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United States Government Accountability Office
Washington, DC 20548

B-306666.2

March 20, 2009

Joseph B. Rochelle
Senior Deputy Prosecuting Attorney
Civil Division, W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

Subject: *Request for Reconsideration of B-306666, June 5, 2006*

Dear Mr. Rochelle:

This is in response to your memorandum of November 26, 2008, requesting that we reconsider our decision in *Forest Surface—Surface Water Management Fees*, B-306666, June 5, 2006, based on two developments that occurred since the decision was issued.¹ The Government Accountability Office is a legislative branch agency, and our decisions and opinions serve to protect Congress's constitutional power of the purse. As such, our statutory authority permits GAO to issue legal decisions and opinions to federal accountable officers, heads of federal agencies and agency components, and Members of Congress.² We are not authorized to entertain requests from private citizens or nonfederal entities. While our jurisdiction extends to the federal government and we cannot issue a decision in response to your request, we have carefully examined the material presented. After due consideration, we do not believe either development provides new information that would cause us to reverse our prior decision in this matter.

In B-306666, we concluded that the Forest Service, as an agency of the U.S. government, is constitutionally immune from paying the surface water management (SWM) fee assessed by King County against Forest Service properties because those

¹ Memorandum from Joseph B. Rochelle, Senior Deputy Prosecuting Attorney, King County, Washington, to Pedro E. Briones, Senior Staff Attorney, and Thomas Armstrong, Assistant General Counsel, GAO, *Subject: GAO B-306666, June 5, 2006, Forest Service—Surface Water Management Fees Decision: King County Response*, Nov. 26, 2008 (Request Memo).

² 31 U.S.C. §§ 717, 3529. See GAO, *Procedures and Policies for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), at 3, 5–6, available at www.gao.gov/legal/resources.html.

fees constitute a tax. Though denominated a “service charge” or “fee,” the facts and circumstances surrounding King County’s assessment of SWM fees disclose that the county provides no direct, tangible service or convenience in exchange for payment of the SWM fee. The benefits paid for by King County’s SWM fee are not narrowly circumscribed but provide undifferentiated benefits to the general population at large. Therefore, we determined that appropriated funds are not available to pay such assessments. Furthermore, although section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), waives sovereign immunity from certain state and local environmental regulations and fees, it does not waive immunity from taxation. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

In your request for reconsideration, you discuss two developments which you believe cast the issues in a different light. First, you point to a recent consent decree issued in another Clean Water Act case in which the City of Cincinnati, Ohio, pursued collection of over \$100,000 in billed SWM fees from the Departments of Health and Human Services and Veterans Affairs. Request Memo, *citing City of Cincinnati v. United States*, Case No. C-1-03-731 (S.D. OH, Nov. 15, 2007) (Consent Decree). Under the terms of the consent decree, the federal government agreed to pay \$17,000 “in final and complete satisfaction of any and all claims the City has against the United States for unpaid Past Alleged Stormwater Fees.” Consent Decree, ¶1, at 3. The federal government also agreed to pay “the first invoices submitted to them for Future Alleged Stormwater Fees.” *Id.* ¶7, at 4. However, this settlement has no bearing on the determination of whether King County’s SWM fee constitutes a tax or a fee. Foremost is the fact that consent decrees by their nature are applicable only to the parties in the case and are not considered precedent on the merits since there is no finding of fact or law:

“The way in which a consent judgment or consent decree resolves, between the parties, a dispute over a legal issue is not a ruling *on the merits* of the legal issue that either (1) becomes precedent applicable to any other proceedings under the law of *stare decisis* or (2) applies to others under the law of claim preclusion or issue preclusion.”

Langton v. Hogan, 71 F.3d 930, 935 (1st Cir. 1995) (emphasis in original).

Moreover, in several places in the Consent Decree, it is stated that the parties enter into it without “an admission of any issue of law or fact by any party.” Consent Decree, at 2, 3, and 4. The stated purpose of the settlement was “to avoid the complication and the expense of further litigation” of the subject stormwater fees. *Id.* at 2. Therefore, there is nothing about this consent decree that would cause us to reassess our analysis of the King County SWM charges.

The second development to which you referred in your memorandum was the recent rulings of the Washington State Pollution Control Hearings Board, which underscored the need for King County to have a comprehensive stormwater management program under the Clean Water Act. Request Memo. Nothing in the discussion of the hearings

and rulings, however, changes the aspect of the SWM fee that makes it more like a tax than a regulatory fee. There is a recognition that the placement of impervious surfaces on developed land is an action that has serious consequences for the quantity of stormwater generated and that there should be a minimization of impervious surface through the application of Low Impact Development (LID) techniques where possible. However, none of the operative provisions in the King County Code, Chapter 9.08, that establish the rationale for and authorize the imposition of the SWM fees, upon which we based our analysis, have changed since B-306666 was issued. Request Memo, Attachment E.

Given the above, we see no basis to revise our conclusion that the King County SWM fee is a tax that the Forest Service, as a federal agency, is not required to pay for the reasons presented in B-306666.

Sincerely yours,



Susan A. Poling
Managing Associate General Counsel

cc: Jesse L. King
Chief Financial Officer
U.S. Forest Service