No. 22-1581

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CITY OF WILMINGTON, DELAWARE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in Case No. 1:16-cv-01691-MHS, Judge Matthew H. Solomson

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-1581

Short Case Caption City of Wilmington, Delaware v. United States

Filing Party/Entity City of Wilmington, Delaware

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Signature: /s/Paul T. Nyffeler

Name: Paul T. Nyffeler

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
City of Wilmington, Delaware		

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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III. STATEMENT OF RELATED CASES

No appeal in or from the same proceeding was previously before this or another appellate court. Plaintiff-Appellant City of Wilmington, Delaware ("Wilmington" or "City") is unaware of any other pending case in this Court or any other court that will directly affect or be affected by this Court's decision in the pending appeal.

IV. JURISDICTIONAL STATEMENT

The U.S. Court of Federal Claims had jurisdiction under 28 U.S.C. § 1491(a)(1) and 33 U.S.C. § 1323 for all claims for payment of Wilmington's stormwater charges and interest pursuant to City Code §§ 45-53(d) and 45-176 and entered final judgment January 27, 2022. Appx0083. Wilmington timely appealed March 25, 2022. Appx2143-2144. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

V. INTRODUCTION

The United States refused to pay stormwater charges Wilmington assessed on five federal properties ("Properties") since January 4, 2011, when Congress' clarified 33 U.S.C. § 1323 to require paying "reasonable service charges" meeting certain technical requirements. Trying this case of first impression, the court committed numerous foundational errors,

each compounding one another in complex ways. Its rulings must be reversed.

VI. STATEMENT OF THE ISSUES

1. Whether the court erred by applying the Contract Disputes Act's appellate standard of *de novo* review.

2. Whether the court erred by (a) disregarding as irrelevant or giving little weight to Wilmington's circumstantial and contemporaneous evidence, and (b) giving dispositive weight to the United States' speculation and conjecture.

3. Whether the court correctly construed "proportionate" and "nondiscriminatory" in 33 U.S.C. § 1323 when assessing the burdens of persuasion and production regarding affirmative defenses of, and presumptions of correctness of government records and reasonableness of ordinances' utility rates and procedures against, the United States.

4. Whether 33 U.S.C. § 1323 obligated the United States to exhaust administrative remedies available via Wilmington's appeal process before contesting stormwater charges at trial by arguing entitlement to those remedies.

5. If 33 U.S.C. § 1323 obligated the United States to exhaust Wilmington's administrative remedies:

a. Whether the court abused its discretion by excusing the United States' failure to exhaust those administrative remedies that (i) involve administrative expertise or discretion and (ii) would not necessarily have been futile if an appeal had been filed between January 4 and March 18, 2011; and

b. Whether the court should have entered judgment under RCFC 52(c) against (not for) Wilmington based in part on the United States' affirmative defense that its failure to exhaust administrative remedies was excusable.

6. Whether Congress' command that 33 U.S.C. § 1323(a) "shall apply notwithstanding any immunity… under any law or rule of law" can be plausibly interpreted as excluding the United States' traditional immunity from interest awards from this waiver.

VII. STATEMENT OF THE CASE

A. THE EPA EXTOLLED WILMINGTON'S "FAIR AND EQUITABLE" STORMWATER UTILITY.

Due to the "significant expense" of operating and maintaining a stormwater management program, the U.S. Environmental Protection

Agency (EPA) issued its 2008 "Funding Stormwater Programs" publication to "assist local stormwater managers understand the alternatives available to fund their stormwater program." Appx1078. The EPA recommended "adopting stormwater service fees by means of a stormwater utility" because they "address the shortcomings and inequities of funding stormwater management by property taxes or water/sanitary service fees," which base charges on "the assessed value of properties" and a portion of a property's drinking water usage, respectively. *Id.* For example, basing stormwater charges on water meters

> is often not equitable because a property's metered water flow usually bears no relationship to the stormwater runoff it generates. For example, a shopping center typically generates a significant amount of stormwater runoff from the impervious area of its buildings and parking lots, but it usually uses a relatively small amount of metered water.

Id. Because measuring "actual stormwater pollution, discharge, or runoff that occurs from each and every parcel," is infeasible, Appx2032 (Joint Stipulations of Undisputed Fact ("JSUF") ¶¶20-21), a "major element" in the "basic methods that stormwater utilities use to calculate service fees" is impervious area, which "is the most important factor influencing

stormwater runoff…," Appx1079; *see also* Appx0177 (303:17-19) (Impervious area "widely accepted as the parameter that best represents contribution to pollution.").

