To: Katie Sheehan, the River Basin Center  
From: Tyler Cashbaugh, University of Georgia Environmental Practicum  
Date: April 21, 2014  
Re: Case Analysis of the Legality of Stormwater Utility Charges in Georgia  
Final Draft

I. BACKGROUND:

The city of Griffin, Georgia established the state’s first stormwater utility in 1997. Since then, stormwater utilities have been springing up across the state. Since 1999, the legality of these stormwater utilities has only been challenged 4 times. Of these 4 lawsuits, 2 were decided as recent as 2013.

In order to fund the operation and maintenance of separate storm sewer systems, including pollution control measures implemented under NPDES permits, many states have enacted laws enabling municipalities to pass ordinances establishing a “stormwater utility.” In Georgia, pursuant to the Home Rule powers granted by the Georgia Constitution, local governments have the power to charge for the services they provide and specific authority to provide stormwater systems. Georgia law also grants local governments the power to operate and maintain any “undertaking” related to the collection, treatment, and disposal of stormwater. Additionally, the law states that “[a] governmental body is authorized to prescribe, revise, and collect rates, fees, tolls, or charges for the services, facilities, or commodities furnished or made available by such undertaking.”

The most common legal challenge to stormwater utilities relates to whether the charge for the utility is considered a fee or a tax. Accordingly, the singular issue before the court in each case discussed below was whether the stormwater utility ordinance imposed a permissible fee, rather than an unconstitutional tax.

II. STORMWATER UTILITY LITIGATION IN GEORGIA:

A. Fulton County Taxpayers Association v. City of Atlanta:

In Fulton County Taxpayers Ass’n v. City of Atlanta, the court ruled that while the City of Atlanta (the “City”) had the power to provide stormwater management services, the manner in which the City assessed its service charge was characteristic of a tax rather than a fee.

The City’s stormwater utility imposed an annual charge based on the size of the parcel of property owned by the landowner. The City charged $11.99 per year for each 10,000 ft. sq. of property, multiplied by a factor of 1-4 depending on the specific use of the land (commercial, residential, industrial). In considering whether the stormwater utility charge at issue was a tax or a fee, the determinative factor for the court was whether the charge was designed to generate revenue for public or governmental purposes or whether it was a fee for services rendered.

The court found that the charge imposed by the City was based on a formula that merely looked to the size and use of each parcel, rather than to any special benefit received. By looking at the size and use of the property only, rather than the amount of impervious surface on a parcel, the ordinance effectively distributed the cost of stormwater services to all citizens, some of whom may not have contributed to the problem, and thereby received no services and no benefit. Moreover, the charge appeared to be imposed to help the City raise revenue generally rather than
for stormwater specifically. The court also noted that, consistent with a tax, the ordinance allowed the City to impose a lien directly against the landowner’s property if the landowner failed to pay the utility charge.

The effect of Fulton County Taxpayers Ass’n was not to preclude the use of stormwater utilities in Georgia. Rather, this case demonstrates how not to structure a stormwater ordinance.

B. McLeod v. Columbia County:

In McLeod v. Columbia County, the Court held that a monthly stormwater utility charge assessed against owners of developed property within a designated area based on the amount of impervious surface area located on their property was a fee and not a tax. The Columbia County Ordinance charged landowners in the designated service area a monthly stormwater utility charge based on the amount of impervious service area on their property. The ordinance charged $0.0875 per month for every 100 ft. sq. of impervious surface area, with a single family dwelling defined as having 900 ft. sq. First, the Court affirmed that local governments have the constitutional and statutory authority to establish stormwater utilities for their citizens. In holding that the charge was a fee and not a tax, the Court relied on several aspects of the assessment, including: (1) the fee applies to developed property and not to undeveloped property owners who neither caused nor contributed to the problem; (2) the properties charged received a special benefit not available to others; and (3) the cost of the services were properly apportioned based on horizontal impervious surface area.

That the charge was not mandatory in nature was further support that it was a fee and not a tax. Moreover, unlike Fulton County Taxpayers Ass’n, the Columbia County Ordinance did not allow the county to impose a lien against a landowner’s property for his failure to pay. In fact, the Columbia County ordinance allowed the landowner to reduce the amount of their monthly charge by providing their own private stormwater management systems. All of these factors led the Court to hold that the charge was a permissible fee and not a tax.

