Stormwater Assessments and Sovereign Immunity: Recent Amendments to Section 313 of the Clean Water Act

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In 2008, the National Research Council ("NRC") reported that out of the U.S. Environmental Protection Agency ("EPA") assessed waterbodies in the United States, urban stormwater[1] runoff was responsible for about 38,114 miles of impaired rivers and streams, 948,420 acres of impaired lakes, 2742 square miles of impaired bays and estuaries, and 79,582 acres of impaired wetlands.[2] Urban stormwater was listed as the primary source of impairment for 13% of all rivers, 18% of all lakes, and 32% of all estuaries.[3] These statistics may not sound dire, but stormwater runoff's influence is disproportionately large, as urban areas covered just 3% of the land mass of the United States in 2008.[4] The NRC also estimated that the total number of permittees in the Clean Water Act's ("CWA")[5] section 402(p) stormwater permit program exceeded half a million, while the number of wastewater permittees numbered fewer than 100,000.[6]

Since the 1990s, municipalities have been trying to mitigate the effects of stormwater pollution, which necessarily includes charging fees to support stormwater programs and infrastructure improvements. Federal facilities are required to pay reasonable service charges for the abatement of water pollution under section 313 of the CWA.[7] In attempting to collect these fees, some municipalities and states designed fees that did not reflect a fee for services rendered, but rather took the form of a tax that benefitted the general public. When the U.S. Government Accountability Office ("GAO") opined that federal facilities could not use their appropriated funds to pay these "fees," because they were really "taxes," the U.S. Congress amended section 313 in 2011 ("2011 Stormwater Amendment"). The resulting 2011 Stormwater Amendment clarified section 313 with a limited waiver of sovereign immunity and provided for payment by federal facilities of any nondiscriminatory stormwater fee that is (1) based on some fair approximation of the facility's contribution to stormwater pollution and (2) used to pay or reimburse the costs associated with any stormwater management program.[8] Congress' codification of the required elements of this fee has mooted much of the wrangling over the nature of the charges.

What is now left is a debate over whether the federal government is responsible for pre-2011 "fees" given that Congress labeled the 2011 Stormwater Amendment as a clarification of section 313. Despite this label, the previous section 313 did not include a waiver for taxation, but provided for a fee.

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1. The U.S. Congress uses this spelling, while the EPA uses the term "storm water." 40 C.F.R. § 122.26(b)(13) (2015).
2. Nat'l Research Council, Urban Stormwater Management in the United States 21 (2008), *available at* http://www.epa.gov/npdes/pubs/nrc_stormwaterreport.pdf. These numbers must be considered an underestimate, since the urban runoff category does not include stormwater discharges from municipal separate storm sewer systems and permitted industries, including construction.
3. *Id.*
4. *Id.*
5. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)).
6. Nat'l Research Council, *supra* note 2, at 29. Section 402 of the CWA can be found at 33 U.S.C. § 1342.
7. 33 U.S.C. § 1323 (1988) (CWA section 313).
8. 33 U.S.C. § 1323 (2012).

Hence, the so-called "clarification" is really a new waiver and should not be applied retroactively.[9]

Part I of this Article discusses the growing stormwater problem that results from increased urbanization and discharged pollutants. Part II details the importance of the Rivers and Harbors Act of 1899 ("RHA")[10] on future stormwater regulation. Part III discusses the creation of the CWA and forms of sovereign immunity under the CWA. Part IV discusses the previous attempts to levy stormwater fees against federal facilities. Part V analyzes the actual 2011 Stormwater Amendment, its limited legislative history, and its sovereign immunity implications. Lastly, Part VI concludes with the implications of the clarification doctrine.

I. The Stormwater Problem

Stormwater runoff is a byproduct of urbanization.[11] Urbanization increases the amount of impervious surfaces as more land is converted into parking lots, roads, highways, and buildings.[12] The increase in impervious surfaces affects the hydrology of surface water, and it is this changed hydrology, coupled with the resulting quality of the stormwater runoff, that affects nearby water bodies.[13] These imperious surfaces are detrimental because they stop water from infiltrating the ground, instead forcing it to flow over land and eventually into the respective waterbody.[14] During storm periods, this water reaches the waterbody much faster than groundwater.[15] Stream channels respond to these increased flows by increasing their cross-sectional area to accommodate the higher flows, such as by widening the stream bank and downcutting the stream bed.[16] This then triggers stream bank erosion and habitat degradation.[17] Scientists have concluded that the impact of urbanization on the hydrologic cycle is dramatic.[18]

In addition to altering a stream's hydrology, stormwater runoff also introduces pollutants into waterbodies. Stormwater includes many urban pollutants such as lawn fertilizers and pesticides, oil and grease from cars and machinery, heavy metals from brake pads and tires, salts from snow and ice treatment, sediment from construction sites, and aromatic hydrocarbons from fuel combustion.[19] These pollutants not only impair water quality, but cause stream warming and decrease biodiversity.[20] Together, these two general effects create what scientists have dubbed the "urban stream syndrome."[21]

Urbanization is occurring at an unprecedented rate as the majority of the United States' population now lives in suburban and urban areas.[22] A case in point is Loudoun County in Northern Virginia, which is in the Potomac River basin. Between 1980 and 2010, the county's population increased five-fold to more than 312,000 people.[23] This population explosion has resulted in more than one-fifth of Loudoun County's subwatersheds having more than 10% impervious cover.[24] In the eastern half of the county, most areas have at least 25% impervious cover.[25] Scientists have long demonstrated that stream degradation can occur at levels of impervious cover as low as 10%.[26] This is corroborated by the aquatic life surveys for Loudoun County, which report that nearly three-quarters of the county's streams are under "stress" or "severe stress."[27]

The traditional means of managing stormwater runoff in urban areas are a curb-and-gutter, catch basin, and storm drain network.[28] These networks take one of two forms: (1) separate storm sewers that convey only stormwater, or (2) combined sewer systems that combine stormwater with sewage.[29] Separate storm sewer systems usually convey runoff directly into a waterbody while combined sewer systems direct the runoff to a treatment plant prior to discharge.[30] In addition to stormwater from these point sources, stormwater can also enter streams from nonpoint sources such as parking lots, highways, open land, rangeland, residential areas, and commercial areas.[31] But stormwater differs from direct discharges in that its flow is quite variable and, hence, harder to monitor for pollutants.[32] While it is an exaggeration to call the problem of urban stormwater the "final frontier" for water pollution regulation, it does represent one of the most challenging facets of water-pollutant control and remains a disproportionately large source of water pollution.[33]

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9. *See* Dekalb Cnty. v. United States, 108 Fed. Cl. 681, 708–10 (2013).
10. Rivers and Harbors Act of 1899, Pub. L. No. 55-425, 30 Stat. 1121.
11. The EPA defines stormwater as "runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13) (2015).
12. *Id.*
13. Nat'l Research Council, *supra* note 2, at 1, 4–5, 11–16.
14. Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. Colo. L. Rev. 431, 441–42 (2011).
15. *Id.*
16. Thomas R. Schueler, *The Importance of Imperviousness*, 1 Watershed Protection Techs. 100, 101 (1994).
17. *Id.*
18. Nat'l Research Council, *supra* note 2, at 144–45.
19. *Id.*
20. Owen, *supra* note 14, at 440–45; Schueler, *supra* note 16, at 102–07.
21. Owen, *supra* note 14, at 440–45.
22. Nat'l Research Council, *supra* note 2, at 1.
23. Potomac Conservancy, *State of the Nation's River 2011: One River, Two Worlds*, Potomac.org 1 (2011), http://static1.squarespace.com/static/52260563e4b0e56a47d7efa6/t/527bb4b7e4b04a4b55113e52/1383838903495/sonr11_finalreport.pdf.
24. *Id.*
25. *Id.*
26. *Id.*; Schueler, *supra* note 16.
27. Potomac Conservancy, *supra* note 23.
28. Office of Water, U.S. Envtl. Prot. Agency, EPA-821-R-99-012, Preliminary Data Summary of Urban Storm Water Best Management Practices 4-4 (1999), *available at* http://water.epa.gov/scitech/wastetech/guide/stormwater/.
29. *Id.*
30. *Id.* at 4-4 to 4-5.
31. *Id.* at 4-5.
32. Nat'l Research Council, *supra* note 2, at 43.
33. *See id.* at 1–2, 18–21.

II. The Rivers and Harbors Act of 1899

In order to appreciate Congress' limited waiver of sovereign immunity for stormwater fees, it is necessary to trace the legislative history of federal efforts to curtail water pollution. In the late nineteenth century, Congress first enacted laws prohibiting the deposit of what it termed "refuse matter" into navigable waters. After the United States Supreme Court held in *Willamette Iron Bridge Co. v. Hatch*[34] that there was no federal common law prohibiting the placement of obstructions in navigable waters,[35] Congress immediately enacted section 10 of the Rivers and Harbors Act of 1890.[36] While section 10 prohibited obstructions, section 6 of the Rivers and Harbors Act of 1890 prohibited discharges into navigable waters.[37] Section 11 mandated that officials report any of these discharges to the applicable district attorney of the United States.[38] The intent of this Act was to remedy the "serious injury" to watercourses caused not only by obstacles that impeded navigation but also by pollution.[39] By the late nineteenth century, not only did obstructions from log booms and the removal of stone from dams threaten the nation's public works, but pollution already affected the nation's waterways.[40] For example, sawmill waste, ballast, steamboat ashes, and rubbish from passing vessels were all reported sources of pollution.[41]

In 1894, Congress simplified section 6 and added an exception for sewage, providing that it

> shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States.[42]

At then–Secretary of War Daniel Lamont's suggestion, the 1894 version of the Rivers and Harbors Act also provided that violation of section 6 constituted a misdemeanor punishable by fine, imprisonment, or both.[43]

In 1899, Congress again amended the Rivers and Harbor Act of 1890.[44] In the 1899 version, Congress moved section 6 to section 13, retaining the reference to refuse matter and the sewage exception, but now identified potential pollution sources.[45] The RHA now read that it was unlawful to:

> [T]hrow, discharge, or deposit, or cause, suffer or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . . .[46]

Congress also made it unlawful to place anything on the bank of any navigable water that would wash into the navigable water and impede navigation.[47] For the first time, Congress authorized the Secretary of War to grant discharge permits provided that "anchorage and navigation will not be injured thereby."[48] Congress also directed the district attorneys of the Department of Justice to "vigorously prosecute" all offenders when the Secretary of War requested them to do so.[49] These amendments were most likely the result of then–Secretary of War Daniel Lamont's 1897 report to Congress, which described the limitations of the Rivers and Harbors Act of 1894 and suggested changes.[50]

These laws were underutilized until the 1960s when the United States Supreme Court held that the sewage exception in section 13 of the RHA was very narrow and that the industrial discharges from iron production at issue, although suspended in a liquid, necessitated a permit.[51] A few years later, in *United States v. Standard Oil Co.*,[52] the Supreme Court read the term "refuse" in 33 U.S.C. § 407 (RHA section 13) to include all foreign substances (including those that were commercially valuable) and pollutants apart from those flowing from streets and sewers and passing therefrom in a liquid state into the watercourse.[53] The Court refused to read section 13 in a vacuum, noting that

34. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).
35. *Id.* at 6, 8, 17.
36. Act of Sept. 19, 1890, ch. 907, § 10, 26 Stat. 426, 454–55.
37. *Id.* § 6, 26 Stat. at 453. Specifically, section 6 prohibited the depositing from "any ship, vessel, lighter, barge, boat or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mill, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind" into navigable waters. *Id.*
38. *Id.* § 11, 26 Stat. at 455.
39. S. Rep. No. 50-224, at 2 (1888).
40. *Id.*
41. *Id.*
42. Act of Aug. 18, 1894, ch. 299, § 6, 28 Stat. 338, 363.
43. *Id.*; *see also* H.R. Exec. Doc. No. 53-123, at 2–3 (1894). Sections 6 through 8 of the RHA track the suggested changes made by Secretary of War Lamont.
44. Rivers and Harbors Act of 1899, Pub. L. No. 55-425, 30 Stat. 1121, 1121.
45. *Id.* § 13, 30 Stat. at 1152.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* § 17, 30 Stat. at 1153.
50. *See* H.R. Rep. No. 54-293, at 8–13 (1897). The changes actually mirror Secretary of War Lamont's proposed Act "Revising and Enlarging Laws for Protection of Navigable Waters." *Compare id.* (containing copy of the draft Act submitted to Congress), *with* Rivers and Harbors Act of 1899 §§ 1–22, 30 Stat. at 1121–61 (version enacted). In addition to the changes noted above, Secretary Lamont suggested the addition of congressional consent to create any obstruction or to construct any bridge, dam, dike, causeway over any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States. H.R. Rep. No. 54-293, § 1, at 8. Secretary Lamont also suggested that it not be lawful to anchor vessels or float loose timber and logs so as to obstruct the passage of other vessels or to sink a vessel in navigable channels. *Id.* § 7, at 10. The Act stated that any abandoned sunken vessel, boat, watercraft, raft, or other obstruction shall be broken up, removed, sold or otherwise disposed of by the Secretary of War. *Id.* § 11, at 12. In the case of an emergency, the Secretary of War had the authority to take possession of any craft so as to "clear immediately" the navigable water. *Id.* § 12, at 12–13. Secretary Lamont also suggested that a bridge owner be criminally liable if they fail to alter said structures to the satisfaction of the Chief of Engineers. *Id.* § 10, at 11–12.
51. United States v. Republic Steel Corp., 362 U.S. 482, 490–91 (1960).
52. United States v. Standard Oil Co., 384 U.S. 224 (1966).
53. *Id.* at 225.

at the time there was "greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well."[54]

But the RHA only regulated the deposit of refuse and not continuous discharges into municipal sewer systems. This gap in what was known as the "Refuse Act" was one of the reasons Congress enacted the Water Pollution Control Act (commonly known as the CWA) of 1972.[55]

III. The Clean Water Act

A. History and Background of the CWA

The 1972 CWA was not Congress' first foray into water pollution regulation besides the RHA. In 1948, Congress enacted the Water Pollution Control Act.[56] Shortly after World War II, Congress recognized that water pollution had become an "increasingly serious problem due to the rapid growth of our cities and industries."[57] This prior Act deferred immensely to the states and focused on providing technical assistance and financial aid to states, agencies, and municipalities.[58] To this end, Congress directed the Surgeon General to work with other federal and state agencies to prepare and adopt comprehensive programs for eliminating and reducing the pollution of interstate waters and tributaries and to improve the sanitary condition of surface and underground waters.[59] Governors could also request that the federal government initiate enforcement proceedings against other states for the creation of water pollution that affected the health and welfare of their citizens.[60]

Congress expanded federal support of state initiated water pollution control efforts into the next decade, but in 1965, it finally required states to establish and enforce water quality standards and implementation plans.[61] Congress also established the Federal Water Pollution Control Administration, which would later become the EPA, in the then–Department of Health, Education, and Welfare.[62] Because it was apparent to Congress that combined sewer systems ("CSS") were overtaxing treatment plants, Congress authorized grants for research and development on the segregation of municipal storm and sanitary sewer systems.[63]

The Senate wanted to have the Secretary of the newly created Federal Water Pollution Control Administration to establish the necessary water quality standards,[64] but the House triumphed and the role of establishing water quality standards remained with the states.[65] But the states moved too slowly, with only twenty-four approved plans in place by 1972.[66] Even though the 1965 amendments added new enforcement provisions, these provisions required a court finding that compliance was feasible before a court could issue an abatement order.[67] Governing bodies appear to have continued to rely on the 1948 abatement procedure and section 13 of the 1899 Refuse Act.[68]

By the early 1970s, Congress desired stronger federal enforcement of water quality standards for interstate waters. Not only were states slow to approve water quality standards, but Congress viewed the existing permit system—based on the RHA—as being inadequate in two important respects: (1) it applied only to industrial polluters and (2) it divided administration authority between two agencies.[69] Because of these shortcomings, the Senate Committee on Public Works proposed what it called a "major change" in the program's enforcement mechanism from water quality standards to effluent limits as enforced by discharge permits.[70] Water quality was to be a measure of program effectiveness and performance, not a means of elimination and enforcement.[71]

The year of 1970 also marked the addition of what is now section 313 of the CWA. In enacting this provision, Congress codified then-existing Executive Order 11,288, which directed that federal facilities "shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purposes of this [Water Quality Improvement] Act in the administration of such property, facility, or activity."[72]

Executive Order 11,288 was not the executive branch's first venture into water pollution control. As early as 1948, President Truman had ordered federal agencies to cooperate with state and local authorities in preventing pollution of surface and underground waters.[73] This included ensuring that the disposal of sewage, garbage, refuse, and other

54. *Id.* at 225–26 (tracing history of the RHA).
55. Conn. Action Now, Inc. v. Roberts Plating Co., Inc., 457 F.2d 81, 88 (2d Cir. 1972); United States v. Lindsay, 357 F. Supp. 784, 792 (E.D.N.Y. 1973). Additionally, Congress also desired to have stronger federal enforcement of water quality standards for interstate waters. S. Rep. No. 92-414, at 3–9 (1971).
56. Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948).
57. S. Rep. No. 80-462, at 1 (1948).
58. *See* Water Pollution Control Act § 1, 62 Stat. at 1155; H.R. Rep. No. 80-1829, at 6 (1948); S. Rep. No. 80-462, at 1–2.
59. Water Pollution Control Act § 2, 62 Stat. at 1155–57. This mandate was subject to the economic feasibility of abatement. *Id.* § 2(d)(7), 62 Stat. at 1157.
60. Subcomm. on Air & Water Pollution, S. Comm. on Pub. Works, Summary and Analysis of Legislation Pending Before the Subcommittee on Air and Water Pollution, S. Doc. No. 92-9, at 4 (1971) [hereinafter S. Doc. No. 92-9]; *see also* Water Pollution Control Act § 2(d)(1)–(4), 62 Stat. at 1156–57.
61. S. Doc. No. 92-9, at 4; Water Pollution Control Act Amendment of 1956, Pub. L. No. 84-660, § 5(a), (g)(1), 70 Stat. 498, 500–01; *see also* S. Rep. No. 84-543, at 3–4 (1955).
62. S. Doc. No. 92-9, at 4; Water Quality Act of 1965, Pub. L. No. 89-234, § 2, 79 Stat. 903, 903.
63. Water Quality Act of 1965 § 3(a), 79 Stat. at 905–06; S. Rep. No. 89-10, at 6 (1965); H.R. Rep. No. 89-215, at 6 (1965).
64. S. Rep. No. 89-10, at 9.
65. *See* Water Quality Act of 1965 § 5(c)(1), 79 Stat. at 907–08; *see also* H.R. Rep. No. 89-215, at 10; H.R. Rep. No. 89-1022, at 10–13 (1965).
66. S. Doc. No. 92-9, at 4–5 (pointing to the inability of the states and federal government to agree on what the Water Pollution Control Act required and the lack of enforceable deadlines as reasons for the delays).
67. *See* Water Quality Act of 1965 § 5(c)(5), 79 Stat. at 909.
68. S. Rep. No. 92-414, at 5 (1971).
69. *Id.*
70. *Id.* at 7–8.
71. *Id.* at 8.
72. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 21, 84 Stat. 91, 107–08; *see also* 33 U.S.C. § 1323 (1970); H.R. Rep. No. 91-940, at 51–58 (1970); H.R. Rep. No. 91-127, at 19–20, 42–43 (1969).
73. Exec. Order No. 10,014, 13 Fed. Reg. 6601 (Nov. 3, 1948) (superseded 1965).

wastes conformed to state law and other federal programs applicable to states and to the public. In 1965, President Lyndon B. Johnson issued Executive Order 11,258, which required federal agencies to develop pollution control plans and required secondary treatment before transmission to municipal treatment facilities.[74] The following year, President Johnson ordered federal agencies to comply with section 11 of the Water Pollution Control Act, which was CWA section 313's predecessor.[75]

In 1972, Congress added a timetable and declared its intent to eliminate the discharge of pollutants into navigable waters by 1985.[76] This policy was reflected in the extensive amendments to the CWA, the most important of which were the federal effluent guidelines and the section 402 and 404 permit programs for point source discharges and the addition of fill material to waters of the United States.[77] The Act also provided for civil and criminal penalties for permit violations.[78] In order to help encourage agency enforcement, Congress added a citizen suit provision in section 505.[79] Congress intended that these programs replace the overwhelmed permit system under the 1965 amendments.[80]

While Congress took over control and enforcement of the federal permit program, it still provided several important roles for the states. Congress continued to authorize states to enter into pollution prevention and control agreements and to enforce their respective pollution control laws.[81] And the states now played an even greater role as the section 401 permit needed to construct or operate any facility now required a state water quality certification pursuant to section 301 of the Act.[82] Section 401 requires a state to certify that any discharge will comply with applicable sections of the CWA and the state's own water quality standards before an applicant can obtain a federal license or permit to conduct any activity (including the construction or operation of facilities) that may result in any discharge to a navigable water.[83] The limitations included in the certification become a condition of any federal license.[84] In effect, the section 401 certification gives the states broad authority to curtail federal permitting by ensuring compliance with their own state water quality standards.