Stormwater charges may be assessed by billing parcels "on the basis of how much impervious area is on the parcel …, based on the impact of a typical single family residence (SFR) home's impervious area footprint." Appx1079. Technically defined as "equivalency stormwater units" (ESUs) or "equivalent residential units" (ERUs) but described here simply as "Runoff Units," this "common practice" uses Runoff Units "as a common denominator of sorts to help property owners conceptualize the runoff for which their property is responsible" by "relating the size and runoff of all City parcels to each other" as compared to a city's archetypal residential parcel's impervious area. *Id.*; Appx0179 (311:9-312:5); Appx0044; Appx0407; *see also* Appx0181 (317:24-318:8); Appx0206 (417:12-420:10).

Among its "recommendations and explanations [to] consider in determining how to comply with" future regulatory demands, the EPA highlighted Wilmington as a case study for establishing "a stormwater utility

to recover costs related to stormwater management on a ***fair and equitable basis***." Appx1078-1080 (emphasis added). In 2006, the EPA limited water pollution to the Christina River Basin by two Total Maximum Daily Loads (TMDLs[1]). *See* Appx0921, Appx0983, Appx0993-0994. The EPA's bacteria and sediment TMDL required Wilmington to be responsible for managing stormwater runoff everywhere within its corporate boundaries, whether the runoff passes through Wilmington's stormwater sewer conveyance system or enters rivers directly. Appx0989, Appx1013. Wilmington's stormwater fee methodology was based on its engineering consultant's professional opinions, applied to "[a]ll parcels that are within the city's corporate boundaries," and adopted by the City Council in City Code § 45-53 ("Ordinance") in 2006 as a sewer charge independently authorized by Wilmington's Charter and Delaware law. *See* Appx2030 (JSUF ¶5); Appx0244; Appx2004 (15:18-16:12) (admitting

[1] TMDLs are "a determination of the amount of a pollutant from point, nonpoint and natural background sources…, which may be discharged to a water quality-limited waterbody without violating water quality standards" for defined uses (*e.g.*, recreation or fishing). Appx0992; *see generally Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 288-291, 299-300 (3d Cir. 2015). "Nonpoint sources of sediment," including stormwater runoff outside sewer system service areas, "are generally much more difficult to identify and quantify than are point sources." Appx1017.

"sewer charges" encompasses "stormwater charges"); Wilmington Charter § 1-101; Del. Code Ann. tit. 7, § 4005(c); Del. Code Ann. tit. 22, § 802. The EPA described Wilmington's process for establishing its stormwater utility, including its selection of the Runoff Unit method, as billing "parcels solely on the basis of their impervious area." Appx1080; *see also* City Code § 45-53 ("impervious area" definition); Appx2032 (JSUF ¶22). To calculate the pro rata cost-per-Runoff Unit to operate Wilmington's stormwater management program, the EPA explained that Wilmington's total costs (~$5.1 million) were divided by the total Runoff Units estimated for all properties within its corporate boundaries (155,363). *See* Appx1082; Appx0410. Wilmington's $8.14/Runoff Unit quarterly fee for its typical residential home was below the $11 national average. Appx1078, Appx1082; *see* Appx0414.

Wilmington's assessment of stormwater charges on a property begins with obtaining its assigned occupancy code from the Department of Land Use for New Castle County ("County") to classify it into one of Wilmington's residential, condominium, and eleven nonresidential stormwater property classes. *See* City Code § 45-53(d)(1)-(3); Appx0464; Appx0226-0227, Appx0238-0243 (table of land use types and associated

designation of stormwater property class). The EPA understood that Wilmington "had accurate impervious area data for all" ~21,000 residential parcels, which had a median impervious area of approximately 789 square feet (defined as one Runoff Unit). Appx1081; *see* Appx0407-0409; City Code § 45-53(d)(8). While the County's records had "actual main floor, attached area, and detached structure square footage data" for residential properties, it lacked data on other possible impervious areas ("driveways or patios or sidewalks") that could contribute runoff. City Code § 45-53(d)(1); Appx0132 (122:10-19, 123:13-19). Therefore, residential parcels "were divided into four tiers to be billed at four separate flat rates," a practice the EPA encouraged. Appx1079, Appx1081-1082.

