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September 29, 2010

Peter J. Nickles, Esq.
Attorney General of the District of Columbia
1350 Pennsylvania Avenue, NW., Suite 409
Washington, DC 20004

Subject: *Use of GAO's Appropriations to Pay the District of Columbia
Stormwater Fee*

Dear Mr. Nickles:

The purpose of this letter is to inform you that we have evaluated the District of Columbia's (District) stormwater fee and, based on the facts and other information provided to us by the District, have determined that the stormwater fee is a tax for which Congress has not waived its sovereign immunity. Accordingly, GAO is constitutionally prohibited from using appropriated funds to pay the stormwater fee assessment due on October 1, 2010. U.S. Const. art. VI, cl. 2 (Supremacy Clause). The reasons for our conclusion are set forth in detail in the Enclosure.

In April 2009, the District Water and Sewer Authority (presently known as D.C. Water) transmitted to the Director of the federal government's Office of Management and Budget (OMB) D.C. Water's fiscal year 2011 billing for federal customers for water and sewer services. Letter from Chief Financial Officer, D.C. Water, to Director, OMB, Apr. 15, 2009 (D.C. Water FY 2011 Bill). The D.C. Water FY 2011 Bill includes a stormwater fee that is assessed on each property located in the District, and D.C. Water is required by District law to collect and credit the fee to a fund administered by the District Department of the Environment (DDOE). This stormwater fee is a flat rate based on the amount of impervious surface on each property.¹

¹ The D.C. Water FY 2011 bill also included an impervious surface charge for sewer service. In a separate letter to D.C. Water today, B-319556, we concluded that GAO's appropriations are available to pay D.C. Water's impervious surface area charge. The purpose of that charge is to cover the costs of capital improvements to D.C. Water's sewer system and treatment facilities, costs that are properly recoverable through a rate for utility services, and the charge represents a fair approximation of services provided to GAO.

It is an unquestioned principle of constitutional law that under the Supremacy Clause, the United States and its instrumentalities are immune from direct taxation by state and local governments. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Therefore, appropriated funds are not available to pay for tax assessments without a specific act of Congress waiving sovereign immunity and conferring on a state or local government the privilege of taxing the federal government. *See Domenech v. National City Bank of New York*, 294 U.S. 199, 205 (1935).

In B-306666, June 5, 2006, we determined that a charge imposed by King County, Washington on the U.S. Forest Service to fund the costs of complying with permit requirements for a particular surface water management program under the Clean Water Act constituted a tax on the federal government. We concluded that the Forest Service's appropriations were not available to pay the tax because Congress had not legislated a waiver of sovereign immunity.

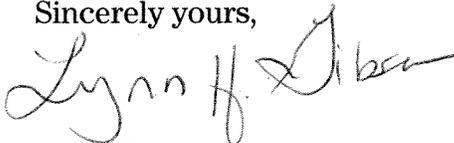
We find no significant difference between the King County assessment and the District stormwater fee. Like the King County assessment, liability for the stormwater fee arises, not upon the provision of a service or the granting of a privilege, but as a result of property ownership in order to raise revenue to defray the costs of the District government in carrying out the District's stormwater management activities, such as efforts to encourage the use of low-impact development practices and functional landscaping, enhanced street cleaning, retrofitting catch basins, expanding the tree canopy within the District, installing green roofs on District-owned properties, installing cameras to record illegal dumping activities, and instituting public education and outreach programs. *See San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992). These activities do not provide a particularized benefit or service to GAO and thus, do not represent a fair approximation of the costs of a service provided to GAO.

While section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), waives sovereign immunity from many state and local environmental requirements, it does not waive the federal government's sovereign immunity from taxation by state and local governments. Under the Supremacy Clause of the U.S. Constitution, the United States and its instrumentalities may not pay taxes imposed by state and local governments unless Congress has legislated a waiver of sovereign immunity. Such a waiver must clearly and expressly confer the privilege of taxing the federal government. Accordingly, we have directed the U.S. Department of the Treasury's Financial Management Service that it may not use GAO appropriated funds to pay the stormwater fee assessment due on October 1, 2010.²

² The charge to GAO for the stormwater fee for fiscal year 2011 is \$7,494.12.

GAO acknowledges the District's significant efforts to reduce its discharge of pollutants generated by stormwater. DDOE has initiated a program to improve the water quality of the District's rivers and their tributaries. DDOE's General Counsel and staff were extremely professional and helpful to us in meetings and telephone calls. They also provided important materials and information to help GAO understand the District's program and the nature of the stormwater fee. Our conclusion here is not meant to question the District's goal of reducing water pollutants or the manner in which the District elects to accomplish this goal. At issue here solely is whether GAO's appropriations are constitutionally available to pay the fee that the District assesses in order to recover its costs. If you have any additional questions on this matter, please contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667.

Sincerely yours,



Lynn H. Gibson
Acting General Counsel

Enclosure

cc: David A. Lebryk
Commissioner, Financial Management Service
U.S. Department of the Treasury

Bicky Corman, Esq.
General Counsel
District of Columbia Department of the Environment

ENCLOSURE

ANALYSIS OF THE DISTRICT STORMWATER FEE

At issue is whether the Constitution's Supremacy Clause prohibits GAO from paying the District of Columbia's (District) stormwater fee, or whether the stormwater fee constitutes a "reasonable service charge" for which the United States has waived its sovereign immunity under section 313(a) of the Clean Water Act.³ 33 U.S.C.

§ 1323(a). Section 313(a) of the Clean Water Act requires federal agencies to comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges.⁴ 33 U.S.C. § 1323(a).

BACKGROUND

GAO obtains its water and sewer service from District Water and Sewer Authority (presently known as D.C. Water), a municipal corporation created by the District Council. D.C. Water operates and maintains the water distribution and sewage collection, treatment, and disposal systems in the District and charges for the services, facilities or commodities furnished by it. D.C. Code §§ 34-2202.02; 34-2202.03(11), (14); 34-2202.16(a). In addition to charging its customers for the water and sanitary sewage services it provides, D.C. Water, pursuant to District law, bills and collects from all property owners in the District a stormwater fee on behalf of the District Department of the Environment (DDOE). DDOE is an executive agency created to, among other things, "protect human health and the environment in accordance with District and federal law and regulation, improve the urban quality of

³ The Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), ch. 758, 62 Stat. 1155 (1948), is codified, as amended, in scattered sections of 33 U.S.C. §§ 1251–1387.

