GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-321685

March 14, 2011

Irvin B. Nathan, Esq.
Acting Attorney General for the District of Columbia
441 4th Street, N.W.
Washington, D.C. 20001

Subject: *Public Law 111-378 and Payment of the Stormwater Charge*

Dear Mr. Nathan:

On September 29, 2010, we informed the Office of the Attorney General that GAO was constitutionally prohibited from using its appropriations to pay the stormwater charge assessed by the District of Columbia Department of the Environment (DDOE), because such charge is a tax. B-320795. Use of GAO's appropriations to pay the DDOE stormwater charge had not been authorized by a legislated waiver of the sovereign immunity of the United States. Subsequent to our letter, Congress enacted an amendment to the Clean Water Act to waive sovereign immunity for certain stormwater assessments. *See* Pub. L. No. 111-378, 124 Stat. 4128 (Jan. 4, 2011). We have determined that, as a result, the DDOE stormwater charge is now payable by GAO without further legislative action. *See* Enclosure.

If you have any questions regarding this matter, please contact Susan A. Poling at 202-512-2667 or Tom Armstrong at 202-512-8257.

Sincerely yours,

Lynn H. Gibson
General Counsel

Enclosure

cc: Randy Hayman, Esq.
General Counsel, D.C. Water and Sewer Authority

ENCLOSURE

ANALYSIS OF PUBLIC LAW 111-378 AND THE PAYMENT OF THE DISTRICT OF COLUMBIA STORMWATER CHARGE

In September 2010, GAO concluded that the stormwater charge assessed by the District of Columbia Department of the Environment (DDOE) is a tax, the payment of which had not been authorized by a legislated waiver of the sovereign immunity of the United States. *See* Letter from General Counsel, GAO, to Attorney General, District of Columbia (District), B-320795, Sept. 29, 2010. We further concluded that although section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), requires federal agencies to comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges, that provision did not waive the federal government's sovereign immunity from taxation by state and local government. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

On January 4, 2011, Congress enacted Public Law 111-378, 124 Stat. 4128, to amend section 313 of the Clean Water Act. Public Law 111-378 added new subsection (c), paragraph (1) of which defines the "reasonable service charges" covered by the section 313(a) waiver of sovereign immunity to include certain stormwater assessments, whether they are denominated a fee or a tax.[1] We have determined that, as a result of paragraph (1) of this newly enacted section 313(c) of the Clean Water

[1] Specifically, new section 313(c)(1), provides as follows:

> "(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 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."

Act, the DDOE stormwater charge is now payable by GAO. However, Public Law 111-378 also added a paragraph (2) to new subsection (c); it is this paragraph, specifically, subparagraph (B), that poses the issue that is the subject of this analysis.

Section 313(c)(2) of the Clean Water Act provides:

> "(2) LIMITATION ON ACCOUNTS.—
>
> "(A) LIMITATION.—The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury.
>
> "(B) REIMBURSEMENT OR PAYMENT OBLIGATION OF FEDERAL GOVERNMENT.—Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government, as described in subsection [313](a), *shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.*"

Pub. L. No. 111-378, 124 Stat. at 4129, *to be codified at* 33 U.S.C. § 1323(c)(2) (emphasis added). The proviso italicized in subparagraph (B) above raises the question of whether a specific appropriation for the payment of stormwater assessments is required before GAO may pay the DDOE stormwater charge, or whether the stormwater charge is payable as a necessary expense from GAO's lump sum Salaries and Expenses appropriations that cover GAO operating expenses. As we explain below, because of the context in which Congress enacted the proviso (as part of a waiver of sovereign immunity), we conclude that GAO may pay the DDOE stormwater charge as a necessary expense of its Salaries and Expenses appropriations without further congressional action.