The EPA's 2008 publication generally summarized Wilmington's stormwater charge methodology for condominium and nonresidential properties, upon which their "stormwater charges[2] were based on their individual" Runoff Units. Appx1082. For example, a condominium or nonresidential "parcel with 7,890 square feet of impervious area would be billed for 10" Runoff Units. *Id*. Unlike residential parcels, Wilmington

[2] The Ordinance switched from quarterly to monthly assessments during the dispute's pendency. *See* Appx0042 n.8.

lacked impervious area data for condominium and nonresidential properties. *Id*. To determine impervious area for condominiums (a "unique… mix of dwelling units, common areas, private roads, and other attributes"), Wilmington acquired geographic information system (GIS) data for the fewer than 60 condominium properties. *Id.*; Appx0229.

Wilmington could "reliably determine the level of imperviousness that exists within a property and/or class of properties…" for ~4,600 nonresidential properties "by applying predetermined stormwater coefficients," known as "runoff coefficients," to their gross parcel areas, obtained from County property records. Appx0227; Appx1082; Appx0409. Wilmington's engineering consultant relied on empirical studies from Prof. Chow, whose comprehensive stormwater runoff research using properties with different land covers resulted in ranges of industry-accepted runoff coefficients for various property categories. *See* Appx0228; *see also* Appx0182-0183 (321:12-325:6). The Ordinance assigned "the high end of the runoff coefficient range of a particular land use…," given Wilmington's "highly urbanized drainage environment…." Appx0228; *see* City Code § 45-53(d)(3); *see also* Appx0195 (374:7-14).

Wilmington prepared an "Example Fee Calculation for a Restaurant" to explain how the Ordinance assesses stormwater fees. Appx0413; *see* Appx0112 (42:1-2, 42:18-23). First, County records are consulted to determine the property's occupancy code (230: Restaurant/Bar) and parcel area (4,000 ft^2). *See* Appx0413; Appx0240. Because Wilmington assigns restaurants to the Commercial stormwater property class, a 0.95 runoff coefficient was multiplied by the restaurant's gross area to estimate its impervious area (3,800 ft^2). *See* Appx0413; Appx0229; City Code § 45-53(d)(3), Table 2. The restaurant's 4.8 Runoff Units (ESUs) were calculated by dividing its estimated impervious area by 789. *See* Appx0413; Appx1082; City Code § 45-53(d)(8). Finally, its quarterly stormwater charge of $39.08 was determined by multiplying its Runoff Units by the $8.141 quarterly Runoff Unit rate. *See* Appx0413; City Code § 45-53(d)(9).

The Ordinance offers property owners the option of appealing their stormwater charge calculations. City Code § 45-53(d)(7). If an owner files a written appeal with "clear and convincing evidence," Wilmington's Department of Public Works has discretion to apply runoff coefficients specifically tailored to delineated land cover areas existing on their property.

Id.; *see* Appx0475 (available runoff coefficients for land cover delineations), Appx0479-0480 (illustrating hypothetical appeal revising runoff coefficient from 0.95 to 0.755 based on land cover evidence). Approved stormwater fee adjustments will become effective only from the billing period in which the adjustment application is received and apply prospectively to future charges. *See* City Code § 45-53(d)(7); Appx0475; Appx0127 (103:1-4). The Ordinance prohibits "retroactive adjustments to the storm water charge… in favor of the appellant," who must pay delinquent charges for appeals to be considered. City Code § 45-53(d)(7); *but see* Appx0779 (one-year grace period for retroactive appeals in 2007); Appx0159-0160 (232:18-233:12) (clerical errors corrected retroactively).

B. UNITED STATES FAILS TO PAY WILMINGTON'S STORMWATER CHARGES ASSESSED ON ITS PROPERTIES.

The United States owns five Properties in Wilmington, located within dredge disposal areas actively maintained by the U.S. Army Corps of Engineers. *See* Appx0041; Appx2029-2030 (JSUF ¶3), Appx2048 (JSUF ¶121); Appx0214; Appx2004 (15:18-16:4, 16:6-12). "Some portion of precipitation that falls on the Properties runs off them and ultimately into the Christina or Delaware Rivers… and runoff can increase the flow

of pollutants into nearby water."[3] Appx0041. County property records identified the Properties as "Vacant," so Wilmington assigned them to the Vacant stormwater property class. *See* Appx2048 (JSUF ¶¶122-23); Appx0445-0449.