⁴ In arriving at our conclusion, we obtained the views of the relevant parties to establish each party's legal position on the matter at issue. In addition to information and supporting materials provided at our request, the District, through its Attorney General, also provided a written memorandum. Memorandum from Attorney General for the District of Columbia to Managing Associate General Counsel, GAO, *Re: GAO B-319556, Impervious Surface Area Charge Imposed by the District of Columbia*, Aug. 23, 2010 (DC AG Memo); Telephone Conversation with Assistant General Counsel for Appropriations Law, and General Counsel, DDOE, and others, Apr. 28, 2010 (DDOE Apr. 28th Teleconference); Meeting between Managing Associate General Counsel, GAO, and General Counsel, DDOE, and others, May 5, 2010 (DDOE May 5th Meeting); Meeting between Managing Associate General Counsel, GAO, and General Counsel, D.C. Water, and others, May 14, 2010; Meeting between Managing Associate General Counsel, GAO, and General Counsel, DDOE, and others, June 3, 2010.

life, [and] streamline the administration of District environmental law and programs, including those relating to environmental health.” D.C. Code § 8-151.02. It is the DDOE stormwater fee charged to GAO that is at issue here.⁵

DDOE Stormwater Fee

In 2001, the District Council enacted legislation that required the collection of a stormwater fee that the District could use to finance costs it incurred in complying with its then newly issued MS4 Permit (defined *infra*). See Storm Water Permit Compliance Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-311); see also DC AG Memo, at 6. Initially, the DDOE stormwater fee was assessed against only D.C. Water customers and consisted of a flat fee charged to single-family residences and a fee calculated as a percentage of water consumption for multifamily residences and commercial properties. D.C. Code § 34-2202.16(d-1) (2008); see also DC AG Memo, at 7. However, in 2009, the District Council enacted the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 (Stormwater Management Act), effective March 25, 2009 (D.C. Law 17-371), which, *inter alia*, required the collection of a stormwater fee against each property located in the District and prescribed a new method for calculating the fee.

D.C. Code § 34-2202.16, as amended by the Stormwater Management Act, now provides, in pertinent part, that:

“(d-1) [D.C. Water] shall collect a stormwater user fee established by the Director of [DDOE], which charge the Director shall establish by rule and may from time to time amend.

“(d-2) The fee shall be collected *from each property in the District of Columbia*, and shall be based on an impervious area assessment of the property.”

⁵ In a letter dated April 13, 2010, we informed D.C. Water that we were evaluating whether the component of D.C. Water’s sewer rate that is based on impervious surface area could constitutionally be imposed on the federal government. In a separate letter to D.C. Water today, B-319556, we concluded that GAO’s appropriations are available to pay D.C. Water’s impervious surface area charge. The purpose of that charge is to cover the costs of capital improvements to D.C. Water’s sewer system and treatment facilities, costs that are properly recoverable through a rate for utility services, and the charge represents a fair approximation of water and sewer services provided to GAO.

D.C. Code § 34-2202.16(d-1)–(d-2) (emphasis added).⁶ While DDOE is charged with setting the stormwater fee, D.C. Water is required to include the charge for the DDOE stormwater fee in its bills to customers of its water and sanitary sewer services. D.C. Code § 34-2202.16(d-1); D.C. Mun. Regs. title 21, § 556.1. Such charge appears as a separate line item on the D.C. Water water and sewer bill. *See, e.g.*, D.C. Water FY 2011 Bill. D.C. Water is also required to create new accounts for those properties that did not receive metered water/sewer service prior to May 1, 2009, in order to bill and collect the DDOE stormwater fee. D.C. Mun. Regs. title 21, § 556.4.

In accordance with the Stormwater Management Act, DDOE converted the DDOE stormwater fee to one based on impervious surface area, effective May 2009. *See* 56 D.C. Reg. 3114 (Apr. 24, 2009) (notice of final rulemaking) (codified at D.C. Mun. Regs. title 21, §§ 556.1–556.6). The impervious surface area charge is calculated based on a flat rate per Equivalent Residential Unit (ERU). D.C. Mun. Regs. title 21, § 556.5. An ERU is defined as one thousand square feet of impervious surface area of real property.⁷ D.C. Mun. Regs. title 21, § 556.1. The Stormwater Management Act also requires the implementation of an incentive program to property owners who voluntarily install measures to increase stormwater retention. D.C. Code § 8-152.03. DDOE anticipates that this incentive will likely take the form of a discount by means of a credit to the monthly stormwater charge. DC AG Memo, at 9.

The stormwater fee is the obligation of the property owner, and failure to pay the fee results in a lien being placed upon the property. D.C. Code § 34-2202.16(d-6). The Mayor may enforce the lien in the same manner that liens for delinquent real property taxes are enforced. *Id.*

⁶ The Stormwater Management Act also added the following definition:

“Impervious area stormwater user fee” or “stormwater user fee” is defined as “a fee that attributes the cost of conveying stormwater runoff via a sewer from a given property, to the quantity of stormwater runoff generated from that same property, by use of impervious surface as a surrogate metric.”

D.C. Law 17-371, § 2(a), *codified, as amended, at* D.C. Code § 8-151.01(6).

⁷ However, the following customers are automatically assigned one ERU: (1) single-family dwellings; (2) individual condominium and apartment units that are served by a separate water and service line and are individually metered; and (3) multifamily structures of less than four dwelling units where all units are served by a single service line and one master meter. D.C. Mun. Regs. title 21, § 556.2. All other properties shall be assessed the DDOE stormwater fee based upon the total amount of impervious area on each lot, and one (1) ERU will be assigned for each 1,000 square feet of impervious area. D.C. Mun. Regs. title 21, § 556.3.