The states also now had the option of administering the section 402 permit program under the supervision of the EPA.[85] Section 402 of the CWA grants EPA the authority to issue a permit for the discharge of any pollutant, except as to fill material (section 404).[86] To this effect, EPA administers the National Pollutant Discharge Elimination System ("NPDES"), which is designed to prevent harmful discharges into the nation's waters.[87] EPA initially administers the NPDES permitting system in each state, though the Agency can transfer such permitting authority to state officials.[88]

Congress also increased the requirements on federal facilities in section 313, now requiring that federal agencies comply with federal, state, interstate, and local standards respecting the control and abatement of pollution in the same manner as any other person.[89] By increasing the compliance burdens on federal facilities, Congress expressed its intent to make federal agencies more responsible for their discharges.[90] Yet these amendments still permitted the President to exempt any federal agency in the executive branch from compliance when "in the paramount interest" of the United States to do so.[91]

Congress again amended the CWA in 1977[92] and 1987.[93] The 1977 amendments to section 313 added that officers in

74. Exec. Order No. 11,258, 30 Fed. Reg. 14,483 (Nov. 17, 1965) (superseded 1966). If a federal entity could not connect to such a system, then it had to install its own waste treatment system. *Id.* at 14,484.
75. Exec. Order No. 11,288, 31 Fed. Reg. 9261 (July 2, 1966) (superseded 1970). Section 11 was also known as 33 U.S.C. § 466(h) (1952).
76. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101, 86 Stat. 816, 816.
77. *See* 33 U.S.C. § 1344 (1976) (CWA section 404); Federal Water Pollution Control Act Amendments of 1972 §§ 301–303, 401–405, 86 Stat. at 844–50, 877–85; Cong. Research Serv., Serial No. 93-1, Legislative History of the Water Pollution Control Act Amendments of 1972, at 321–23 (1973).
78. *See* Federal Water Pollution Control Act Amendments of 1972 § 309, 86 Stat. at 859–60; Cong. Research Serv., *supra* note 77, at 529, 689–90.
79. Federal Water Pollution Control Act Amendments of 1972 § 505, 86 Stat. at 888–89; *see also* 33 U.S.C. § 1365 (1976) (CWA section 505); S. Rep. No. 92-414, at 79 (1971).
80. S. Rep. No. 92-414, at 8 (discussing the "uncertainty" created by the 1965 Act and the new permit system that prohibited the discharge of pollutants into the navigable waters).
81. Federal Water Pollution Control Act Amendments of 1972 § 103, 86 Stat. at 817–19.
82. *See* 33 U.S.C. § 1311 (1976) (CWA section 301); 33 U.S.C. § 1341 (1976) (CWA section 401).
83. 33 U.S.C. § 1341; Pub. Util. Dist. No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 707–08 (1994).
84. *Pub. Util. Dist. No. 1*, 511 U.S. at 724–25.
85. Federal Water Pollution Control Act Amendments of 1972 § 402, 86 Stat. at 880–83.
86. 33 U.S.C. § 1342(a) (1976) (CWA section 402); 33 U.S.C. § 1344 (1976).
87. *See* 33 U.S.C. § 1342(a).
88. 33 U.S.C. §§ 1251(b), 1342 (1976); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 650 (2007).
89. Federal Water Pollution Control Act Amendments of 1972 § 313, 86 Stat. at 875.
90. Cong. Research Serv., *supra* note 77, at 805.
91. Federal Water Pollution Control Act Amendments of 1972 § 313, 86 Stat. at 875. After the 1972 amendments to the CWA, President Nixon mandated that federal facilities comply with federal, state, interstate, and local substantive standards and limitations, to the same extent as any other person subject to such standards and limitations. This directive included compliance with effluent limitations and ocean dumping, along with references to the other recently amended environmental protection laws. Just as in 1970, the executive branch authorized the heads of federal agencies to exempt facilities subject to certain limitations. Exec. Order No. 11,752, 38 Fed. Reg. 34,793, 34,793–95 (Dec. 17, 1973). President Carter issued a similar Executive Order in the late 1970s, but added that federal facilities comply with the "same substantive, procedural, and other requirements that would apply to private persons." Exec. Order No. 12,088, 43 Fed. Reg. 47,707, 47,707 (Oct. 13, 1978). During this same time, several states received permission from the EPA to include federal facilities in their NPDES programs. *See* 46 Fed. Reg. 39,671 (Aug. 4, 1981) (Wyoming and Montana); 45 Fed. Reg. 81,876 (Dec. 12, 1980) (Georgia); 45 Fed. Reg. 65,656 (Oct. 3, 1980) (South Carolina); 45 Fed. Reg. 42,368 (June 24, 1980) (New York); 44 Fed. Reg. 65,664 (Nov. 14, 1979) (Nebraska); 44 Fed. Reg. 70,920 (Oct. 10, 1979) (Wisconsin); 44 Fed. Reg. 55,651 (Sept. 27, 1979) (Illinois); 43 Fed. Reg. 36,323 (Aug. 16, 1978) (Indiana).
92. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.
93. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

performance of their official duties were also subject to the CWA, including the payment of reasonable service charges.[94] Congress intended that these amendments further clarify that all federal facilities must comply with all substantive and procedural requirements of federal, state, or local water pollution control laws.[95]

Section 313 now applied notwithstanding any immunity of officials under any other provision of law.[96] However, Congress specifically declared that federal employees were not personally liable for any civil penalties under the CWA.[97] Congress also authorized the President to issue regulations exempting from compliance any "weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States . . . and which are uniquely military in nature" if it was in the paramount interest of the United States.[98]

B. Sovereign Immunity Under the Clean Water Act

A federal agency's obligation to pay any stormwater charge depends on the degree to which Congress has waived sovereign immunity in the CWA. The doctrine of sovereign immunity dates back to 1821 and is a judicial construct with roots in British common law.[99] Sovereign immunity shields the federal government from lawsuits. Unless Congress waives sovereign immunity, federal agencies are exempt from state regulation and actions by private citizens.[100]

The doctrine of sovereign immunity was entrenched in Supreme Court jurisprudence long before the Court explained its origin.[101] The Supreme Court has recently affirmed that "[a] waiver of sovereign immunity must be unequivocally expressed in statutory text" and will be strictly construed.[102] Congress does not have to use "magic words" to waive sovereign immunity, but the scope of the waiver must be clearly discernible from the statutory text in light of traditional interpretive tools.[103] Any ambiguity in the statutory language must be construed in favor of immunity, but sovereign immunity does not displace the other traditional tools of statutory construction.[104]

While the Supreme Court consistently applied the doctrine of sovereign immunity, it was not until 1882 that the Court first opined as to its origin. In 1846, the Supreme Court held that a circuit court could not entertain a private bill that sought to enjoin the United States from collecting on a judgment.[105] The Court declared that the circuit court did not have jurisdiction over the case as "the government is not liable to be sued, except with its own consent, given by law."[106] In 1851, the Supreme Court again applied the doctrine and proclaimed that the doctrine was "the settled principle in our system of jurisprudence," but did not comment on its history.[107] In 1882, the Court finally acknowledged that the doctrine was rooted in English common law but that there was no such thing as a "kingly head" of this nation.[108] After declaring that it was difficult to find a similar root in the United States given that there was no person in our government that exercised supreme executive power, the Court declared that it was most probable that

> it has been adopted . . . as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.[109]

The Court has not elaborated any further on these origins. Since 1951, the Supreme Court has found an express waiver of sovereign immunity on only a handful of occasions, including §§ 1346 (United States as Defendant), 2409a (Real Property Quiet Title Actions) and 2501 (Court of Federal Claims Statute of Limitations) of title 28 of the U.S. Code, and § 552a(g)(4)(A) (Privacy Act of 1974) of title 5.[110] When it does find the waiver, the Court usually does not devote much time to analysis, which is most likely due to the Court's requirement that the waiver be unequivocal.

For instance, the alleged waiver in 28 U.S.C. § 2501 states: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."[111] In analyzing the extent of this waiver, the Court succinctly noted that "[a] waiver of the sovereign immunity of

94. Clean Water Act of 1977, sec. 61, § 313, 91 Stat. at 1598.
95. H.R. Rep. No. 95-830, at 93 (1977); S. Rep. No. 95-370, at 67–68, 184 (1977). Congress most extensively amended section 404's permit system for dredge and fill, adding sections (d) through (t). *See* Clean Water Act of 1977, sec. 67(b), § 313(d)–(t), 91 Stat. at 1600–06. These sections included Secretary of the Army authority to issue general permits, exceptions to dredge and fill permits, and program delegation to the states. *Id.*
96. S. Rep. No. 95-370, at 184.
97. H.R. Rep. No. 95-830, at 35–36.
98. *Id.* at 93.
99. Harry M. Hughes & Mitzi O. Weems, *Federal Sovereign Immunity Versus State Environmental Fines*, 58 A.F. L. Rev. 207, 213–14 (2006) (discussing the history of sovereign immunity).
100. *Id.* at 212. Even though the doctrine was firmly embedded in the Supreme Court's jurisprudence as early as 1846, scholar Edwin M. Borchard is credited with coining the term in 1921. *Id.* at n.29 (citing Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 4 (1924)).
101. United States v. Lee, 106 U.S. 196, 207 (1882) (noting that the Court had repeatedly asserted the principal but had never discussed the reasons for its existence).
102. FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012); *see also* Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983).
103. *Cooper*, 132 S. Ct. at 1448.
104. *See id.*
105. United States v. McLemore, 45 U.S. 286, 288 (1846).
106. *Id.*
107. Reeside v. Walker, 52 U.S. 272, 290 (1851).
108. United States v. Lee, 106 U.S. 196, 205–06 (1882).
109. *Id.* at 206.
110. FAA v. Cooper, 132 S. Ct. 1441, 1448–49 (2012) (referring to 5 U.S.C. § 552a(g)(4)(A)); Franconia Assocs. v. United States, 536 U.S. 129, 141 (2002) (referring to 28 U.S.C. § 2501); Block v. North Dakota, 461 U.S. 273, 275–76 (1983) (referring to 28 U.S.C. § 2409a); United States v. Gilman, 347 U.S. 507, 508 (1954) (noting that "[t]he Tort Claims Act, by imposing liability on the United States for the negligent acts of its employees, has placed it in the general position of a private employer").
111. *Franconia Assocs.*, 536 U.S. at 138 (citing 28 U.S.C. § 2501).

the United States 'cannot be implied but must be unequivocally expressed.' That requirement is satisfied here."[112] The Court acted just as swiftly over thirty years later when it considered the waiver in 28 U.S.C. § 2409a, noting that "[u]nder the Quiet Title Act of 1972 [("QTA")], . . . the United States, subject to certain exceptions, has waived its sovereign immunity and has permitted plaintiffs to name it as a party defendant in civil actions to adjudicate title disputes . . . ."[113]

The Court did not apply canons of statutory construction when it addressed the civil remedies provision of the Privacy Act. The Court merely noted that § 552a(g)(4)(A) of title 5 provides that for any "intentional or willful" refusal or failure to comply with the Act, the United States shall be liable for "actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000."[114]

Congress waived sovereign immunity in sections 313 and 505 of the CWA. Section 313 mandates that

> federal facilities . . . 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.[115]

Section 505 of the CWA provides that "a citizen may commence civil actions in district court against any person (including . . . the United States . . .) who is alleged to be in violation of . . . an effluent standard or limitation under this Act . . . ."[116]

These waivers have been challenged in the Supreme Court on three occasions.[117] In *EPA v. California ex rel. State Water Resources Control Board*, the State of California claimed that section 313 mandated that federal facilities had to have a state-issued section 402 NPDES permit to discharge pollutants into a water of the United States, and because California had assumed responsibility for the NPDES permitting program, California was the permitting authority.[118] As support for its argument, California pointed to the mandate in section 313 that agencies discharging pollutants must "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."[119] California also argued that section 505's reference to citizen suits for violations of effluent standards or limitations bolstered its argument.[120]

The Supreme Court rejected California's claim because section 313 of the CWA did not expressly provide that federal dischargers must obtain state NPDES permits. The Court noted that neither section 313 nor any other section of the 1972 amendments expressly state that obtaining a state NPDES permit is a "requirement respecting control and abatement of pollution."[121] The Court rejected California's arguments regarding section 505's waiver as it pertained to section 402 and not section 313.[122]