DISCUSSION

The term "obligation" in the federal budget and accounting context means "[a] definite commitment that creates a legal liability of the government, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions of the other party beyond the control of the United States." GAO, *A Glossary of Terms Used in the Federal Budget Process,* GAO-05-734SP (Washington, D.C.: Sept. 2005), at 70. Similarly, the ordinary meaning of "obligation" is "something (as a promise or contract) that binds one to a course of action; a liability; a duty." *The Merriam-Webster Dictionary* 511 (50th anniv. ed. 1994). Thus, the use of the term "obligation" might suggest that subparagraph (B) renders a federal agency's liability or legal duty to pay a stormwater assessment contingent on a specific appropriation for such purpose. However, a contextual reading of subparagraph (B) counsels

against such an interpretation. Furthermore, our examination of the legislative history of Public Law 111-378 supports this conclusion.

The Supreme Court has indicated that the meaning of a statute is to be determined not just "by reference to the language itself," but also by reference to "the specific context in which that language is used and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The Court has also stated that while the Court, in construing waivers of sovereign immunity, should not extend the waiver beyond that which Congress intended, neither should the Court "assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. 111, 118 (1979); *see also United States v. Williams*, 514 U.S. 527, 536 (1995) (holding that a narrow reading of the waiver of sovereign immunity at issue would leave the plaintiff without a remedy, which was not the intent of Congress); *United States v. Williams*, 514 U.S. at 541 (Scalia, J., concurring) (The rule requiring clear statement of waivers of sovereign immunity does not "require explicit waivers to be given a meaning that is implausible. . . .").

Applying this principle of statutory construction, we find that, when read within the context of subsection (c) specifically and section 313 generally, subparagraph (B) can reasonably be interpreted, not as conditioning the waiver of sovereign immunity for stormwater assessments on a specific appropriation for such purpose, but rather as emphasizing that like other "reasonable service charges" covered by the waiver in section 313(a), federal agencies are to pay stormwater assessments from their existing appropriations available for operational expenses.

Congress has consistently and unambiguously stated its intention that, with regard to the reduction and control of pollution of all kinds, federal facilities are to be placed on an equal footing and be subject to the same processes and sanctions as private companies. *See, e.g.*, S. Rep. No. 95-370 (1977) (accompanying Pub. L. No. 95-217, Clean Water Act of 1977); S. Rep. No. 92-414, at 65–66 (1971) (accompanying Pub. L. No. 92-500, Federal Water Pollution Control Act Amendments of 1972); H.R. Conf. Rep. No. 102-886, at 17–18 (1992) (accompanying Pub. L. No. 102-386, Federal Facilities Compliance Act of 1992); H.R. Rep. No. 102-111, at 5 (1992) (same). Hence, section 313(a) of the Clean Water Act provides that federal instrumentalities "*shall* be subject to, and comply with, all Federal, State, interstate, and local requirements, . . . including the payment of reasonable service charges." 33 U.S.C. § 1323(a). The purpose of section 313(c)(1) is to redefine the term "reasonable service charges" to expressly bring stormwater assessments within the ambit of "reasonable services charges" that federal agencies are required to pay under section 313(a). To interpret subparagraph (B) of subsection (c)(2) as making the duty to pay stormwater assessments, unlike other reasonable service charges payable under section 313(a), contingent on a specific appropriation would frustrate the purpose of section 313(c)(1).

In that regard, the apparent purpose of subparagraphs (A) and (B) of subsection (c)(2) is to clarify that subsection (c)(2) was aimed at directing federal agencies to

use existing available lump sum appropriations to pay stormwater assessments covered by subsection (c)(1). Section 401(a) of the Congressional Budget Act of 1974, as amended, 2 U.S.C. § 651(a), provides that it shall not be in order for either the House or the Senate to consider a bill or resolution that provides new authority to incur indebtedness unless the bill or resolution provides that such authority shall be effective for any fiscal year only to such extent and in such amounts as are provided in appropriation acts.[2] Further, subparagraph (A) prohibits the use of funds from any permanent authorization account in the Treasury to pay the stormwater assessment. As a result, to satisfy the subsection (c)(1) mandate (federal agencies "shall be subject to, and comply with . . . reasonable service charges"), agencies would necessarily refer to their general operating appropriations; in GAO's case, its annual Salaries and Expenses appropriations.