The amounts collected by D.C. Water for the DDOE stormwater fee are credited to the MS4 Permit Compliance Enterprise Fund (Enterprise Fund).⁸ D.C. Code § 8-151.02. Monies in the Enterprise Fund are to be used solely to defray the costs of activities undertaken by the District to comply with the MS4 Permit to the extent such activities were not undertaken prior to the issuance of the MS4 Permit or are not otherwise required by law.⁹ D.C. Code § 8-152.02(d), § 8-152.02(e)(2); *see also* DC AG Memo at 6-7. The Director of DDOE is charged with allocating the resources of the Enterprise Fund to carry out the MS4 Permit mandated activities that have the greatest impact on reducing stormwater pollution. D.C. Code § 8-152.02(a). The Stormwater Administration established within DDOE monitors and coordinates the stormwater management activities of all District agencies and reviews and approves agency requests for reimbursements for stormwater management activities undertaken in accordance with the MS4 Permit. D.C. Code § 8-152.01(a).

MS4 Permit Administered by DDOE

District residents are served by one of two sewer systems, both of which are operated and maintained by D.C. Water. One is a combined wastewater collection system (combined sewer system or CSS), which serves approximately one-third of the District, including GAO; and the other is the Municipal Separate Storm Sewer System (MS4), which serves the other two-thirds of the District. D.C. AG Memo, at 2-3; DDOE Apr. 28th Teleconference. A CSS is a wastewater collection system that collects and conveys sanitary sewage and stormwater runoff through a single-pipe system to a treatment facility, which, in the case of D.C. Water, is the Blue Plains treatment facility (Blue Plains). DC AG Memo, at 2; DDOE May 5th Meeting. After treatment at Blue Plains, the mixture is then released through two outfalls into the Potomac River. DC AG Memo, at 2.

Unlike the single-pipe system of the CSS, the MS4 collects and conveys sanitary sewage and stormwater runoff via separate pipes. DC AG Memo, at 2-3; The stormwater pipe receives stormwater runoff from catch basins located on public property, such as curbs and street corners, and discharges it, untreated, directly into

⁸ “MS4” refers to the District’s Municipal Separate Storm Sewer System, which is explained in more detail in the next section. The Enterprise Fund also includes revenues collected from grants made for stormwater activities, as well as monies appropriated by the District Council. D.C. Code § 8-152.02(c).

⁹ “Monies from the Enterprise Fund shall only be used to fund the *costs of complying* with the MS4 Permit” D.C. Code § 8-152.02(d) (emphasis added). By contrast, the water and sewer rates levied by D.C. water are the only source of revenue for the maintenance of the District’s supply of water and sewage systems, and constitute a fund exclusively to defray the costs of D.C. Water. D.C. Code § 34-2202.16(b).

the local waterways via over 400 outfalls. *Id.* Meanwhile, a separate pipe collects and conveys sanitary sewage to Blue Plains, where it is treated before being released into the local waterways. DDOE Presentation Slides, *Public Hearing on Proposed Revisions to Stormwater Fees* (Apr. 13, 2009), at 5, available at <http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,498382.asp> (last visited Aug. 10, 2010).

The National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act establishes the basic structure for regulating discharges of pollutants into the waters of the United States, including rivers, lakes, and streams. 33 U.S.C. §§ 1311(a), 1342. Under the NPDES permit program, the U.S. Environmental Protection Agency (EPA) and state permitting authorities issue and enforce permits to regulate pollution from industrial dischargers and treatment facilities, known as “point sources.”¹⁰ 33 U.S.C. § 1342. Among other things, NPDES permits establish effluent limitations on discharges into the waters of the United States.¹¹ See 33 U.S.C. § 1311(b).

The outfalls that convey the treated sewage from Blue Plains and the stormwater outfalls from the MS4 are point sources for which permits are issued under the NPDES program. The EPA has issued to the District NPDES Permit No. DC0000221, which pertains to stormwater discharged from the MS4 (MS4 Permit), and has issued to D.C. Water NPDES Permit No. DC0021199, which pertains to the discharge from Blue Plains.¹² Each permit allows discharges from the applicable system into the

¹⁰ The Clean Water Act defines “point source” to mean “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

¹¹ The term “effluent limitation” means any restriction established by a state or the EPA Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents that are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance. 33 U.S.C. § 1362(11).

¹² The MS4 Permit, issued on August 19, 2004, expired on August 18, 2009 and has been administratively extended. See *Fact Sheet Re: Proposed Draft NPDES Permit No. DC0000221*, available at www.epa.gov/reg3wapd/npdes/pdf/DCMS4/DCMS4DraftFactSheet_04-19-10 (last visited Sept. 27, 2010). In April 2010, EPA proposed to reissue a NPDES permit to replace the 2004 permit and published a draft permit for notice and comment. The draft permit is available at www.epa.gov/reg3wapd/npdes/pdf/DCMS4/DCpermit4-19-10 (last visited Sept. 27, 2010). References to the MS4 Permit herein are to the 2004 permit.

Potomac and Anacostia Rivers and their tributaries in accordance with the requirements of their respective permits.

The MS4 Permit requires the District to implement controls and best management practices necessary to reduce the discharge of pollutants in stormwater discharges to the maximum extent practicable and in accordance with the District's Upgraded Stormwater Management Plan, as updated on February 19, 2009 (District SWMP).¹³ MS4 Permit, at 4. These activities are carried out by DDOE, D.C. Water, and various other District agencies, including the District's Department of Transportation, Department of Public Works, Office of Planning, Office of Public Education Facilities Modernization, Office of Property Management, and Department of Parks and Recreation (collectively, Stormwater Agencies). D.C. Code § 8-152.01(c). The stormwater management activities required of the District by the MS4 Permit, include, but are not limited to: encouraging the use of low-impact development practices and functional landscaping; enhanced street cleaning; preventive maintenance and inspection of existing stormwater management facilities; retrofitting catch basins; expanding the tree canopy within the District; installing green roofs on District-owned properties; installation of rain gardens; implementing control measures to monitor and assess the impact of stormwater runoff from municipal facilities, such as solid waste transfer stations and salt storage facilities; installing cameras to record illegal dumping activities; maintaining the District's existing program for the reduction of the discharge of pollutants from construction sites;¹⁴ evaluating the use, application, and removal of chemical de-icers; and educating the public on the collection and disposal of pet waste and environmentally friendly fertilizing and landscaping techniques. MS4 Permit, at 10–12; District SWMP, at 5-1 to 5-39; DDOE May 5th Meeting.