C. DeKalb County, Georgia v. United States:

The United States Court of Federal Claims in Georgia held that the stormwater management charges assessed by DeKalb County were impermissible taxes that could not be imposed on federal properties within the county without the government’s consent. Unlike the McLeod and Fulton County cases, dealing with the assessment of stormwater charges against Georgia residents, this case dealt with the assessment of stormwater charges against federal properties owned by the federal government. Thus, unlike those cases, a federal right was involved here—i.e., the federal government’s right to be immune from direct taxation from state and local governments. Accordingly, because a federal right was involved, the distinction between fees and taxes was a federal question and the determination made by the Georgia courts in Fulton County and McLeod regarding this issue did not affect the outcome in this case.

The court faced 2 issues in this case: First, were the stormwater management charges taxes or fees? Second, if the charges were taxes rather than fees, did the government waive its immunity from such taxes under the Clean Water Act?

I. Whether Charges Are Taxes or Fees?
To distinguish between permissible fees and impermissible taxes, the court applied the 3-part inquiry announced in *San Juan Cellular Telephone Co. v. Public Service Commission*. That test asks the following questions: First, which governmental entity imposed the charge? Next, which parties must pay the charge? And finally, the third—and most important—factor asks for whose benefit are the revenues generated by the charge spent?

The first prong of the *San Juan Cellular* test asks which governmental entity imposed the charge at issue. To this end, when an assessment is imposed by a legislative body, rather than an administrative agency, it is more likely to be viewed as a tax than as a fee. In this case, the stormwater charges were adopted, and their precise amounts were set, by DeKalb County’s board of commissioners. The specific rates could only be amended by the county’s board of commissioners and chief executive. Moreover, the court stated that a charge is more likely to be a tax when the responsibility for administering and collecting the assessment lies with the county’s general tax assessor, rather than with a regulatory agency. Here, the county’s stormwater charges were billed to the government on an invoice from the county’s tax commissioner. In light of the fact that the stormwater charges in this case were adopted and set by the DeKalb County’s legislative body, *i.e.*, its board of commissioners, and collected by DeKalb County’s tax collector, the Court found that charges were taxes rather than fees.

Next, pursuant to the second prong of the *San Juan Cellular* test, the court examined which parties had to pay the utility charge. In doing so, the court noted that if the charges are imposed on all citizens, or a broad class of them, rather than a small group, the charge is more likely to be a tax. DeKalb County imposed its stormwater charges upon every single owner of developed property in the unincorporated portions of the county and every business that was located there. Therefore, because the stormwater charge was not assessed against a narrow group, but was instead imposed on the majority of property in the county, the court held that the second prong of the *San Juan Cellular* inquiry also suggested that the charge was a tax.

Finally, the third prong of the *San Juan Cellular* test seeks to determine who benefits from the revenues generated by the charge. If the County spends the revenue to provide a benefit for the general public, then the charge is more likely to be a tax, but if the revenue is spent to provide a particularized benefit for a narrow group, or to offset the cost of regulating a narrow group, then the charge is more likely to be a fee. The court emphasized that this prong of the test is often the most important factor when courts face cases that could fall either way. The DeKalb County Ordinance stated that the purpose of the utility was to “[R]educ[e] flooding, erosion and water pollution caused by stormwater runoff.” The court found this purpose—*i.e.*, flood prevention and abatement of water pollution—to be a benefit enjoyed by the general public. Moreover, the charges were not individually based on the benefits to each owner of developed property. Rather, regardless of how much rain fell on a property, and how much of that rain actually left the property, the charge remained the same. Thus, because the stormwater utility provided no individualized, measurable benefit to individual property owners, the DeKalb County charges were more likely a tax.

To summarize, then, the court concluded that under the *San Juan Cellular* test the stormwater charges assessed by DeKalb County on federal properties were impermissible taxes.