In *U.S. Department of Energy v. Ohio*,[123] Ohio sought state and federal civil penalties for alleged past violations of the Resource Conservation and Recovery Act of 1976 ("RCRA")[124] and the CWA.[125] To ascertain if the federal government was liable for past violations (where the remedy would be punitive fines), the Court discussed sovereign immunity in the federal facility and citizen suit provisions of both the CWA and RCRA.[126] The Court first addressed to what degree the similar citizen suit provisions of the two statutes waived sovereign immunity for punitive fines against the federal government.[127] The Court found that neither citizen suit provision waived sovereign immunity for punitive fines because the provisions incorporated existing civil penalties and these provisions did not define "person" to include the United States.[128] Ohio argued that the citizen suit provisions themselves defined "person" to include the United States, but the Supreme Court refused to budge, declaring that the waiver was not sufficiently clear and unequivocal.[129]

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112. *Id.* at 141 (citations omitted) (quoting United States v. King, 395 U.S. 1, 4 (1969)).
113. *Block*, 461 U.S. at 275–76. Whether the United States had waived immunity was not the gravamen of the case. There were two separate issues: (1) whether Congress intended the QTA to provide the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property and (2) whether the QTA's twelve-year statute of limitations is applicable in instances where the plaintiff is a state. *Id.* at 276–77.
114. *Cooper*, 132 S. Ct. at 1448–49 (citing 5 U.S.C. § 552a(g)(4)(A)). Perhaps, the Court did not bother dissecting the waiver because the real crux of the challenge was to the meaning of "actual damages." *See id.* at 1449.
115. 33 U.S.C. § 1323 (1970).
116. 33 U.S.C. § 1365 (1970) (CWA section 505).
117. *See* U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992); Weinberger v. Romero-Barcelo, 456 U.S 305 (1982); EPA v. Cal. ex rel. State Water Res. Control Bd., 426 U.S. 200 (1976). In *Weinberger v. Romero-Barcelo*, the Supreme Court held that the CWA did not mandate the issuance of an injunction in the face of all statutory violations, but permitted the exercise of discretion on the part of district court judges. *Weinberger*, 456 U.S at 320. This was unlike the Endangered Species Act, which mandates injunctions in order to avoid jeopardizing the continued existence of any endangered species. *Id.* at 313–14.
118. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 210–11. Although only the state of California is mentioned in the case name citation, the state of Washington was also a party to the dispute.
119. *Id.* at 212, 221.
120. *Id.* at 222.
121. *Id.* at 200, 212–13, 221–22. At this time, section 313 of the CWA only mandated that federal installations
> engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants 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 (1970).
122. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 222–24.
123. U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992).
124. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992k (2012)).
125. *U.S. Dep't of Energy v. Ohio*, 503 U.S. at 612.
126. Both parties, and more importantly, the Court, acknowledged that the federal government was liable for coercive fines. *Id.* at 613.
127. *Id.* at 615.
128. *Id.* at 617.
129. *Id.* at 619–20.

The Court then addressed the federal facilities provision of the CWA. At the time of the suit, section 313 provided that:

> Each department, agency, or instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner . . . as any nongovernmental entity . . . . 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 . . . . The United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.[130]

Ohio claimed that Congress' use of the term "sanctions" and the fact that the section 402 permits arose under federal law, demonstrated a waiver as to punitive fines.[131] Again, the Court refused to find a sufficiently clear and unequivocal waiver of sovereign immunity. The Court held that "sanctions" as it appeared in the context of "process and sanctions," made it distinct from what it called "substantive requirements."[132] This structure implied, according to the Court, that Congress' use of the term "sanction" was drafted to allow states to coerce federal actors to comply with the law, but not to impose punitive fines.[133] As to whether the state statutes approved by the EPA and supplanting the CWA could be read to arise under federal law, the Court concluded that Congress' use of "arising under Federal law" was not sufficiently clear to establish a waiver for punitive fines.[134]

The federal facilities waiver in RCRA was similar to the first sentence of section 313. Section 6961 of title 42 of the U.S. Code provided that the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . in the same manner, and to the same extent, as any person is subject to such requirements."[135] Congress also provided that "[n]either the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief."[136] Ohio claimed that the "all . . . requirements" language was a waiver of sovereign immunity for punitive fines.[137] As it did with the CWA, the Court dismissed Ohio's claim as to § 6961, noting that it agreed with the Tenth Circuit that the "all . . . requirements" language could reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures.[138] The Court observed that all of the requirements refer to either mechanisms requiring review of substantive compliance—permit and reporting requirements—or to mechanisms for enforcing substantive compliance in the future—injunctive relief and subsequent sanctions.[139] What the Court did not see was any mention of any mechanism for penalizing past violations or an example of punitive fines.[140] To the Court, this was "powerful evidence" that Congress had no intent to subject the United States to punitive fines.[141]

IV. Stormwater Taxation?

The limited waiver as to reasonable service charges in section 313 of the CWA did not deter states and municipalities from trying to collect what amounts to stormwater taxes. In 2001, King County, Washington, attempted to collect stormwater assessments from the U.S. Forest Service ("Forest Service"). King County had implemented the 1987 CWA and created a surface water management program to regulate nonpoint source pollution.[142] The Forest Service maintains over 350,000 acres of federal land in that county and, as a federal entity, is statutorily obligated to pay "reasonable service charges" if it discharges pollutants as defined in the CWA.[143]

The Washington Revised Code permits counties in the State of Washington to raise revenue through rates and charges assessed against those served by, or receiving benefits from, any stormwater control facility or contributing to an increase of surface water runoff.[144] Under this authority, King County charged a "surface water management fee" on all developed parcels in unincorporated areas of the county, for surface and stormwater management services provided by the stormwater management program.[145] These services include, among others, basin planning, surface and stormwater quality and environmental monitoring, and facility design and construction.[146]

According to King County, these fees were necessary in order to (1) promote the public health, safety, and welfare by minimizing uncontrolled surface and stormwater, erosion, and water pollution, (2) preserve and utilize the many values of the county's natural drainage system, including water

130. *Id.* at 620 (quoting 33 U.S.C. § 1323(a) (1988)).
131. *Id.*
132. *Id.* at 623.
133. *Id.*
134. *Id.* at 627–28.
135. *Id.* at 627 (quoting 42 U.S.C. § 6961).
136. *Id.*
137. *Id.*
138. *Id.* at 627–28 (citing Mitzelfelt v. Dep't of the Air Force, 903 F.2d 1293, 1295 (1990)).
139. *Id.* at 628.
140. *Id.*
141. *Id.*; *see generally* Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505, 1505 (amending RCRA's federal facilities provision to expressly provide for coercive fines for past violations).
142. *See* U.S. Gov't Accountability Office, B-306666, Forest Service–Surface Water Management Fees 2, 9 (2006), http://www.gao.gov/decisions/appro/306666.htm [hereinafter U.S. GAO-B-306666].
143. *Id.* at 1, 4; *see also* 33 U.S.C. § 1323 (2000).
144. U.S. GAO-B-306666, *supra* note 142, at 4–5 (citing Wash. Rev. Code § 36.89.080(1) (2005)).
145. *Id.* at 5 (citing King Cnty., Wash. Code §§ 9.08.050(A), 9.08.070(C) (2005)).
146. *Id.* at 3 (citing King Cnty., Wash. Code § 9.08.010(Y) (2005)).

quality, open space, fish and wildlife habitat, recreation, education, urban separation and drainage facilities, and (3) provide for the comprehensive management and administration of surface and stormwater.[147] King County based its fees on the relative contribution of increased surface and stormwater runoff from a given parcel to the surface and stormwater management system.[148]

The Forest Service questioned the validity of the fees, claiming that no direct services were provided to the Forest Service.[149] The Chief Financial Officer of the Forest Service then requested an advance decision from the Comptroller General ("Comp Gen") under 31 U.S.C. § 3529 as to the propriety of paying these fees.[150] The Comp Gen applied *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*[151] to ascertain the propriety of the fees.[152] In *San Juan Cellular*, the recognized leading decision on the issue of whether a fee is a tax,[153] the First Circuit concluded that a classic tax meets a three part test: (1) it is imposed by a legislature upon many, or all, citizens, (2) it raises money, and (3) it is spent for the benefit of the entire community.[154] Conversely, a regulatory fee is imposed by an agency upon those subject to its regulation and serves regulatory purposes, and the monies it raises are placed in a special fund to help defray the agency's regulation-related expenses.[155] When the inquiry about whether an assessment is a tax or a regulatory fee is inconclusive, courts applying the *San Juan Cellular* test have declared that the most important factor becomes the purpose behind the statute or regulation that imposes the fee.[156]

Applying this test, the Comp Gen concluded that it was necessary to examine the statute's purpose because the assessment fell somewhere in between a tax and a fee.[157] The assessment raised money to benefit the entire community and King County provided no direct or tangible service. But the assessment served a regulatory purpose as the money was deposited into a special fund used only for maintaining and operating stormwater facilities.[158] Ultimately, the Comp Gen noted that this special fund was used to benefit the population at large and concluded that the assessment was a "thinly disguised tax" as the revenue generated benefited the population at large and did not provide any King County service.[159] As section 313 did not waive sovereign immunity for such taxation of the federal government, appropriated funds were not available to pay the tax.[160]

In 2010, the controversy came to a head in Congress' backyard when the Government Accountability Office ("GAO") declared that federal facilities had to pay the District of Columbia Water and Sewer Authority's ("DC Water") Impervious Surface Area charge for sewer overflows, but not the District of Columbia's ("District") stormwater management fees, out of appropriated funds.[161] The GAO declared that the Supremacy Clause prohibited the federal government from paying the District's stormwater management fee because it was a tax.[162]

District residents are served by one of two sewer systems. One is a CSS, which serves about one-third of the District (including the GAO).[163] The other is a multiple separate storm sewer system ("MS4"), which serves the other two-thirds of the District.[164] The CSS system collects stormwater runoff and sanitary sewage through a single-pipe system leading to the Blue Plains Advanced Wastewater Treatment Plant ("Blue Plains").[165] The MS4, on the other hand, collects and conveys sanitary sewage and stormwater runoff in separate pipes[166]; the sewage is treated at Blue Plains before being released, while the stormwater is collected in public catch basins and is discharged untreated into local waterways.[167]

In 2009, the District of Columbia amended its stormwater permit compliance law (D.C. Law 17-371) to require the collection of a stormwater fee against each property located in the District and prescribed a new method for calculating the fee.[168] This new fee was based on an impervious surface area ("ISA") assessment of each property in the District.[169] The ISA charge was calculated based on a flat rate per equivalent residential unit.[170] The funds from the fee was then credited to the MS4 Permit Compliance Enterprise Fund, and