Pursuant to the Ordinance's mandates for Vacant properties, Wilmington separately estimated each Property's impervious area using a 0.30 runoff coefficient, determined each Property's Runoff Units, and multiplied each Property's Runoff Units by the Runoff Unit Rate to determine each Property's stormwater charge. *See* City Code § 45-53(d)(3); Appx2049-2054 (JSUF ¶¶130, 131, 133-137, 140-144, 147-151, 154-158, 161-165); Appx0123-0124 (86:23-89:21) (discussing Appx0445-0449); Appx0134-0135 (129:13-132:4, 134:7-20), Appx0184 (331:9-332:19).

The United States refused Wilmington's 2009 payment demand, asserting the stormwater charges were essentially taxes that "the federal

[3] This satisfies the requirement, unaddressed by the court, that a federal agency has "engaged in any activity… which may result, in… runoff of pollutants" from the Properties. 33 U.S.C. § 1323(a); *see* 33 U.S.C. § 1362(6) ("pollutant" includes dredged material); 33 C.F.R. § 323.2(d) ("runoff or overflow from a contained land or water disposal area" deemed a "discharge of dredged material").

government has not waived sovereign immunity" to pay. Appx0280. Although the United States received the Properties' stormwater charges, there is no evidence it determined those charges were unreasonable or failed to satisfy any elements of § 1323(c)(1) between 2009 and 2016, despite Congress' January 4, 2011, amendment thereto. *See* Appx2005 (29:4-17), Appx2007-2008 (40:3-41:11, 54:3-55:3); *see also* Appx2004-2005 (17:19-18:15); *infra* Section VII.C.2.

C. WILMINGTON SUES THE UNITED STATES.

Wilmington sued the United States in the U.S. Court of Federal Claims on December 22, 2016, seeking to recover "the payment of reasonable service charges" assessed for "the control and abatement of water pollution" and interest pursuant to the 33 U.S.C. § 1323. Appx0038 (citation omitted). Wilmington's amended complaint, filed April 16, 2021, included delinquent stormwater charges on the Properties ($2,577,686.82) and interest ($3,360,441.32) between January 4, 2011, and April 16, 2021, amounts to which the United States stipulated. Appx0038 (citing Appx2065, Appx2068); *see* Appx0167 (261:10-16).

1. The Parties' Motions for Partial Judgment on the Pleadings.

The parties cross-moved for partial judgment on the pleadings. *See* Appx0001-0002 (*City of Wilmington v. United States* (*Wilmington I*), 136 Fed. Cl. 628 (2018)). The United States' motion contended that "§ 1323 does not expressly waive sovereign immunity with respect to interest" and that City Code § 45-176 does not provide for interest on stormwater charges. Appx0002, Appx0007-0008. The court denied the United State's motion based on Wilmington's argument that the sovereign immunity waiver for interest can be found between two provisions of § 1323(a)—first, "the United States is a property owner in the City subject to that locality's Code and is required to pay reasonable stormwater charges in the same manner and to the same extent as any nongovernmental entity," and second, "[t]his subsection shall apply notwithstanding any immunity… under any law or rule of law." Appx0007-0008 (quoting 33 U.S.C. § 1323(a)). Because Wilmington might prove its stormwater charges "constitute '…sewer system charges…' under… City Code § 45-176(c), and thus, are subject to interest on the unpaid stormwater charges at issue, Defendant's motion…" failed to show "to a certainty that [Wilmington] is entitled to no relief under any state of facts which could

be proved in support of [its] claim"—the court necessarily, if implicitly, concluded that § 1323(a)'s immunity waiver included interest. Appx0007-0008 (internal citation omitted); *contra* Appx0081 n.41.