The legislative history supports the view that Congress expected that stormwater assessments, like other reasonable service charges under section 313(a) of the Clean Water Act, would be paid from existing appropriations available for operating expenses. For example, when the bill that became Public Law 111-378 was considered in the House of Representatives, Representative Oberstar stated as follows:

> "The intent of subsection (c)(2)(A) of Section 313 of the Clean Water Act, as added by S. 3481, is to ensure that there is no increase in mandatory spending pursuant to the U.S. Treasury's permanent authority to pay, without further appropriation, the water and sewer service charges imposed by the government of the District of Columbia. . . .
>
> "In addition, the intent of subsection (c)(2)(B) of Section 313 of the Clean Water Act, as added by S. 3481, is to require that Congress make available, in appropriations acts, the funds that could be used to pay stormwater fees, but not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges."

156 Cong. Rec. H8979 (Dec. 22, 2010) (statement of Rep. Oberstar).

Apparently speaking as to section (c)(2)(B), Representative Johnson added:

> "The provision simply says that agencies and departments should use their annual appropriated funds to pay for stormwater fees. . . . This new language requires that Congress make available, in appropriations acts, the funds that could be used for that purpose. It should not be

[2] The Act was intended to improve congressional control of budget outlays and to impose a restriction on backdoor spending, which is, spending outside the appropriation process. H. R. Rep. No. 658, at 16–17, 22–23 (1973); S. Rep. No. 688, at 1, 7 (1974).

> interpreted as requiring appropriations acts to state specifically or expressly that the funds could be used to pay these charges. The statutory language does not require this, and such a restrictive reading is not intended."

156 Cong. Rec. H8980 (Dec. 22, 2010) (statement of Rep. E. Johnson).

Our analysis here is not inconsistent with our analysis in previous decisions in which we have interpreted similar language. *See, e.g.*, B-204078.2, May 6, 1988; B-230755, Jul. 6, 1988. For example, in B-204078.2, we construed the effect of a provision restricting the obligation or expenditure of the Panama Canal Revolving Fund for administrative expenses, "except to the extent or in such amounts as are provided in appropriations Acts." *Id.* at 4-5. We concluded that an examination of the Panama Canal Act, as a whole, made it clear that Congress intended the administrative expenses restriction to be read strictly and that authority to obligate or expend amounts from the Revolving Fund for administrative expenses must be specifically provided for in an appropriations act. *Id.* at 5.

We considered similar restrictive language in B-230755. At issue in B-230755 was language directing the U. S. Environmental Protection Agency (EPA) to "pay, to the extent provided in appropriations acts," the federal share of costs associated with two specific pollution control projects in the State of New York. Under the Clean Water Act, EPA was required to pay certain expenses related to pollution control projects. Because House and Senate conferees had specifically removed amounts from EPA's appropriations for this purpose, we were unwilling to read EPA's fiscal year 1998 appropriations as available for this purpose.

In the matter before us, to parse the words of subparagraph (B) of subsection (c)(2) and read the subparagraph in a very literal manner, without the context of subsection (c) as a whole, would frustrate the purpose of subsection (c)(1), and we are unwilling to read subparagraph (B) that way. It would be anomalous for Congress on the one hand to waive sovereign immunity and then on the other hand seemingly take it away.

CONCLUSION

Public Law 111-378 has amended section 313 of the Clean Water Act to extend the waiver of federal sovereign immunity to certain stormwater assessments, such as the DDOE stormwater charge. GAO's appropriation for Salaries and Expenses is now available for payment of the DDOE stormwater charge.

We emphasize the narrowness of our conclusion. We are not concluding that the phrase *"except to the extent and in an amount provided in advance by any appropriations Act"* or a variant thereof is, as a general matter, insufficient to condition budget authority on a specific appropriation. Rather, we simply conclude that because of the context in which Congress used that phrase in section 313(c) of

the Clean Water Act, such a condition does not exist with respect to stormwater assessments payable under section 313(a).