147. *Id.* at 3, 9 (citing King Cnty., Wash. Code § 9.08.040 (2005)).
148. *Id.* at 3 (citing King Cnty., Wash. Code § 9.08.070(A)).
149. *See id.* at 1, 5.
150. *Id.* at 1.
151. San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R., 967 F.2d 683 (1st Cir. 1992).
152. U.S. GAO-B-306666, *supra* note 142, at 5–8 (citing *San Juan Cellular*, 967 F.2d at 685).
153. *See infra* note 274 (referring to several courts that have used the *San Juan Cellular* test).
154. *San Juan Cellular*, 967 F.2d at 685.
155. *Id.*
156. Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000); *see also* U.S. GAO-B-306666, *supra* note 142, at 6 (citing to both *Valero Terrestrial Corp.*, 205 F.3d at 134, and *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993), wherein the city of Huntington attempted to impose a municipal service fee for fire and flood protection, and street maintenance on the United States Postal Service that stemmed solely from the federal government's status as property owner and not the use of any city service).
157. U.S. GAO-B-306666, *supra* note 142, at 5–9, 12–13.
158. *Id.* at 8.
159. *Id.* at 9.
160. *Id.* at 1, 10, 12. The Comp Gen refused to apply *Massachusetts v. United States*, 435 U.S. 444, 466–67 (1978), noting the case was inapplicable as it involved federal taxation of state functions. *See* U.S. GAO-B-306666, *supra* note 142, at 5 n.9.
161. Both of these charges were part of DC Water's fiscal year 2011 bill for federal customers for water and sewer services. U.S. Gov't Accountability Office, GAO-B-320795, Use of the GAO's Appropriations to Pay the District of Columbia's Stormwater Fee 5 (2010) [hereinafter U.S. GAO-B-320795]; U.S. Gov't Accountability Office, GAO-B-319556, Use of Appropriated Funds to Pay for the D.C. Water Impervious Surface Area Fee 6 (2010) [hereinafter U.S. GAO-B-319556].
162. U.S. GAO-B-320795, *supra* note 161, at 6.
163. *Id.* at 7.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 8.
168. D.C. Code § 34-2202.16 (2009).
169. *Id.*
170. D.C. Mun. Regs., tit. 21, § 556.5; U.S. GAO-B-320795, *supra* note 161, at 6.

the money in this fund was used solely to defray the costs of compliance with the MS4 Permit program.[171]

The GAO applied *San Juan Cellular* and focused on the purpose of the fee.[172] It concluded that the fee was a tax for several reasons:

> The stormwater fee (1) ha[d] been imposed pursuant to legislation against each property in the District (2) to raise revenue that (3) [was] to be spent for the public benefit, that is, to defray the costs of the District's activities to protect or restore local water quality standards in compliance with its MS4 Permit.[173]

The fee arose from GAO's status as a property owner, not as a fee for service, in order to raise revenue that was to be used for the public benefit (i.e., MS4 Permit program).[174] While it would seem that the GAO would also benefit from the MS4 program, GAO was actually serviced by the CSS and not the MS4.[175] The GAO building at issue was located in the part of the District that has a CSS, but any building in the District will funnel sewage, either in a combined pipe or a separate pipe, to Blue Plains.[176] The 2011 Stormwater Amendment was a direct response to this decision and the general refusal by federal facilities to pay stormwater fees.[177]

However, the GAO determined that the District's ISA charge for combined sewage overflows was not a tax, and that the GAO could use its appropriations to pay this fee.[178] The ISA charges were also based on the amount of the impervious surface located on each property.[179] The District's Code permits DC Water, a public utility and independent municipal corporation, to "establish, adjust, levy, collect, and abate charges for services, facilities, or commodities . . . supplied by it" and to "maintain . . . operate, extend, enlarge . . . construct, and improve the water distribution and sewage collection, treatment, and disposal systems."[180] DC Water has no authority to levy taxes but establishes and adjusts retail water and sewer rates to cover its costs of construction, interest on capital, operation and maintenance, necessary replacement of equipment, and the principal and interest on bonds.[181] These rates can only be used to maintain the District's water and sewage systems.[182]

According to the GAO, in April 2008, DC Water notified the U.S. Office of Management and Budget ("OMB") of its newly implemented impervious area billing program, informing OMB that it was going to assess charges against federal customers and that the funds collected would be used to recover the costs of the Combined Sewer Overflow Long-Term Control Plan.[183] This plan's purpose was to reduce the number of combined sewer overflows so that DC Water could meet EPA-established water quality standards, and the plan's projects were part of a larger program to enhance DC Water's water and sewer facilities infrastructure.[184]

What took these charges out of the "tax" realm was that the funds collected from these fees went to sewer projects.[185] The GAO concluded that the fees were a component of the utility rate a customer must pay to obtain water and sewer services and therefore declined to label it a "tax."[186] But even if the GAO building had been located in the part of the District that is serviced by the MS4, the GAO would most likely have found the fees appropriate as long as the fees went to improve Blue Plains or the District's water and sewer facilities infrastructure.[187]

V. The 2011 Stormwater Amendment

A. *Limited Legislative History*

Prior to 2011, section 313 of the CWA merely required all executive, legislative, and judicial branches of the federal government discharging pollutants to pay reasonable service charges to the same extent as any nongovernmental entity.[188] But as a result of the continuing refusal of federal agencies to pay municipal stormwater charges in the District, Congress amended section 313 in 2011 in order to "clarify" federal responsibility for stormwater pollution.[189]

Congress added subsection (c) to section 313, which provides in part:

> (c) Reasonable Service Charges.—
>
> (1) In general. For the purposes of this Act, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is—
>
> (A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and
>
> (B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that

171. U.S. GAO-B-320795, *supra* note 161, at 7–8. The MS4 Permit Program is the District's NPDES (section 402) permit program.
172. *Id.* at 12.
173. *Id.*
174. *Id.* at 12–18, 21.
175. *Id.* at 7.
176. *Id.*
177. *Id.* at 5; *see also* discussion *infra* Part V.A.
178. U.S. GAO-B-319556, *supra* note 161, at 1.
179. *Id.*
180. *Id.* at 3 (citing D.C. Code §§ 34-2202.03(11), (14), 34-2202.16 (2009)).
181. *Id.* (citing D.C. Code §§ 1-204.87(b), 34-2202.03, 34-2202.09(i), 34-2202.16(b) (2009)).
182. *Id.* (citing D.C. Code § 34-2202.16(b)).
183. *Id.* at 4.
184. *Id.* at 5.
185. *See id.* at 6–7.
186. *See id.* at 1, 6.
187. *See id.* at 7 (focusing on the fee being related to water and sewer services).
188. *See* Clean Water Act of 1977, Pub. L. No. 95-217, sec. 61, § 313(a), 91 Stat. 1566, 1598 (codified as amended at 33 U.S.C. § 1323(a) (2012)).
189. *See* An Act to Amend the Federal Water Pollution Control Act to Clarify Federal Responsibility for Stormwater Pollution, Pub. L. No. 111-378, sec. 1, § 313, 124 Stat. 4128, 4128 (2011). Clarifications are generally applied retroactively. *See* Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999); United States v. Sanders, 67 F.3d 855, 856–57 (9th Cir. 1995).

> manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.[190]

There are no committee reports and only a few references in the congressional record about the amendment. Congressman James Oberstar of Minnesota offered that "this legislation clarifies that Federal agencies and departments are financially responsible for any reasonable Federal, state, or locally derived charges for treating or otherwise addressing stormwater pollution that emanates from Federal property."[191] Congressman Oberstar opined that stormwater remains a leading cause of water quality impairment and cited a National Academy of Sciences report that identified the lack of funding to implement and enforce federal and state stormwater control programs.[192] The congressman specifically noted the frustrated efforts of states and municipalities to address the problem and that federal refusal placed a greater financial burden on these entities.[193] Delegate Eleanor Holmes Norton of the District, the lead House sponsor of the bill, and Congresswoman Eddie Bernice Johnson of Texas echoed Congressman Oberstar's concerns.[194] Senator Cardin, the Senate sponsor of a similar version of the House bill, stated that it was a "bill to clarify Federal responsibility to pay . . . localities for reasonable costs associated with the control and abatement" of stormwater pollution.[195]

B. Sovereign Immunity in the 2011 Stormwater Amendment

In the 2011 Stormwater Amendment, Congress provided that a "reasonable service charge" consists of some approximation of a facility's contribution to stormwater that is used to pay the reasonable costs of maintaining or improving an entity's stormwater management program.[196] Congress intended that the federal government pay reasonable stormwater fees, but did Congress waive sovereign immunity for stormwater taxes? The seminal case on federal government immunity from taxation is *McCulloch v. Maryland*.[197] At issue in *McCulloch* was Maryland's ability to tax state branches of the Bank of the United States.[198]

In *McCulloch*, the Court declared that "the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all."[199] Applying this logic, the Court denied Maryland's attempts to tax the Baltimore branch of the Bank, stating that:

> The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the [C]onstitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is an empty and unmeaning declamation.[200]

Over 150 years after *McCulloch*, the Court elaborated on the federal government's taxing power, stating that "[t]axation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income."[201] This power is largely unfettered, as the Court noted: "The lawmaker may, in light of the 'public policy or interest served,' make the levy slight if a bounty is to be bestowed; or the lawmaker may make a substantial levy to keep entrepreneurs from exploiting a semipublic cause for their own personal aggrandizement."[202]

Supremacy aside, the next question remains: what is a tax? The Supreme Court noted in *New Jersey v. Anderson*[203] that "[t]axes are imposts levied for the support of the Government, or for some special purpose authorized by it."[204] The closest that the Supreme Court has come to an actual definition of a tax was in *United States v. La Franca*.[205] Mr. La Franca, a restaurant owner who sold liquor in his restaurant, was sued in a federal district court for nonpayment of taxes and penalties.[206] Mr. La Franca was also convicted of selling intoxicating liquor in violation of the National Prohibition Act ("NPA").[207]

Because La Franca sold liquor in his restaurant, the federal government deemed him to be a retail liquor dealer and assessed two taxes and two penalties against him pursuant to the NPA and the Revenue Act of 1924 ("RA").[208] One of these taxes was a RA-imposed tax for unlawfully engaging in the sale of liquor contrary to Louisiana law that was then doubled under the NPA.[209] The other tax was a retail liquor dealer's tax that the NPA doubled.[210]

190. An Act to Amend the Federal Water Pollution Control Act to Clarify Federal Responsibility for Stormwater Pollution, sec. 1, § 313, 124 Stat. at 4128.
191. 156 Cong. Rec. H8978 (daily ed. Dec. 22, 2010) (statement of Rep. Oberstar).
192. *Id.*
193. *See id.*
194. *See id.* at H8978-80.
195. 156 Cong. Rec. S11023 (daily ed. Dec. 22, 2010) (statement of Sen. Cardin).
196. An Act to Amend the Federal Water Pollution Control Act to Clarify Federal Responsibility for Stormwater Pollution, Pub. L. No. 111-378, sec. 1, § 313, 124 Stat. 4128, 4128 (2011).
197. McCulloch v. Maryland, 17 U.S. 316 (1819).
198. *Id.* at 425.
199. *Id.* at 405.
200. *Id.* at 433.
201. Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340–41 (1974).
202. *Id.* at 341.
203. New Jersey v. Anderson, 203 U.S. 483 (1906).
204. *Id.* at 492; *see also* United States v. New York, 315 U.S. 510, 515–16 (1942).
205. *See* United States v. La Franca, 282 U.S. 568, 573 (1931).
206. *Id.* at 569.
207. *Id.* (citing 27 U.S.C. § 52).
208. *Id.* at 572.
209. *Id.* at 569–70, 572.
210. *Id.* The penalties encompassed a $4.68 penalty for failure to make and file a tax return as a retail liquor dealer, and a $500 unspecified penalty. *Id.*

The Court ultimately held that all of the assessments were penalties and that the government could not collect them as Mr. La Franca's prior criminal conviction under the NPA barred the collection of civil penalties under a different statute for the same acts.[211] In finding the taxes to be penalties, the Court noted:

> A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the *essential nature* of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.[212]

While the Supreme Court has subsequently cited *La Franca*, it has not substantively added to its analysis of what constitutes a tax.[213]

As to what constitutes a fee, the Supreme Court has been relatively explicit, noting in 1974:

> A fee, however, 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. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society . . . . A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation.[214]

The Supreme Court has historically upheld fees that relate to the stated purpose of the respective statutes, doing so for the first time in 1884 when it upheld an excise duty of $0.50 per passenger that the collector of the Port of New York imposed on ship owners, the stated purpose of which was "to defray the expense of regulating immigration . . . for the care of immigrants . . . and for the general purposes and expense of carrying the [immigration] act into effect."[215] The Court upheld the fee, holding that it was permissible for Congress to impose the fee on the ship owner in exercise of its power to regulate immigration.[216]

In the absence of any Supreme Court precedent as to how to distinguish a tax from a fee, a few lower courts have looked to the Court's analysis in *Massachusetts v. United States*[217] for guidance.[218] In *Massachusetts v. United States*, the Court noted that its earlier decisions placed the states and the federal government on equal footing in regard to reciprocal taxation.[219] Concluding that the Court had departed from this stance over time, the Court now declared that the two entities were not on equal footing, as the immunity of the federal government from state taxation is derived from the Supremacy Clause and the states' immunity from federal taxes is judicially implied from the states' role in the constitutional scheme.[220] The Court made clear that the Constitution only prohibits the federal government from taxing the states if that taxation interferes with their traditional sovereign functions.[221] The states do not enjoy the same luxury. In 1970, Congress concluded that the level of annual federal outlays on aviation, while significant, had not been sufficient to permit the "national airsystem" to develop the capacity to cope satisfactorily with the current and projected growth in air transportation.[222] To remedy this, Congress enacted the Airport and Airway Revenue Act of 1970 ("AARA"),[223] which imposes an annual "flat fee" registration tax on all civil aircraft, including those owned by the states and by the federal government, that fly in the navigable airspace of the United States.[224] The AARA also imposed a 7-cent-per-gallon tax on aircraft fuel, which, together with a 5-cent-per-pound aircraft tire and 10-cent-per-pound tube tax, and the registration tax, reflected the cost of program benefits to private noncommercial general aircrafts.[225] States were exempted from the fuel, tire, and tube taxes.[226]

The Supreme Court upheld the tax because it fairly applied to all entities, not just to the states.[227] The Court articulated the following three-part test for determining whether the imposition of the fee stretched beyond what was constitutionally permissible: the charges (1) must not discriminate against *state* functions, (2) are based on a fair approximation of the use of the system, and (3) are structured to produce revenues that will not exceed the total cost to the federal gov-

211. *Id.* at 574–76. While not entirely clear, the Court's rationale seemed to be that the civil penalty for a criminal act would create a double jeopardy issue. *See id.*

212. *Id.* at 572–73 (emphasis added). The Supreme Court has recently reaffirmed that it is not bound by labels in this type of exercise. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2595 (2012) (citing United States v. Constantine, 296 U.S. 287, 294 (1935); *cf.* Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992) ("[M]agic words or labels" should not "disable an otherwise constitutional levy.") (internal quotation marks omitted); United States v. Sotelo, 436 U.S. 268, 275 (1978) ("That the funds due are referred to as a 'penalty' . . . does not alter their essential character as taxes."); Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941) ("In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.") (internal quotation marks omitted)).

213. *See* United States v. Reorganized CF&I Fabricators, 518 U.S. 213, 224 (1996); Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777 n.15 (1994); Carter v. Carter Coal Co., 298 U.S. 238, 289 (1936). The Supreme Court recently noted that the penalty for not obtaining health insurance in the Patient Protection and Affordable Care Act of 2010, possessed the "essential feature of any tax: it produces at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594 (citing United States v. Kahriger, 345 U.S. 22, 28 n.4 (1953)). The Court's task in *National Federation of Independent Business* was not to distinguish a tax from a fee, but to distinguish a tax from a penalty. *Id.* at 2593–600.

214. Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340–41 (1974).

215. Edye v. Robertson, 112 U.S. 580, 590 (1884).

216. *Id.* at 596.

217. Massachusetts v. United States, 435 U.S. 444 (1978).

218. *See* Maine v. Dep't of the Navy, 973 F.2d 1007, 1013 (1st Cir. 1992); N.Y. State Dep't of Envtl. Conservation v. U.S. Dep't of Energy, 772 F. Supp. 91, 99–101 (N.D.N.Y. 1991), *aff'd*, 218 F.3d 96 (2d Cir. 2000).

219. *Massachusetts v. United States*, 435 U.S. at 454–55.

220. *Id.* at 454–56.

221. *Id.* at 455–56.

222. *Id.* at 447.

223. Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236.

224. *Massachusetts v. United States*, 435 U.S. at 447–48.

225. *Id.* at 444.

226. *Id.* at 469.

227. *Id.* at 467.

ernment of the benefits to be supplied.[228] As long as the tax passed this test, the Court noted that "there can be no substantial basis for a claim that the National Government will be using its taxing powers to control, unduly interfere with, or destroy states' ability to perform essential services."[229]

In upholding the tax, the Court also noted that the AARA actually discriminated in favor of the states since it retained the states' exemption from the 7-cent-per-gallon fuel tax that applies to private, noncommercial general aviation.[230] While the Court did not classify the tax as a fee, it was clear that the benefits to the users of national airways (including states) was foremost in the Court's collective mind.[231]

Three courts have applied *Massachusetts v. United States* to ascertain whether a state's attempt to collect a fee is really an attempt to tax the federal government. These courts have incorrectly declared that the states and the federal government were on equal footing and that it was appropriate to apply the *Massachusetts v. United States* test.[232] In a case from 1991—*New York State Department of Environmental Conservation v. U.S. Department of Energy* ("*NYDEC*")[233]—involving past-due fees under the CWA, Clean Air Act,[234] and RCRA, the U.S. District Court for the Northern District of New York cited to *McCulloch* instead of the Court's dicta in *Massachusetts v. United States* that it had abrogated the states' ability to tax the federal government in its post-*McCulloch* decisions.[235] Because the ruling treated the two entities as equals insofar as their taxing powers were concerned, the district court went on to incorrectly apply the *Massachusetts v. United States* test to a case of state taxation of a federal entity.[236]

The United States argued that the fees actually were impermissible taxes, while New York's State Department of Environmental Conservation ("NYDEC") claimed that these statutes constituted a blanket waiver of sovereign immunity.[237] Unfortunately, the parties agreed that the applicable test was the *Massachusetts v. United States* test and that the charges were nondiscriminatory.[238]

One of the sticking points in this case was the means by which the NYDEC assessed the charges, as the charges were based on the size or quantity of an entity's operations and not upon the services rendered.[239] In 1989, the rates of the air regulatory charges for several federal facilities in New York quintupled as compared to 1983 through 1989 levels.[240] Beginning in 1985, the rates for waste regulatory charges were statutorily doubled from 1983 and 1984 levels, and the water regulatory charges were more than doubled from the 1983 through 1988 levels.[241] The United States argued that the failure of the NYDEC to increase services commensurate with the substantial increase in assessed charges demonstrated that the charges were not based upon a fair approximation of the federal government's use of the New York system, but were impermissible tax-like exactions.[242] The district court rejected the government's argument, citing to *Massachusetts v. United States* for the proposition that the charges only had to represent a "fair approximation" of the costs of the benefits.[243] The district court relied on additional dicta from *Massachusetts v. United States* and noted that, even if the federal facilities did not actually use services provided by NYDEC, the services were nevertheless available for their use.[244] As the two entities were clearly not on the same footing regarding their power to tax one another, the district court's reliance on *Massachusetts v. United States*, although agreed upon by the parties, was erroneous.

The United States also argued that the funds were actually commingled with New York's general revenue fund and this constituted further evidence that the charges were really taxes.[245] Prior to 1989, all of the air and water charges were deposited into the State's general revenue fund.[246] In 1989, New York began placing these monies into a special environmental enforcement fund.[247] From 1983 through 1984, all of the waste charges were deposited into the State's general revenue fund.[248] From 1985 through 1988, half of the waste monies collected were deposited into New York's special hazardous waste remedial fund and the other half were deposited into New York's general revenue fund.[249] In 1989, the State began depositing half of the waste charges into its environmental superfund and half into the special enforcement fund.[250]

While the district court found that the federal facilities' pre-1989 fees were actually substantially lower than the actual costs of the programs, the district court erroneously noted that there was "no requirement that courts must inquire into the manner in which a government uses the revenue obtained by such assessments in determining whether such charges are impressible taxes rather than permissible fees."[251] To the contrary, the ultimate use of the monies col-

228. *Id.* at 466 (emphasis added).
229. *Id.* at 467.
230. *Id.*
231. *See id.* at 467–70.
232. *See* Maine v. Dep't of the Navy, 973 F.2d 1007, 1013 (1st Cir. 1992); N.Y. State Dep't Envtl. Conservation v. U.S. Dep't of Energy, 772 F. Supp. 91, 99 (N.D.N.Y. 1991), *aff'd*, 218 F.3d 96 (2d Cir. 2000); United States v. Maine, 524 F. Supp. 1056, 1059 (D. Me. 1981).
233. *N.Y. State Dep't of Envtl. Conservation* v. *U.S. Dep't of Energy*, 772 F. Supp. at 99.
234. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7671q (2012)).
235. *N.Y. State Dep't of Envtl. Conservation* v. *U.S. Dep't of Energy*, 772 F. Supp. at 93–95 (citing 33 U.S.C. § 1323; 42 U.S.C. § 7418; 42 U.S.C. § 6961).
236. *Id.* at 99.
237. *Id.* at 98. The federal facilities at issue were primarily Department of Defense facilities but also included two Department of Energy laboratories. *Id.* at 93 n.1.
238. *Id.* at 99.
239. *Id.*
240. *Id.* at 94.
241. *Id.*
242. *Id.* at 99.
243. *Id.* at 99–100.
244. *Id.* at 100.
245. *Id.* at 100–01.
246. *Id.* at 100.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 101.

lected is an important factor in deciding whether a charge is a tax or a fee. The charges must offset the costs of administering the regulatory program in order to constitute a fee.[252] Here, New York appeared to have underfunded its programs and was seeking to recoup its losses from the federal government. As the parties had agreed that *Massachusetts v. United States* was the correct precedent to apply, the United States was now liable for over $1 million in impermissible taxes.[253]

In *Maine v. Department of the Navy*,[254] the First Circuit did not analyze the distinction between the federal government's power to tax and the states' inability to tax the federal government without a waiver of sovereign immunity.[255] The First Circuit noted only that other courts had used the *Massachusetts v. United States* test in similar situations when states attempted to impose regulatory charges on federal entities.[256] In 1986, Maine sued the U.S. Navy ("Navy"), claiming that the shipyard in Kittery, Maine, had not complied with Maine's federally approved hazardous waste laws.[257] The Navy refused to pay punitive fines imposed under state law for past noncompliance and moved for summary judgment on the ground of sovereign immunity.[258]

