Stormwater Management Fees/Municipality: Federal Appellate Court Addresses Application to U.S. Corps of Engineers Properties

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The Federal Circuit ("Court") addressed an issue arising out of a municipality's agreement to stormwater fees on federal property. See *City of Wilmington v. United States,* 68 F.4th 1365 (Fed. Cir. 2023).

The question considered was whether certain fees assessed by the city of Wilmington, Delaware, ("Wilmington"), against the United States for stormwater management pursuant to Clean Water Act ("CWA") requirements were reasonable service charges under 33 U.S.C. § 1323.

The 1972 amendments to the CWA established "total maximum daily loads" ("TMDLs") setting forth the maximum amount of a pollutant permitted to enter waterbodies the state had identified as impaired. These amendments included the provision at issue in this case: 33 U.S.C. § 1323 (the "Federal Facilities Section"). This statutory provision requires federal facilities to comply with federal, state, interstate, and local requirements related to the abatement of water pollution. It states, in part:

". . . each department, agency, or instrumentality of the. . . Federal Government. . . (2) engaged in any activity resulting. . . In the discharge or runoff of pollutants,. . . shall be subject to. . . all Federal, State, interstate, and local requirements. . . including the payment of reasonable service charges."

Congress amended the CWA to define the term "reasonable service charges" as used in subsection 1323(a) as follows:

For the purposes of this chapter, 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 ....

Wilmington implemented a stormwater management program in January 2007, charging all owners of property within its corporate boundaries – both residential and non-residential – a monthly stormwater management fee based on an estimation of each property's contribution stormwater runoff. The city devised a methodology for approximating the runoff attributable to each property based on

recommendations from the engineering firm Black & Veatch. For non-residential properties, the city assesses each parcel's monthly stormwater fee based on a formula comprised of four variables:

1. The total area of the property ("gross parcel area") as measured by New Castle County Department of Land Use tax assessment records.
2. A "runoff coefficient," which is a multiplier based on estimates of a property's imperviousness. The coefficient ranges from 0 to 1, with a higher coefficient indicating greater imperviousness. Using a property's land use code assigned by county tax records, the city gives each property a stormwater class which determines its coefficient.
3. The impervious area, calculated by multiplying the property's total area by the property's assigned runoff coefficient. This calculation results in the number of ESUs, or the "ESU factor," for the property.
4. The ESU factor is multiplied by the city's charge rate to yield the total monthly charge for the property.

Wilmington also developed an appeal process that permit property owners to appeal:

1. The calculation of the storm water charge;
2. The assigned storm water class;
3. The assigned tier, if applicable; and
4. The eligibility for a credit.

The U.S. Army Corp of Engineers ("USACE") owns five properties in Wilmington. The city assigned the Properties to the "Vacant" stormwater class with a runoff coefficient of 0.30. Based on this coefficient and Wilmington's methodology, the city assessed the USACE $2,577,686.82 in fees for the Properties between January 4, 2011, and April 16, 2021. The USACE never paid and never appealed this charged amount. Wilmington sought those fees and $3,360,441.32 had accrued interest.

The trial court granted the federal government's motion for judgment on partial findings. It held that the Federal Facilities Section waives the United States' sovereign immunity only for "reasonable service charges." Wilmington was held to have not met that standard by failing to prove its charges are a fair approximation of the Properties' proportion contribution to the stormwater pollution.

The Federal Circuit affirmed. It stated there was nothing inherently wrong with Wilmington's general methodology for determining a property owner's stormwater management fee. However, the Court found that Wilmington's approach did not meet the statutory definition of "reasonable service charges" for two reasons.

First, Wilmington failed to show that the County tax assessment records "properly categorize the Properties for stormwater purposes."

Second, the trial court did not clearly err in finding that the city failed to show the runoff coefficient of 0.30 applicable to the Vacant stormwater class provides a fair approximation of the Properties' rate of runoff.

For these reasons, the CWA did not waive the USACE's sovereign immunity.

The Court also held that Wilmington's appeal process is permissive rather than mandatory. Therefore, the USACE was not required to pursue the appeal process.

A copy of the Decision can be downloaded here.