Wilmington's motion sought to prohibit the United States from contesting "'stormwater calculations based on site-specific, technical information…' that could have been considered in an appeal under… City Code § 45-53(d)(7)." Appx0003 (citation omitted). Declining to prohibit the United States from contesting Wilmington's stormwater charges at trial, the court held that neither § 1323 nor the Ordinance constrained its discretion to refuse application of the exhaustion doctrine because City Code § 45-53(d)(7) "does not require a property owner to pursue an administrative appeal"—an owner "may appeal," not "must." Appx0005-0006 (quoting *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000)), n.3. The court was concerned that the United States "would suffer serious prejudice" if precluded from asserting facts that it could have presented in Wilmington's administrative appeal process. Appx0006. In fact, the United States planned to assert the affirmative defense that it "should be excused from the alleged failure…" if § 1323 required exhaustion of Wilmington's administrative remedies. Appx2146 (quoting *United States*

v. Joseph A. Holpuch Co., 328 U.S. 234, 240 (1946)). The court also concluded *sua sponte* that Wilmington's "administrative appeal would not have provided Defendant the remedy it seeks in this forum because… City Code only grants prospective relief and does not permit parties to appeal fees that were already assessed." Appx0006; *see* Appx2155 (Def's Corrected Mot. For J. Based on Partial Findings at 44 (Dkt. No. 119) ("relief" the United States seeks is "retroactive adjustment of all past charges").[4]

2. Wilmington's Motions *in Limine* and for Reconsideration.

Wilmington's motion *in limine* sought to preclude the United States from introducing evidence, testimony, and arguments about wetlands allegedly present on the Properties. *See* Appx0012-0015 (*City of Wilmington v. United States* (*Wilmington III*), 152 Fed. Cl. 373 (2021)). If the United States had used Wilmington's appeal process in the 73 days between January 4 and March 18, 2011—when Congress amended 33 U.S.C. § 1323 and the first disputed stormwater charge was assessed, re-

[4] Wilmington's consent motion for leave to include these pages in the appendix is pending. *See* Dkt. No. 10.

spectively—a successful appeal to lower the 0.30 runoff coefficient applicable to Vacant stormwater class members to 0.10 for portions of the Properties covered with "woods, marsh, or wetlands" would have "prospectively" lowered all disputed stormwater charges by up to 67%. *See* City Code § 45-53(d)(7); Pub. L. No. 111-378, 124 Stat. 4128 (2011); Appx0281; Appx0303; Appx0325; Appx0347; Appx0369; *compare* City Code § 45-53(d)(3) *with* Appx0475 (appeal's Runoff Coefficients for Land Cover Delineations) and Appx0479-0480 (example appeal); Appx0155 (213:12-214:14). Declining to reconsider its prior ruling or prohibit the United States from presenting wetland evidence to support its affirmative defense that its failure to exhaust administrative remedies should be excused, the court held that Wilmington "should have filed a motion for reconsideration consistent with RCFC 59(b), not a motion *in limine*." Appx0014 (discussing Appx0005-0006).

Additionally, the court declared moot Wilmington's request to preclude the United States from presenting certain contemporaneous evidence based on its representations. *See* Appx0016. However, the court was "unsure whether or how the [federal] government's contemporaneous assessment is relevant to the Court's *de novo* review of Wilmington's

claim for payment pursuant to the statute at issue…." *Id.*; *see also* Appx2023-2024 ("…because the Court conducts a *de novo* inquiry regarding the reasonableness of the stormwater charges…"; "The fact that the Court will ultimately resolve these issues *de novo*…") (*City of Wilmington v. United States* (*Wilmington II*), 141 Fed. Cl. 558 (2019)).

Wilmington thereafter filed a motion to reconsider, which the court denied for reasons given during a status conference. *See* Appx0021. Again refusing to deviate from its prior ruling, it held that "the United States is free to put on whatever evidence it deems fit in order to show that the charges are not correct…" and that Wilmington can raise any argument it wants about how "the [Federal] Government can't show that… the charges were unreasonable…." Appx0024-0025 (12:6:10, 13:1-11). The court also explained trial would be handled like a contract dispute under the Contract Disputes Act's (CDA) *de novo* review, under which "parole evidence" like "irrelevant" testimony from even "the President of the United States… wouldn't matter because the contract is what governs the collectability, not some government official's view as to the allowability." Appx0029-0031 (32:23-33:3, 33:16-21, 37:10-38:12); *see* 41 U.S.C. § 609(a)(3) (actions "proceed de novo…."). Accordingly, "the best way to

look at this issue is" that contemporaneous evidence is "probative, but barely so," maybe "not probative in a contract-type case," and inadmissible before a jury. Appx0031 (37:10-38:12).