2. *Did the Government Waive its Immunity under the CWA?*
Since the court determined that the charges imposed by DeKalb County were in fact taxes, the court sought to determine whether the Clean Water Act ("CWA") waived the government’s immunity from such charges. DeKalb County argued that the 2011 amendment to the CWA did waive the federal government’s sovereign immunity from stormwater utility charges that the county sought to recover.

Since its original enactment in 1972, the CWA has included a provision known as the Federal Facilities Section, 33 U.S.C. § 1323 (2006), which requires the federal government to meet the same water pollution abatement requirements as those applicable to private entities. Since its original enactment in 1972, the CWA has included a provision known as the Federal Facilities Section, 33 U.S.C. § 1323 (2006), which requires the federal government to meet the same water pollution abatement requirements as those applicable to private entities.xxxii

Section 313 of the CWA, as amended in 1977 and as it still reads today, states that:

> [e]ach 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.xxxiii

Despite the 1977 amendment to the Federal Facilities Section of the CWA, which sought to require the federal government to pay stormwater charges, the federal government routinely refused to pay the types of charges at issue in the DeKalb County case, arguing that the charges were taxes rather than fees.

In response, Congress amended the CWA to specify, in a new Section 313(c), that the “reasonable service charges” payable by federal facilities under Section 313(a) include any stormwater assessment regardless of whether the assessment is denominated a fee or a tax.xxxiv Thus, the 2011 amendment changed Section 313 of the Clean Water Act so that it would represent an unequivocal waiver of the government’s immunity from the type of stormwater management charges at issue in this case.

In this case, DeKalb County sought to recover unpaid stormwater management charges assessed against 18 different properties—6 owned by the United States and 12 owned by the Postal Service—for the years 2005 through 2010.xxxv Although the government conceded that Section 313, as amended in 2011, subjected it to prospective liability for stormwater management charges, whether characterized as fees or taxes, it argued that the 1977 version of that section did not contain an unambiguous waiver of the government’s sovereign immunity from state or local taxes. The issue for the court, therefore, was whether “reasonable service charges” could be interpreted to include taxes prior to the 2011 amendment.

To waive the government’s sovereign immunity, Congress must express its intent to do so in terms that are unequivocal and unambiguous.xxxvi Although the court found that the 1977 version of Section 313 did contain an unambiguous waiver from “reasonable service charges,” it held that the scope of the term was ambiguous and did not contain a clear waiver of the government’s sovereign immunity from taxes.xxxvii The court noted that the term “reasonable
service charges” is susceptible to at least two plausible interpretations: first, that the term encompasses both fees and taxes, and, in the alternative, that the term is limited to fees alone. xxxviii Because ambiguities are resolved in favor of immunity, the court held that the 1977 version of Section 313 did not clearly waive the government’s immunity from state or local taxes.

In summary, because the Congress did not clearly waive the government’s immunity from taxes until 2011, DeKalb County could not recover the stormwater charges it sought to collect for the years 2005 through 2010.

D. Homewood Village, LLC v. Unified Government of Athens-Clarke County

The last case in Georgia that discussed the legality of stormwater utility charges was decided on March 4, 2013. In Homewood Village v. Unified Government of Athens-Clarke County, xxxix the Georgia Supreme Court held that the stormwater utility ordinance adopted by the Athens-Clarke County government, which required property owners to pay fees based on their estimated relative contribution to stormwater runoff problems, imposed a permissible fee, rather than an unconstitutional tax. xl

Homewood Village LLC, owned by Howard Scott, owed Athens-Clarke County $72,739, not including late fees, for stormwater utility bills dating back to 2005, the year that Athens-Clarke County created its stormwater utility ordinance. Homewood Village argued that the ordinance was an unconstitutional tax which could not be assessed involuntarily.