¹³ The District SWMP, which is incorporated into the MS4 Permit, outlines the District's strategy for implementing a more sustainable approach to manage the pollution carried by stormwater runoff into the District's waterways. District SWMP, at 1-1. Such strategy includes reducing pollutants in stormwater runoff from commercial, federal and District government operated facilities, residential areas, landfills, industrial facilities, construction sites, and hazardous waste sites, as well as stormwater pollutants due to deicing activities and the use of snow and ice control materials. See District SWMP, at 5-1 to 5-39; MS4 Permit, at 10–19.

¹⁴ The District's existing regulatory program for stormwater management at construction sites is found at D.C. Mun. Regs. title 21, §§ 500–599. This regulatory program imposes requirements, including permit and fee requirements, with respect to land disturbing activities. For example, developments and re-developments must establish stormwater management measures and erosion and sediment controls.

DISCUSSION

It is an unquestioned principle of constitutional law that under the Supremacy Clause, the United States and its instrumentalities are immune from direct taxation by state and local governments. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). However, a charge made by a state or a political subdivision of a state for a service rendered or convenience provided is not a tax. *See Packet Co. v. Keokuk*, 95 U.S. 80, 85–86 (1877) (wharf fee levied only on those using the wharf is not a tax).

Service-related fees imposed by a governmental entity tend to fall into one of two principal categories: user fees and regulatory fees. *See* 20 Op. Off. Legal Counsel 12. User fees are based on the rights of a governmental entity as the proprietor of the instrumentalities used and are tied in some fashion to the payer's use of the service (*e.g.*, charges for water and sewer services). *See, e.g., United States v. City of Columbia, Missouri*, 914 F.2d 151, 155–56 (8th Cir. 1990) (holding that a charge imposed by the city not in its capacity as sovereign, but as a vendor of goods and services, and that arises from the United States' consensual purchase of the city's property, is a permissible service fee and not a tax); *cf. United States v. City of Huntington, West Virginia*, 999 F.2d 71, 74 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (holding that a fee for core government services arising from federal agencies' status as property owners is a tax). Regulatory fees are assessed against a narrow class of persons as part of a regulatory scheme to defray the cost of regulating the particular business or activity engaged in by such persons (*e.g.*, permit and license fees). *See, e.g., Marcus v. State of Kansas Dept. of Revenue*, 170 F.3d 1305 (10th Cir. 1999) (holding that an assessment imposed for disabled parking placards was a regulatory fee); *State of Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992) (considering the reasonableness of a state hazardous waste regulatory charge assessed against the federal government); *San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992) (holding that a periodic fee imposed to defray the cost of regulation is regulatory fee and not a tax).

Regardless of their characterization, user fees and regulatory fees share common traits: (1) they are charged in exchange for a particular governmental service or privilege that benefits the party paying the fee in a manner not shared by other members of society; (2) they are paid voluntarily, in that the party paying the fee has the option of not utilizing the governmental service or applying for the privilege, thereby avoiding the charge; and (3) they are not collected to raise revenues but to compensate the governmental entity for the service provided or to defray the government's costs of regulating. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 340–41 (1974) (reasoning that a fee, as opposed to a tax, is incident to a voluntary act, is paid in exchange for a benefit bestowed on the payer that is not shared by other members of society, and compensates the government for the cost of performing the service); *Bidart Bros. v. The California Apple Commission*, 73 F.3d 925 (9th Cir. 1996) (holding that assessments imposed by non-legislative body on a small number of organizations, kept in a segregated fund, and spent for a

purpose that did not benefit the general public was not a tax); *United States v. River Coal Company, Inc.*, 748 F.2d 1103 (6th Cir. 1984) (holding that reclamation fee assessed on mine operators and used to restore abandoned mines was a tax for purposes of the federal Bankruptcy Act).

Taxes, on the other hand, are “enforced contribution[s] to provide for the support of government.” *United States v. La Franca*, 282 U.S. 568, 572 (1931). Distinguishing a tax from a fee requires careful analysis because the line between tax and fee can be a blurry one. *Collins Holding Corp. v. Jasper County, South Carolina*, 123 F.3d 797, 800 (4th Cir. 1997). The proper analysis to arrive at the real nature of the assessment is to examine “all the facts and circumstances . . . and assess them on the basis of the economic realities” *City of Columbia*, 914 F.2d at 154; *see also Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000). Applying the principles set forth in *National Cable Television Ass’n*, 415 U.S. 336, the First Circuit Court of Appeals has described a classic “tax” as one meeting a three-part inquiry—an assessment that (1) is imposed by a legislature upon many, or all, citizens (2) to raise revenue that (3) is spent for the benefit of the entire community. *San Juan Cellular*, 967 F.2d at 685 (citations omitted) (distinguishing between a tax and a regulatory fee).¹⁵ On the other hand, a classic “regulatory fee” is imposed by an agency upon those subject to its regulation. *Id.* A regulatory fee may serve a regulatory purpose by deliberately discouraging certain conduct by making it more expensive, or by raising money placed in a special fund to defray the cost of regulation. *Id.*

When the result of the *San Juan Cellular* three-part test places a charge somewhere between a tax and a fee, the most important factor becomes the purpose underlying the statute or regulation imposing the charge in question. *See Valero*, 205 F.3d at 134 (citing *South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983)). If the ultimate use of the revenue benefits the general public, then the charge will be considered a tax; the charge will more likely be considered a fee if the revenue’s benefits are narrowly

¹⁵ We applied *San Juan Cellular* in our decision concluding that a surface water management fee assessed by King County, Washington, against property owned by the U.S. Forest Service was a tax. *See* B-306666, June 5, 2006 (discussed in more detail *infra*). The *San Juan Cellular* test has also been applied by the Fourth, Fifth, Ninth and Tenth Circuit Courts of Appeal, by the U.S. Department of Justice, Office of Legal Counsel and by the District of Columbia Court of Appeals. *See Valero*, 205 F.3d at 134; *Marcus*, 170 F.3d at 1311; *Home Builders Ass’n of Mississippi, Inc. v. City of Madison, Mississippi*, 143 F.3d 1006, 1011 (5th Cir. 1998); *Bidart Bros.*, 73 F.3d at 931; *District of Columbia v. Eastern Trans-Waste of Maryland, Inc.*, 758 A.2d 1, 11 (D.C. 2000) (applying the *San Juan Cellular* three-part test to determine that a solid waste facility fee was a tax for purposes of the D.C. Anti-Injunction Act); 20 Op. Off. Legal Counsel 12 (concluding that a Clean Air Compliance Fee assessed by the District against property, including property owned by the federal government, was a tax).

circumscribed. *San Juan Cellular*, 967 F.2d at 685; *see also* B-306666, June 5, 2006 (King County).