The money Maine collected went into a state hazardous waste fund used to pay salaries and for equipment used to enforce state hazardous waste laws, including the costs of site inspections and cleanup of hazardous waste spills.[259] The First Circuit incorrectly applied *Massachusetts v. United States*, a case about the federal government's power to tax the states, and found that the "rough relationship" between the state regulatory charge and its use was sufficient to show that the charge was a reasonable and permissible fee, not an impermissible tax.[260]

Lastly, a district court in Maine also erroneously applied *Massachusetts v. United States* when it assessed the propriety of state taxation of federal credit unions, acknowledging only that *Massachusetts v. United States* was in the "analogous context of state immunity from federal taxation."[261] But this time, the court's application of *Massachusetts v. United States* did not prejudice the United States. Unlike the district court in *NYDEC*, the district court in *United States v. Maine*[262] correctly required a specific benefit to the user, in this case the United States, to take the charge out of the tax realm.[263]

The money at issue in *United States v. Maine* went to fund programs administered by Maine's Bureau of Consumer Protection.[264] The programs benefitted consumers but were financed by fees and charges paid by creditors.[265] The district court relied on dicta in *Massachusetts v. United States*, which observed that "[a] governmental body has an obvious interest in making those who specifically benefit from its services pay the cost" and found the charges to be an impermissible tax as the credit unions did not specifically benefit from the programs of Maine's Bureau of Consumer Protection.[266]

Most circuits do not apply *Massachusetts v. United States* to distinguish a tax from a fee. Two courts have specifically rejected the notion that states and the federal government are on equal footing. For example, the Eighth Circuit has correctly acknowledged that the federal government's right to be free of state taxation is a "blanket immunity," while the states' immunity is "somewhat limited," and thus has refused to apply *Massachusetts v. United States*.[267] The Fourth Circuit has also correctly rejected the premise that states and the federal government are on equal footing when it comes to taxation.[268]

In the same year that the First Circuit decided *Maine v. Department of the Navy*, it also introduced the previously discussed three-part *San Juan Cellular* test.[269] The *San Juan Cellular* test is the most often used means of deciphering a tax from a fee. In *San Juan Cellular*, the First Circuit noted:

> The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.[270]

252. Edye v. Robertson, 112 U.S. 580, 590, 595–96 (1884).
253. *N.Y. State Dep't of Envtl. Conservation v. U.S. Dep't of Energy*, 772 F. Supp. at 93, 99.
254. Maine v. Dep't of the Navy, 973 F.2d 1007 (1st Cir. 1992).
255. *Id.* at 1013; Massachusetts v. United States, 435 U.S. 444, 455–56 (1978).
256. *Maine v. Dep't of the Navy*, 973 F.2d at 1013. To bolster its application of *Massachusetts v. United States*, the First Circuit also cited three law review articles: (1) Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 ELR 10326, 10330 (1985) (arguing *Massachusetts v. United States* standard appropriate for § 6961), (2) William D. Benton & Byron D. Baur, *Applicability of Environmental "Fees" and "Taxes" to Federal Facilities*, 31 A.F. L. Rev. 253, 254–55 (1989) (stating same), and (3) Patrick A. Genzler, *Federal Facility Payment of State Environmental Fees*, 38 Naval L. Rev. 149, 158 (1989) (stating same). *Maine v. Dep't of the Navy*, 973 F.2d at 1013. While these works advocate application of *Massachusetts v. United States*, none of these articles cite to any instance where the Supreme Court has sanctioned the reciprocal application of the *Massachusetts v. United States* test. Nor do these articles address the Court's stance in *Massachusetts v. United States* that it had abandoned its earlier position that the states and the federal government were on equal footing as sovereigns. *See Massachusetts v. United States*, 435 U.S. at 454–56.
257. *Maine v. Dep't of the Navy*, 973 F.2d at 1009. The Navy was required to comply with Maine's hazardous waste disposal laws pursuant to 42 U.S.C. §§ 6961–6962. *Id.* at 1010, 1014.
258. *Id.* at 1009.
259. *Id.* at 1012.
260. *See id.*
261. *See* United States v. Maine, 524 F. Supp. 1056, 1059 (D. Me. 1981).
262. United States v. Maine, 524 F. Supp. 1056 (D. Me. 1981).
263. *See id.* at 1059.
264. *Id.* at 1059–60.
265. *Id.* at 1060.
266. *Id.* at 1059–60.
267. *See* United States v. City of Columbia, 914 F.2d 151, 153–54 (8th Cir. 1990).
268. *See* United States v. City of Huntington, 999 F.2d 71, 73 (4th Cir. 1993).
269. *See* Maine v. Dep't of the Navy, 973 F.2d 1007, 1013 (1st Cir. 1992); San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R., 967 F.2d 683, 685 (1st Cir. 1992) (holding that a classic tax will meet the following three-part test: (1) it is imposed by a legislature upon many, or all, citizens; (2) it raises money; and (3) it is spent for the benefit of the entire community); *see also United States v. City of Columbia*, 914 F.2d at 154.
270. *San Juan Cellular*, 967 F.2d at 685 (internal citations omitted). The GAO also correctly applied the *San Juan Cellular* test in its analysis of whether it could pay DC Water's stormwater fee. *See supra* text accompanying notes 172–73.

In *San Juan Cellular*, the First Circuit upheld a 3% "periodic fee" assessed on a privately-owned, cellular telephone company as a permissible regulatory fee.[271] The First Circuit derived its test from the many circuit courts addressing the issue and Supreme Court dicta in *National Cable Television Ass'n v. United States*[272] that distinguished a regulatory fee from Congress' power to tax pursuant to Article 1, section 8, clause 1 of the U.S. Constitution.[273] In contrast to its application of *Massachusetts v. United States* in *Maine v. Department of the Navy*, the First Circuit's opinion in *San Juan Cellular* is a very thorough application of multi-circuit case law distinguishing a tax versus a regulatory fee. Perhaps this is why courts consistently apply *San Juan Cellular* when distinguishing between a tax and a regulatory fee.[274]

After the 2011 Stormwater Amendment, courts need not apply any judicially created test to determine whether the assessment is a fee or a tax. In the 2011 Stormwater Amendment, Congress specified that any reasonable service charge must be nondiscriminatory, based on a fair approximation of the proportionate contribution of the facility to the stormwater pollution, and that the money collected be used to pay or reimburse the costs associated with any stormwater management program.[275] Congress further specified that whether such a fee was labeled a tax was not fatal to its validity.[276] By providing that any assessment must meet these criteria, Congress made it clear that it had not waived sovereign immunity for taxation of the federal government, as the collected funds are clearly tied to a facility's contribution to the stormwater pollution and must be used to defray the entity's costs of operating a stormwater program.[277] If Congress had meant to waive sovereign immunity for taxation, it would not have included these fee-type provisions that the Court has recognized since 1974.[278]

VI. Implications of the Clarification Doctrine

While Congress created its own test, federal facilities will still have to face claims for unpaid fees incurred prior to the 2011 Stormwater Amendment, as municipalities will assert that the 2011 Stormwater Amendment is a clarification of an existing law. But even if courts find that the 2011 Stormwater Amendment is a clarification of existing law, the pre-2011 Stormwater Amendment unpaid fees must meet Congress' new test in order for federal facilities to be liable.

Two courts have addressed claims of retroactivity and arrived at different conclusions. In *United States v. City of Renton*,[279] the United States sought the refund of any stormwater fees that it paid prior to the implementation of the 2011 Stormwater Amendment, while the cities of Renton and Vancouver, Washington, sought fees the United States had not paid prior to that date.[280] Pursuant to section 402 of the CWA, the City of Renton operated a "storm and surface water utility" since 1987.[281] Renton charged rates based on square footage of impervious surface.[282] The collected fees were used exclusively for expenditures relating to the surface water utility to provide, maintain, and improve Renton's MS4.[283] The Bonneville Power Administration ("BPA"), a United States power-marketing entity, administered two parcels within Renton.[284] "BPA paid Renton stormwater fees for those parcels until July 30, 2009," at which point "BPA claimed sovereign immunity and terminated its payments."[285] BPA resumed payments for the stormwater and surface water fees on January 4, 2011.[286]

The City of Vancouver had operated an MS4 since January 1995.[287] Vancouver also charged rates based on the square footage of impervious surface, with uniform rates for each class of users.[288] BPA owned one property within Vancouver, the Ross Complex facility.[289] "In 1996, BPA provided a map to Vancouver showing the impervious surface at the facility."[290] From January 1, 1995 to January 21, 2010, BPA paid its stormwater fees.[291] After Congress passed the 2011 Stormwater Amendment, BPA contacted Vancouver and met with officials in May 2011.[292] In Sep-

271. *San Juan Cellular*, 967 F.2d at 684.
272. Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340–44 (1974).
273. *San Juan Cellular*, 967 F.2d at 685 (citing *Nat'l Cable Television Ass'n*, 415 U.S. at 340–44).
274. *See* Kathrein v. City of Evanston, 636 F.3d 906, 911 (7th Cir. 2011); Chamber of Commerce of the United States v. Edmondson, 594 F.3d 742, 761 (10th Cir. 2010); Hedgepeth v. Tennessee, 215 F.3d 608, 612 (6th Cir. 2000) (noting that *San Juan Cellular* is the leading decision on the issue of what constitutes a tax versus a fee); Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000); Hexom v. Or. Dep't of Transp., 177 F.3d 1134, 1136–37 (9th Cir. 1999); Home Builders Ass'n v. City of Madison, 143 F.3d 1006, 1011 n.14–16 (5th Cir. 1998); Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 714 (2d Cir. 1993); Dekalb Cnty. v. United States, 108 Fed. Cl. 681, 700 (2013); Principal Life Ins. Co. v. United States, 70 Fed. Cl. 144, 168–69 (2006) (noting *San Juan Cellular* is perhaps the "clearest explication").
275. 33 U.S.C. § 1323(c)(1)(A)–(B) (2012); *see also Principal Life Ins. Co.*, 70 Fed. Cl. at 168.
276. 33 U.S.C. § 1323(c)(1)(B).
277. *See id.*; *cf. Nat'l Cable Television Ass'n*, 415 U.S. at 340–42.
278. *See San Juan Cellular*, 967 F.2d at 685 (noting that a regulatory fee serves regulatory purposes by, for example, raising money that is placed in a special fund to help defray the agency's regulation-related expenses).

> A fee, however, 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. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a *benefit on the applicant*, not shared by other members of society . . . . A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation.
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> *Nat'l Cable Television Ass'n*, 415 U.S. at 340–41 (emphasis added).