The dispositive issue in the case was whether the ordinance adopted by Athens-Clarke County imposed a permissible fee rather than an unconstitutional tax, and that issue was controlled by the Court’s decision in the nearly identical case of McLeod v. Columbia County. xli

Like the ordinance in McLeod, the Athens–Clarke County Ordinance (1) applied to residential and non-residential developed property, but not to undeveloped property; (2) the cost of the stormwater services was apportioned based primarily on impervious surface area; and (3) the properties charged received a special individualized benefit from the funded stormwater services. xlii

The Court distinguished the assessment from a tax on the ground that the local government calculated the amount of the assessment based on the costs of storm water improvements required to service storm water runoff from the owner’s land. Thus, unlike the ordinance in Fulton County Taxpayers Ass’n which imposed a “blanket” stormwater charge based solely on the size and use of each parcel, the Athens-Clarke County Ordinance was individually tailored to each piece of land, and charges were based on the benefit each landowner received. In addition, like the Ordinance in McLeod, the Athens-Clarke County Ordinance provides exceptions for landowners who provide onsite stormwater management systems. xliii

Moreover, the Athens-Clarke County Ordinance does not permit the imposition of a lien directly against the property of those who fail to pay. xlv

III. CONCLUSION:

The Georgia cases discussing the legality of stormwater utility charges do not dispute the fact that local governments have the power to provide stormwater management services or their ability to charge for such services. The only disputed issue has been whether those charges constitute an impermissible tax or a permissible fee.
Stormwater utility charges have been upheld as permissible fees when: (1) the fee applies to developed property owners and not to undeveloped property owners who neither caused nor contributed to the problem; (2) the properties charged received a special individualized benefit not available to others; (3) the cost of those services was properly apportioned based on impervious surface area; (4) the ordinance allows property owners to reduce the amount of the charge by creating and maintaining private stormwater management systems; and (5) the ordinance does not permit the imposition of a lien directly against the property of those who fail to pay the utility charge. In *Fulton County Taxpayers Ass’n*, the only case that held a utility charge to be a tax rather than a fee, none of the above factors were present. Thus *Fulton County* provides a compelling example of how not to structure a stormwater ordinance.

In the federal context, local governments assessing stormwater utility charges against properties owned by the federal government should not have to worry about this distinction. Because the 2011 amendments to Section 313 of the CWA ended any distinction between taxes and charges, the federal government will be liable for any stormwater utility charges assessed against it after 2011.

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³ Ga. Const. art. IX, §. II, par. III(a)(6) authorizes any county to provide “Stormwater…collection and disposal systems.”


⁶ All 4 Georgia cases challenging stormwater utilities since 1999 have centered around this issue.


⁸ Id., at 1.

⁹ The court cited *Gunby v. Yates*, 214 Ga. 17 (1958), which defined a tax as “an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or services rendered.”

¹⁰ *Fulton Cty Taxpayers Ass’n*, 1999 WL at 3.

¹¹ Id. at 3.

¹² Id.


¹⁴ Note that the state court addressed the issue only because a federal court remanded the case after determining that the charges were taxes under federal law. *See See McLeod v. Columbia Cnty.*, 254 F.Supp.2d 1340, 1344-49 (S.D.Ga.2003) (holding that a county’s stormwater management charges were taxes for purposes of the Tax Injunction Act, 28 U.S.C. § 1341 (2006)).

¹⁵ McLeod, 278 Ga. at 242.

¹⁶ See Columbia County, Ga., Ordinance § 16-1-1(b)(2) (explaining that 900 ft. sq. is the minimum required floor area for a building to be considered a single family home).

¹⁷ McLeod, at 243.

¹⁸ Id. at 244-45.

¹⁹ Id.


²¹ Id. at 696-97.

²² See DeKalb Cnty., Georgia, 108 Fed. Cl. at 696.

²³ 967 F.2d 683 (1st Cir.1992).

²⁴ DeKalb Cnty., Georgia, 108 Fed. Cl. At 700.

²⁵ Id.

²⁶ Id.

²⁷ Id. at 701.

²⁸ Id.
The various sections of the CWA are often referred to as they appeared in the law enacted by Congress, rather than as they were ultimately codified in the United States Code. The Federal Facilities Section, for example, is sometimes referred to as Section 313 of the CWA, even though it is codified at 33 U.S.C. § 1323. In this memo, I will refer to that section as “Section 313.”

See 33 U.S.C. § 1323(c).
DeKalb Cnty, Georgia, 108 Fed. Cl. at 690-91.
Id. at 707.
Id. at 709 (emphasis added).
Id.
Id.
Id. at 515.
Athens-Clarke County, Ga., § 5-5-10(d)(1) (2005).
Homewood Village, 292 Ga. at 515.