DDOE's Stormwater Fee

Based on the facts and other information provided to us by the District, we conclude that DDOE's stormwater fee charged to GAO is not a regulatory fee constituting a service charge within the scope of section 313(a) of the Clean Water Act, but is, instead, a tax. The stormwater fee (1) has been imposed pursuant to legislation against each property in the District (2) to raise revenue that (3) is 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. The stormwater fee arises automatically from GAO's status as a property owner, not upon the provision of a service or the granting of a privilege, in order to raise revenue to fund core government functions. *See Hagar v. Reclamation District No. 108*, 111 U.S. 701, 707 (1884) (stating that "[a]ssessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes"); 20 Op. Off. Legal Counsel 12 (concluding that the District's "Clean Air Compliance Fee" assessed on property owners to recover the costs of the District mass transit operations was a tax). Non-payment of the fee could result in a property lien enforceable in the same manner as a lien for non-payment of real estate taxes. D.C. Code § 34-2202.16(d-6).

The District asserts that under *San Juan Cellular*, the DDOE stormwater fee is not a tax, but a regulatory fee because it is being assessed to recover the costs arising from the regulation of the District by the EPA through the MS4 Permit. DC AG Memo, at 21. The District further contends that property owners benefit from the District's compliance with the Clean Water Act, because the District is bearing a regulatory burden so that individual owners whose properties contribute to stormwater runoff do not have to. DC AG Memo, at 5-6. In support of its contention that the DDOE stormwater fee is a regulatory fee, the District cites *Maine*, 973 F.2d 1007, as instructive. We do not find the facts in that case analogous to the facts here.

The federal environmental statute considered in *Maine* was the Resource Conservation and Recovery Act (RCRA). RCRA permits states to promulgate their own hazardous waste programs in lieu of the federal program; and it requires federal facilities to comply with state laws in that regard. 42 U.S.C. §§ 6926, 6961. Specifically, RCRA subjects the United States to "all . . . State . . . requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner . . . as any person is subject to such requirements, including the payment of reasonable service charges." 42 U.S.C. § 6961. Thus, RCRA contains a limited waiver of sovereign immunity for reasonable service charges comparable to that contained in section 313(a) of the Clean Water Act. 42 U.S.C. § 6961.

Maine involved the propriety of a state licensing fee and per pound waste generation fee imposed on generators of hazardous waste, including the federal government. The fees were used to pay the costs associated with supervising and enforcing the state's hazardous waste laws, including the costs of site inspections and clean-up of hazardous waste spills. *Maine*, 973 F.2d at 1013. The Department of Navy claimed that because a portion of the fees collected by the state was used to fund a hazardous waste spill response team, whose work provided a general benefit to the public, the fees were impermissible taxes, not permissible regulatory fees. *Id.*

However, the court concluded that while the spill response team did provide a general benefit, “[i]t also benefits the regulated entities in a special way” and “helps to insure their compliance with state goals and standards for prompt clean-ups.” *Id.* (emphasis added). In the court's view, the state spill response team bore a close enough relationship to the state's regulatory process as to permit the state to assess regulated entities that may cause spills a special charge for its support. *Id.* Thus, the court concluded that the fees were like classic regulatory fees “imposed by an agency upon those subject to its regulation,” and used to “rais[e] money placed in a special fund to help defray the agency's regulation-related expenses.” *Id.* at 1012, quoting *San Juan Cellular*, 967 F.2d at 685.

Having concluded that the state fees were regulatory charges, the *Maine* court drew on the principles espoused in *Massachusetts v. United States*, 435 U.S. 444 (1978), to determine whether such fees were unreasonable as a matter of law and, hence, outside the scope of the RCRA waiver. *Maine*, 973 F.2d at 1011. *Massachusetts* involved a federal aircraft registration tax in the form of a flat fee assessed against all civil aircraft operating in the airspace of the United States. The state of Massachusetts challenged the constitutionality of the charge as applied to state-owned helicopters used exclusively for police functions. Reasoning that “[a] nondiscriminatory taxing measure that operates to defray the costs of a federal program by recovering a fair approximation of each beneficiary's share of the cost” does not offend the principles of implied state sovereign immunity, the Supreme Court held the federal revenue measure as applied to state property was permissible. *Massachusetts*, 435 U.S. at 459–60.

Accordingly, the court in *Maine* stated that the regulatory charges imposed on the Department of the Navy would be permissible if such charges (1) did not discriminate, (2) were based on a fair approximation of use of the state's hazardous waste regulatory program, and (3) were structured to produce revenues that will not exceed the total costs of the benefits to be supplied. *Maine*, 973 F.2d at 1013. The Department of Navy again pointed to the fact that it had never availed itself of the services of the state's spill response team; therefore, the Navy had received no benefit, and the regulatory fees were not based on a “fair approximation” of the Navy's use of the state's regulatory program. *Id.* at 1014. Without deciding this issue, the court noted that the state's spill response team capability was available to minimize any future spill at the shipyard. Thus, the Navy and other generators of

hazardous waste, as a class, seemed to benefit from the availability of the state's emergency clean-up capability. *Id.* Ultimately, the court held that, given the sparse record before it, the Navy was not entitled to a judgment, as a matter of law, that the state's fees were unreasonably high. *Id.*