279. United States v. City of Renton, No. C11-1156JLR, 2012 WL 1903429 (W.D. Wash. May 25, 2012).
280. *Id.* at *1.
281. *Id.* at *2.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* January 4, 2011, was the effective date of the 2011 Stormwater Amendment. *See* An Act to Amend the Federal Water Pollution Control Act to Clarify Federal Responsibility for Stormwater Pollution, Pub. L. No. 111-378, 124 Stat. 4128, 4128 (2011).
287. *United States v. City of Renton*, 2012 WL 1903429, at *2.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*

tember 2011, BPA resumed payments, retroactive to January 4, 2011.[293] The BPA declared that it was "paying the newly accruing chares [sic] only as it continues to negotiate over the charged rates to ensure that . . . the rates are reasonable and nondiscriminatory."[294]

The official title of the 2011 Stormwater Amendment is "An Act to Amend the Federal Water Pollution Control Act to *Clarify* Federal Responsibility for Stormwater Pollution."[295] The district court correctly noted that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.[296]

In the Ninth Circuit, when Congress declares an act to be a clarification of an earlier statute, the amendment is applied retroactively to all cases pending as of the date of its enactment.[297] To qualify as a clarification of an earlier statute, there must be some congressional intent thereof.[298] If the fact is not obvious from the amendment's title, courts look to legislative history.[299] The Ninth Circuit considers the remarks of bill sponsors to be "authoritative guide[s] to the statute's construction."[300] In *ABKCO Music, Inc. v. LaVere*,[301] the Ninth Circuit concluded that amendments to the Copyright Act[302] were a clarification after observing that the relevant House committee report and bill co-sponsors expressed that the intent of amendments to 17 U.S.C. § 303(b) were to clarify the Copyright Law of 1909 in the presence of increasing litigation.[303] Courts will also find an amendment to be a clarification if the amendment resolves a dispute among the courts as to the law's meaning.[304]

Also helpful in establishing an amendment's clarifying purpose is the respective agency's prior interpretation of the law. If Congress seems to be codifying an agency's previous interpretation and hopefully notes this in the legislative history, this intent will also weigh in favor of a court finding the amendment is a clarification.[305] Interestingly, the Supreme Court does not appear to have addressed this issue in the way that most circuit courts have. Perhaps this is why most circuit courts look to their sister circuits when applying the doctrine.[306]

However, the Supreme Court does have a line of case law that is consistent with the circuit courts' clarification doctrine. The Court has long ascribed to the doctrine that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.[307] Consistent with the doctrine of clarification, this presumption can be overcome with a clear indication of retroactive application in the statute or its legislative history.[308] In the civil context, the Court has established a test for determining whether a change in law should be applied retroactively. In addressing what the Court has dubbed "the nonretroactivity question," the Court has stated:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.[309]

The Court acknowledged that this test leaves room for disagreement in hard cases but that judges tend to have "sound . . . instinct[s]" and that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance."[310]

The clarification doctrine does not conflict with *Landgraf v. USI Film Productions*,[311] as *Landgraf* is only implicated if a court deems that "the new provision attaches new legal consequences to events completed before its enactment."[312] The clarification doctrine is not implicated in such an instance as the legal consequences were already in place.

Perhaps a more interesting issue regarding clarification is whether an entity must have a lawsuit pending before it can benefit from Congress' clarification of a statute. Many federal facilities have past-due charges, but rarely will the municipality involved have filed suit prior to the 2011 Stormwater Amendment. This issue was not raised in *Renton* even though the cities filed their counterclaim well after the 2011 Stormwater Amendment took effect.[313] However, it is clear from the Ninth Circuit cases cited in *Renton* "that clarifying legislation is not subject to any presumption against retro-

293. *Id.*
294. *Id.*
295. An Act to Amend the Federal Water Pollution Control Act to Clarify Federal Responsibility for Stormwater Pollution, Pub. L. No. 111-378, 124 Stat. 4128, 4128 (2011) (emphasis added).
296. *United States v. City of Renton*, 2012 WL 1903429, at *5 (citing Loving v. United States, 517 U.S. 748, 770 (1996)).
297. ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 689 (9th Cir. 2000).
298. *Id.* at 689–90.
299. *Id.*; *see also* Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283–84 (11th Cir. 1999).
300. United States v. Maciel-Alcala, 612 F.3d 1092, 1100 (9th Cir. 2010).
301. ABKCO Music, Inc. v. LaVere, 217 F.3d 684 (9th Cir. 2000).
302. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.
303. *ABKCO Music*, 217 F.3d at 690.
304. *Id.* at 691.
305. *Id.*; *see also* Levy v. Sterling Holding Co., 544 F.3d 493, 507–08 (3d Cir. 2008) (announcing a four-factor test that does not consider the enacting body's description of an amendment as a clarification but does consider prior agency treatment).
306. *See* Baptist Mem'l Hosp., v. Sebelius, 566 F.3d 226, 229 (D.C. Cir. 2009); *Levy*, 544 F.3d at 506; Brown v. Thompson, 374 F.3d 253, 258–59 (4th Cir. 2004); Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999); Pope v. Shalala, 998 F.2d 473, 483 (7th Cir. 1993); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992); Boddie v. Am. Broad. Cos., 881 F.2d 267, 269 (6th Cir. 1989).
307. Bennett v. New Jersey, 470 U.S. 632, 639–40 (1985) (citing United States v. Sec. Indus. Bank, 459 U.S. 70, 79 (1982); Greene v. United States, 376 U.S. 149, 160 (1964)).
308. *See id.* at 641.
309. Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994).
310. *Id.* at 270.
311. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).
312. *Id.* at 270.
313. *See* United States v. City of Renton, No. C11–1156JLR, 2012 WL 1903429, at **2–3 (W.D. Wash. May 25, 2012) (finding that the United States did not file its original claim until July 12, 2011).

activity and is applied to all cases pending as of the date of its enactment."[314] This appears to be the case in at least the Eleventh Circuit as well.[315] But does this affirmative statement mean that any municipality is out of luck if it failed to file suit for past-due fees before the 2011 Stormwater Amendment? The circuit courts appear to be silent on this issue, perhaps indicating that future suits for past acts are not precluded provided that they are not barred by the applicable statute of limitations. That certainly was the case in *Renton*.

Applying the 2011 Stormwater Amendment retroactively, the *Renton* court easily found that the United States was liable for paying reasonable service charges prior to January 4, 2011. The district court pointed to the 1977 CWA amendments and proclaimed that the reference to "the payment of reasonable service charges" by the federal government and its duty to comply with all state and local "requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution . . . ."[316] reflected "an unequivocal and unambiguous waiver of sovereign immunity."[317]

The government claimed it was immune from the retroactive payment of the fees because the stormwater management fees were taxes "from which it had not waived immunity prior to the amendment."[318] The district court rejected the government's claim, announcing that "even if the stormwater management fees are characterized as taxes, the clarification provided by the Stormwater Amendment indicates that Congress had waived immunity to such taxes even prior to the Amendment."[319]

The district court rejected the federal government's other arguments that it never voluntarily sought a benefit or service and that the stormwater charges were not imposed for a service or benefit provided to the United States.[320] The district court countered that CWA section 313 does not require a request or receipt of a service, and it noted that the difference between taxes and fees was not relevant because Congress clearly waived its immunity to "local requirements, administrative authority, and process and sanctions . . . including reasonable service charges."[321]

The district court left for another day the issue of whether the cities' charges met the requirements of section 313(c).[322] However, given that most circuits do retroactively apply amendment clarifications,[323] this decision could spell budget catastrophe for federal agencies that have refused to pay valid stormwater fees prior to the 2011 Stormwater Amendment.

The Court of Federal Claims ("COFC") came to the contrary conclusion of *Renton* regarding both the scope of the waiver in the 1977 CWA and the application of the clarification doctrine. "Reasonable services charges" in the 1977 CWA, the COFC concluded, more closely corresponds with the charging of a fee rather than the imposition of a tax.[324] The COFC looked both at the nature of the charge and the nomenclature that Congress used in the 1977 CWA.[325] While the COFC noted that there were two plausible readings of the statute, the presence of ambiguity necessitated reading the waiver as narrowly as possible.[326]

Since the COFC found that there was not a waiver in the 1977 version of the CWA for taxation, the 2011 Stormwater Amendment was not a clarification, but a new waiver of sovereign immunity, and thus could not be applied retroactively.[327] The COFC agreed with the general proposition of retroactivity espoused in *Piamba Cortes v. American Airlines Inc.*,[328] yet it noted that the *Renton* court failed to consider the import of the doctrine of sovereign immunity.[329] The clarification doctrine can never be applied in the case of a statute waiving sovereign immunity, as any ambiguity contained in the statute must be resolved in favor of immunity.[330] In contrast, the clarification doctrine permits a court to review legislative history of the later enactment in order to determine if Congress meant to "clarify" a previous statute.[331] The COFC's conclusion is logically consistent, and more courts are likely to apply it given that the "clarification" involved a waiver of sovereign immunity.

As the Roman historian and author, Pliny the Elder, noted almost two thousand years ago,[332] "the only certainty is that nothing is certain."[333] Congress clarified the components of a proper stormwater fee—a nondiscriminatory stormwater charge that is (1) based on some fair approximation of the facility's contribution to stormwater pollution and (2) used

314. ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 689–90 (9th Cir. 2000).
315. *See* Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999) ("[C]oncerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law.").
316. *United States v. City of Renton*, 2012 WL 1903429, at *5 (quoting 33 U.S.C. § 1323 (2006)).
317. *Id.*
318. *Id.* at *9.
319. *Id.*
320. *Id.*
321. *Id.* at *10 (citing CWA § 313(a), (c)).
322. *Id.* at **10–11 (denying summary judgment for cities on issue of specific service charges based on CWA section 313(c)).
323. *See* Baptist Mem'l Hosp. v. Sebelius, 566 F.3d 226, 229 (D.C. Cir. 2009) (relating to retroactivity of agency rule clarification); Levy v. Sterling Holding Co., 544 F.3d 493, 506–08 (3d Cir. 2008) (relating to retroactivity of rule clarification); Brown v. Thompson, 374 F.3d 253, 258–59 (4th Cir. 2004) (relating to retroactivity of statutory clarification); Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283, 1287, 1290 (11th Cir. 1999) (relating to retroactivity of convention or treaty clarification); Pope v. Shalala, 998 F.2d 473, 483–85 (7th Cir. 1993) (relating to retroactivity of rule clarification); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992) (relating to retroactivity of Puerto Rico law clarification); Boddie v. Am. Broad. Cos., 881 F.2d 267, 269–70 (6th Cir. 1989) (relating to retroactivity of statutory clarification).
324. Dekalb Cnty. v. United States, 108 Fed. Cl. 681, 707 (2013).
325. *Id.* at 699–707.
326. *Id.* at 707–08.
327. *Id.* at 710.
328. Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999).
329. *Dekalb Cnty. v. United States*, 108 Fed. Cl. at 709 (citing *Piamba Cortes*, 177 F.3d at 1283; United States v. City of Renton, No. C11–1156JLR, 2012 WL 1903429, at *1 (W.D. Wash. May 25, 2012)).
330. *Id.* (citing FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012)).
331. *Id.* at 710.
332. *See* Jerry Stannard, *Pliny the Elder*, Encyclopedia Britannica, http://www.britannica.com/EBchecked/topic/464822/Pliny-the-Elder (last visited July 7, 2015).
333. *Pliny the Elder Quotes*, BrainyQuote.com, http://www.brainyquote.com/quotes/quotes/p/plinytheel403841.html (last visited July 8, 2015).

to pay or reimburse the costs associated with any stormwater program.[334] These components bear no resemblance to a tax levied to raise money for the benefit of the general public.[335] While it would seem that after the 2011 Stormwater Amendment it is beyond dispute Congress never waived sovereign immunity for stormwater taxation, courts will still have to deal with pre-2011 Stormwater Amendment stormwater fees through application of the clarification doctrine as municipalities are sure to try to increase their revenue in these fiscally challenging times.

334. 33 U.S.C. § 1323(c)(1) (2012).

335. *See* San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R., 967 F.2d 683, 685 (1st Cir. 1992).