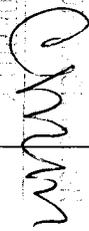
STOREDAHL PROPERTIES, LLC,

Appellant,

v.

CLARK COUNTY,

Respondent.

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STATE OF WASHINGTON
BY  DIRECTOR

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Brief of Appellant Storedahl Properties, LLC was served this day via electronic mail and hand delivery, at the following addresses:

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DATED this 11th day of May, 2007.


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