As the *Maine* case illustrates, the very essence of a regulatory fee is that it is assessed against regulated entities in exchange for a particularized benefit or privilege and is used to defray the costs of the regulatory program to which the regulated entities are subject. *Id.* at 1012 (recognizing that “[a] regulatory, or licensing fee, insofar as it is reasonable, seems properly viewed as a kind of charge for a regulatory, or administrative, ‘service’”). Here, the District is not assessing the DDOE stormwater fee in connection with any regulation of property or property owners. The stormwater fee is not tied to any compliance mechanism in the way the licensing and waste generation fees in *Maine* were assessed to recoup the state's cost of regulating generators of hazardous waste under its hazardous waste laws.¹⁶

In addition, unlike the particularized benefit the regulated waste generators received from the hazardous waste spill response team in *Maine*, here District property owners are not receiving any particularized benefit in exchange for the DDOE stormwater fee. Rather, the DDOE stormwater fee is used to defray the costs of the District's activities that benefit the public generally, such as enhanced street cleaning, tree planting, installing green roofs on District buildings, and educating the public on the collection and disposal of waste. DC AG Memo, at 7, 12–13; District SWMP at 5-1 to 5-39. The District seemingly advances the absence of regulation as the particular

¹⁶ In support of its position, the District also relies on *Jorling v. United States Department of Energy*, 218 F.3d 96 (2nd Cir. 2000). As with *Maine*, we view *Jorling* as distinguishable because the issue before the court was whether a regulatory fee was reasonable, not whether a charge was a regulatory fee versus a tax. In *Jorling*, the court considered whether a state's waste regulatory charges imposed on federal facilities were “reasonable” and, therefore, within the scope of the RCRA waiver. *Jorling*, 218 F.3d at 98. The parties agreed that the test for determining the reasonableness of the charges was that articulated in *Massachusetts*. *Id.* at 100. The U.S. Department of Energy (DOE) claimed that the charges could not satisfy the “fair approximation” component, where they exceeded the cost of services provided by a ratio of nine to one and, therefore, were unreasonable as a matter of law. *Id.* at 101. The court reasoned that the “fair approximation” prong of the *Massachusetts* test required only that the challenged method for imposing the charge fairly apportions the costs of providing the service. *Id.* at 103. Finding that the state's method for assessing waste regulatory charges had not been shown to be unreasonable as a matter of law, the court affirmed the district court's denial of DOE's motion for summary judgment. *Id.* at 106–07.

benefit conferred on property owners.¹⁷ DC AG Memo, at 5. We do not agree that the fact the District has declined to impose on property owners a permit or other regulatory requirement with respect stormwater runoff is a particularized benefit.

In its memorandum to us, the District noted that property owners will have the opportunity to reduce their stormwater fee, if they install certain stormwater retention measures on their properties. DC AG Memo, at 9–10. We recognize that a fee may also serve a regulatory purpose by deliberately discouraging particular conduct by making it more expensive. *See San Juan Cellular*, 967 F.2d at 685. The incentive contemplated by the District may very well spur action on the part of property owners. However, we do not view the automatic assessment of a fee together with an incentive to reduce that fee sufficient to classify the District stormwater fee as a regulatory fee.

In 2006, we addressed a fee assessed by King County, Washington, that is similar to the District's stormwater fee. B-306666, June 5, 2006. There, we concluded that the Supremacy Clause prohibited federal agencies from paying that fee. *Id.*

In King County, the U.S. Forest Service requested GAO's decision on whether appropriated funds were available to pay a surface water management fee (SWM fee) imposed by King County, Washington. King County had implemented a surface water management program to comply with the requirements of its NPDES municipal stormwater permit. B-306666, at 2. Washington state law authorizes Washington state counties, including King County, to raise revenues 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. *Id.* King County annually assessed a SWM fee on all developed parcels in certain areas of the county to cover the costs of municipal activities such as basin planning, facilities maintenance, public involvement, drainage investigation and enforcement, environmental monitoring, facility design and construction, among others. *Id.* SWM fees were based on the parcel's percentage of impervious surfaces. *Id.* The Forest Service questioned the applicability of the fee because no services were provided to the agency. *Id.* at 3.

We determined that the Supremacy Clause prohibited the Forest Service from paying the King County SWM fees because the fees constituted a county tax imposed on the

¹⁷ The District argues that “a property owner’s individual discharge of [stormwater] into the MS4 is permitted, because the [District’s] discharge from the MS4 is permitted [by the EPA under the MS4 Permit]. . . . In this case, the persons who generate [stormwater] pay their share of the costs required to manage [stormwater]. . . . [T]he regulatory burden that the municipality bears under this scheme . . . is not a burden that otherwise represents a fundamental local government function.” DC AG Memo, at 5–6 (emphasis in original).

United States. Applying *San Juan Cellular's* three-part inquiry, we concluded that the fee was (1) imposed by the county council on all owners of developed property in designated areas (2) to raise money that is (3) spent to benefit the entire community. *Id.* at 4. Activities supported by the fees benefited the King County population at large. *Id.* at 4. Liability for the SWM fee was incident to property ownership, not any voluntary act. *Id.* at 5.

In 1993, the Fourth Circuit Court of Appeals addressed a fee that, like the District stormwater fee and the King County SWM fee, was based on property ownership. *Huntington*, 999 F.2d 71. Pursuant to West Virginia state law, the city of Huntington imposed a municipal service fee for fire and flood protection based on the square footage of buildings owned in the city. *Id.* at 72. The United States brought an action to enjoin the city from assessing and collecting the fee from federal agencies owning property in the city. *Id.* at 72–73. The Fourth Circuit concluded that the fee, although labeled a “service fee,” was a tax because it constituted an enforced contribution to support the government. *Id.* at 74. The court noted that liability for Huntington’s fee arose not from any use of city services but from the federal government’s status as property owner. *Id.*

Like the SWM fee at issue in King County and the municipal service fee at issue in *Huntington*, the District assesses its stormwater fee to raise revenue to cover the costs of the District government, and liability for the fee is not incident to any voluntary act, but rather, arises automatically as a result of property ownership. The District statute requiring DDOE to set the stormwater fee provides that the fee “shall be collected *from each property in the District of Columbia.*” D.C. Code § 34-2202.16(d-2) (emphasis added). In enacting the Stormwater Management Act, the District Council has mandated the assessment of the DDOE stormwater fee against property in the District, and nonpayment of the fee will result in a property lien enforceable in the same manner as a lien for nonpayment of real estate taxes. Such a mandatory assessment is an indication of an involuntary exaction, or a tax.

In addition, as noted above, the District does not provide a service to GAO in exchange for the DDOE stormwater fee. The activities funded by the DDOE stormwater fee—implementing low-impact development practices, administering a green rooftops program for new construction, functional landscaping, enhanced street sweeping, public education, *etc.*—are actions required of the District government to comply with its MS4 Permit, and do not provide a particularized service or convenience to individual property owners. Rather, they broadly benefit the community as a whole, like the activities funded by the SWM fee in King County, Washington, and the municipal services in *Huntington*. In fact, the District recognizes

as much, noting that activities such as street sweeping are core government functions.¹⁸ DC AG Memo, at 7.

The crediting of an assessment to a segregated fund is one characteristic of a classic regulatory fee. See *San Juan Cellular*, 967 F.2d at 685. Indeed, the District's stormwater fee collections are credited to the Enterprise Fund, a segregated fund that is to be used only for carrying out activities to comply with the MS4 Permit. D.C. Code § 8-152.02(d). This fact, however, does not convert the DDOE stormwater fee into a regulatory fee. If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial. *Valero*, 205 F.3d at 135 (reasoning that if the special fund is used to benefit the population at large, then the segregation of the revenue to a special fund is immaterial in determining whether the charge is a fee or a tax); *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Management Dist.*, 166 F.3d 835, 839-40 (6th Cir. 1999) (concluding that a permitting fee is a tax although revenue placed in a special fund, because the fee conferred no benefit on the payers different than that enjoyed by the general public); *United States v. River Coal Company, Inc.*, 748 F.2d 1103, 1106 (6th Cir. 1984) (holding that a reclamation fee placed in segregated fund to pay for reclamation of abandoned mines was a tax, because the fee did not confer a benefit to mining operators different from that enjoyed by the general public when environmental conditions improved). "If, on the other hand, the assessment covers only a narrow class of persons and is paid into a special fund to benefit regulated entities or defray the cost of regulation, it sounds like a fee." *Collins*, 123 F.3d at 800 (citations omitted). As noted above, the Enterprise Fund serves neither purpose that would render it a "fee," but falls squarely within the characterization of a "tax."

Taxes, like fees or service charges, may also serve regulatory purposes. See *National Cable Television Ass'n*, 415 U.S. at 341 (noting that a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise). When tax assessments also have some attributes of fees, an important factor in determining whether it is a tax or a fee is the purpose behind the assessments. See *Valero*, 205 F.3d at 134. Broadly stated, taxes are assessed to pay for activities undertaken for the public welfare, such as core government functions.

¹⁸ DDOE argues that to the extent the District "enhanced" its efforts with respect to such core functions in order to comply with the MS4 Permit, compensation for such activities should not be considered a tax, but a regulatory fee. DC AG Memo, at 7-8. We do not agree that the enhancement, or increase, in core government functions changes their essential nature just because they are undertaken in accordance with the MS4 Permit. They remain core government services comparable to street maintenance and flood protection financed by *Huntington's* municipal service fee.

As the court found with respect to the city of Huntington's municipal service fee, we conclude that the DDOE stormwater fee is a tax, for which liability arises from GAO's status as a property owner, to raise revenue to pay the District's costs of complying with the MS4 Permit and not as a result of a regulatory benefit or particularized privilege conferred on GAO. *See Huntington*, 999 F.2d at 73–74. The stormwater fee (1) has been assessed by legislation against property owners in the District (2) to raise revenue that (3) is to be spent for the public benefit, that is, the District's activities required to comply with the MS4 Permit.

Clean Water Act and Federal Sovereign Immunity

Having concluded that the District stormwater fee charged to GAO is a tax, the question arises whether the section 313(a) waiver of sovereign immunity applies to the DDOE stormwater fee and permits GAO to use appropriated funds to pay it. Section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), provides, in pertinent part, that:

“Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity *including the payment of reasonable service charges*. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.”

Id. (emphasis added).

The Supreme Court has established that waivers of sovereign immunity such as section 313(a) must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (holding that absent some degree of success on the merits by a claimant, a federal court may not award attorneys fees under section 307(f) of the Clean Air Act). A waiver of sovereign immunity cannot be implied but must be unequivocally

expressed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Nothing less than an act of Congress clearly and explicitly conferring the privilege of taxing the federal government will suffice. *Domenech v. National City Bank of New York*, 294 U.S. 199, 205 (1935); see also *United States v. Idaho*, 508 U.S. 1, 8 (1993) (stating that when considering waivers of sovereign immunity as to monetary exactions from the United States, “we have been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for them”).

The Supreme Court has twice considered the scope of section 313(a), and in both cases, the Court declined to construe the waiver broadly. In 1976 the Supreme Court found that a prior, similar version of section 313 was not sufficiently clear and unambiguous as to require federal dischargers to obtain state NPDES permits.¹⁹ *EPA v. California*, 426 U.S. 200, 211–12 (1976). Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, that is, specific congressional action that makes this authorization of state regulation clear and unambiguous. *Id.* at 211, citing *Hancock v. Train*, 426 U.S. 167, 179 (1976).²⁰ Notwithstanding section 313’s requirement that federal facilities pay “reasonable service charges,” the Court held that section 313 did not expressly provide that federal dischargers must obtain state NPDES permits. *EPA*, 426 U.S. at 212. Nor did the provision expressly state that obtaining a state NPDES permit was a requirement respecting control and abatement of pollution, as the language of then-section 313 provided. *Id.* at 212–13.

Following the Supreme Court’s holding in *EPA*, Congress amended section 313 to its current form, which now explicitly requires federal facilities to, among other things, pay permit fees in connection with state and local substantive and procedural requirements respecting the control and abatement of water pollution. See Clean Water Act of 1977, Pub. L. No. 95-217, § 61(a), 91 Stat. 1597, 1598 (Dec. 27, 1977) (amending 33 U.S.C. § 313(a)). Subsequently, the Supreme Court again narrowly construed the Clean Water Act’s waiver provision, holding that Congress had not waived the federal government’s sovereign immunity from liability for civil fines

¹⁹ Then-section 313 provided, in relevant part, that federal agencies shall “comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.” 33 U.S.C. § 1323 (Supp. IV 1970).

²⁰ *Hancock* and *EPA* were companion cases decided on the same day. *Hancock* concerned the extent of the sovereign immunity waiver in the Clean Air Act’s federal facilities provision, 42 U.S.C. § 7418. For a more detailed discussion of these cases and the legislative histories of the federal facilities provisions in the Clean Water Act, Clean Air Act, and Safe Drinking Water Act, see B-286951, Jan. 10, 2002.

imposed by the state of Ohio for Clean Water Act violations. *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992). Rejecting a broad reading of current section 313's "all . . . requirements" language, the Court found that the language can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures. *Id.* at 627–28, quoting *Mitzelfelt v. Department of the Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990).

Other federal courts have also construed the Clean Water Act's section 313(a) waiver provision narrowly.²¹ See *New York State Department of Environmental Conservation v. United States Department of Energy*, 772 F. Supp. 91, 98 (N.D.N.Y. 1991) (holding that section 313 is not a blanket waiver of the United States' sovereign immunity from the imposition and assessment of taxes by a State). See also *In re: Operation of the Missouri River System Litigation*, 418 F.3d 915 (8th Cir. 2005) (stating that section 313 is a limited waiver of sovereign immunity); *Sierra Club v. Lujan*, 972 F.2d 312 (10th Cir. 1992) (stating that section 313 does not waive federal sovereign immunity from liability for punitive civil penalties).

As we concluded in King County, the absence of clear and unambiguous language in section 313(a) subjecting federal facilities to the payment of state and local taxes, together with the Supreme Court's narrow construction of section 313(a) counsels

²¹ Only two lower courts have considered stormwater fees assessed by a municipality against the federal government in the context of section 313(a) of the Clean Water Act. Both cases arise out of the same facts. In *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 274–76 (1997) (*Cincinnati I*), the city sought to recover storm drainage service charges levied against property of the government. The court held that the charges sought by the city constituted an impermissible tax on the United States, rather than permissible user fees; thus no implied contract existed between the City of Cincinnati and the federal government. *Cincinnati I*, 39 Fed. Cl. at 274. Accordingly, the Court of Federal Claims dismissed the city's complaint for failure to state a claim. While the court's dismissal of the complaint was affirmed by the Court of Appeals for the Federal Circuit, the appellate court did not find it necessary to address the fee *versus* tax issue. *Cincinnati v. United States*, 153 F.3d 1375, 1378 (Fed. Cir. 1998). Instead, the appellate court held that the involuntary nature of the storm drainage service charge was dispositive in finding that no implied contract existed; however, the involuntary nature of the charges was not dispositive of whether the charge was a user fee or an impermissible tax. *Id.* The city subsequently filed a Tucker Act claim in federal district court, seeking to collect the same charges that were at issue in *Cincinnati I*. *City of Cincinnati v. United States*, No.: 03-CV-731 (S.D. Oh. Mar. 27, 2007) (*Cincinnati II*). The court in *Cincinnati II* denied the parties' cross-motions for summary judgment, finding that a fair reading of section 313(a) provided a substantive claim for money damages such that the court had subject matter jurisdiction over the city's Tucker Act claim. *Id.* at 5.

against reading taxes into the scope of the section 313(a) waiver. In at least one instance, Congress has waived sovereign immunity and permitted state and local taxation of certain federal activities in the field of environmental regulation. See 42 U.S.C. § 2021d(b)(1)(B) (providing that federal low-level radioactive waste that is disposed at nonfederal disposal facilities “shall be subject to the same conditions, regulations, requirements, fees, *taxes*, and surcharges . . . in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government”) (emphasis added). Conversely, section 313(a) does not expressly provide that federal agencies must pay state and local environmental taxes. Section 313(a) “never even mention[s] the word ‘taxes’ when referring to the obligations of the United States.” *New York State Department of Environmental Conservation*, 772 F. Supp. at 98 (comparing 42 U.S.C. § 2021d(b)(1)(B) with section 313(a), codified at 33 U.S.C. § 1323(a)).

Section 313(a) requires federal agencies to comply with local requirements “respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity.” 33 U.S.C. § 1323(a). Accordingly, if the District requires that some action be taken by property owners to control stormwater runoff from their property, then GAO must comply with such a requirement to the same extent as any nongovernmental entity. For example, if a permit were required, GAO would obtain one. Here, the DDOE stormwater fee is not “respecting the control and abatement of water pollution” because nothing is required of GAO, except the payment of the fee. Based on the facts and other information provided to us by the District, it is clear that the purpose of the District stormwater fee is to generate revenue for the District to satisfy its obligations under the MS4 Permit. The fee is not assessed to defray the cost of regulating GAO, nor does it represent a fair approximation of a particularized service provided to GAO.

CONCLUSION

We conclude that the DDOE stormwater fee is a tax assessed on GAO, as a District property owner, in order to raise revenue to defray the District’s costs of activities required by its MS4 Permit, such as efforts to encourage the use of low-impact development practices and functional landscaping, enhanced street cleaning, retrofitting catch basins, expanding the tree canopy within the District, installing green roofs on District-owned properties, installing cameras to record illegal dumping activities, and public education and outreach programs. While section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), waives sovereign immunity from many state and local environmental requirements, it does not waive the federal government’s sovereign immunity from taxation by state and local governments. Under the Supremacy Clause of the U.S. Constitution, the United States and its instrumentalities may not pay taxes imposed by state and local governments unless Congress has legislated a waiver of sovereign immunity. Such a waiver must clearly and expressly confer the privilege of taxing the federal government. Accordingly, GAO’s

appropriated funds are not available to pay the DDOE stormwater fee unless Congress enacts a waiver, as required by the Constitution.