3. Trial Held April 19-20, 2021.

Wilmington called Commissioner of Public Works Kelly Williams in its case-in-chief. *See* Appx0040. When the United States' cross examination of Commissioner Williams concluded, it then called her as a witness in its defensive case-in-chief to forego recalling her later. *See* Appx0139 (149:20-24). Asked about Wilmington's appeal process, Commissioner Williams confirmed that properties in each stormwater class differ significantly in size but share other characteristics—e.g., vacant property class members lack typical structures—and acknowledged the possibility that "properties with completely different land covers," such as wetlands, grass, and gravel, "could be included in the vacant stormwater class." Appx0142-0143 (164:10-166:5) (discussing Appx0234-0235, Table 9); *accord* Appx0045 ("The 'vacant' class includes properties that 'are not similar at all to one another' in terms of 'land cover ***and size***.'") (emphasis added); *see also* Appx0197 (381:10-383:20) (vacant stormwater class

properties impose different demands on Wilmington's stormwater management program in proportion to their size); *but see* Appx0057 n.23 (court neglected to consider how size differences allow charges on a class containing "totally different properties" to remain proportional to runoff while retaining "similar land use characteristics").

Wilmington also called Hector Cyre to present his testimony, pursuant to the court's Pre-Trial Order. *See* Appx2061. Based on his decades of stormwater rate design experience, the court found Cyre "very thorough and, frankly, very persuasive and clearly an expert." Appx0187 (344:10-14); *see* Appx0171-0172 (280:13-282:3). Moreover, the court stated

> a fundamental theory of Wilmington's case -- is that the system overall is a reasonable system, in the general sense of the word "reasonable." And, therefore, the resulting charges… the outputs of the formulas and the system are, therefore, reasonable, particularly combined with the ability to appeal. … And ***my inclination is that, in general, if you will, Mr. Cyre on that front is correct***.

Appx0210-0211 (436:16-437:1) (emphasis added).

Cyre testified that Wilmington's stormwater charges are, "in technical terms, reasonable," "nondiscriminatory," and "based on some fair

approximation of the… proportional contribution of properties to stormwater pollution." Appx0172 (282:16-25). "Wilmington's use of the runoff coefficient… results in a fair approximation of the proportionate contribution of all the various classes to stormwater contribution." Appx0196 (379:18-380:17); *see also* Appx0185 (335:13-336:7) (charges apportioned across property classes appropriately, discussing Appx0409). Because the stormwater charges assessed on the Properties "are based on" and pursuant to the Ordinance, Cyre added that, "by extension…, there's some fair approximation of the proportional contribution of properties of the United States at issue in this lawsuit." Appx0038; Appx0172 (283:1-18); *see* Appx0196-0197 (379:25-380:17, 381:10-384:5).

Cyre explained that Wilmington's method for approximating runoff made "reasonable assumptions" based on an "extensive body of… empirical studies" from engineers and scientists about the importance of impervious area, gross parcel area, and land use when apportioning stormwater management program costs. Appx0175 (293:3-294:7). Cyre had "relatively high confidence" that tax assessment databases can be "trusted," not just "presumed," to reflect "real" property conditions. Appx0179 (309:22-310:1), Appx0193 (366:24-367:10); *see* Appx0182

(321:5-11). Based on his experience with dredge spoil storage sites elsewhere, Cyre expected no variance between estimated and actual runoff from the Properties. Appx0205-0206 (415:16-417:4).

The court questioned Cyre about whether a hypothetical residential property in the highest residential tier might contribute more runoff but pay less than a hypothetical federally-owned nonresidential property. *See* Appx0181 (317:16-22, 318:18-319:18), Appx0183 (328:4-17). Cyre explained that although the Ordinance does not calculate residential properties' effective runoff coefficients, he would expect large residential properties' effective runoff coefficients to be appropriate without seeing "specific examples" of significant outliers. *Id*. He explained that it was not unusual for localities to take different approaches to estimate impervious area, which is a fair way to approximate the contribution of a property to stormwater pollution validated by empirical studies. Appx0177 (302:25), Appx0180 (313:8-14). Cyre testified that Wilmington's four-tiered residential stormwater charge based on size of impervious area was "technically… very reflective of what it should be." Appx0180 (315:22-316:17); *see* City Code § 45-53(d)(1).

The court asked Cyre to assess Wilmington's method for estimating properties' impervious area and associated runoff within a spectrum of methods for assessing stormwater pollution contributions. Appx0178 (306:9-11). Cyre testified that Wilmington's stormwater rate methodology was "not at the 10[th] percentile," near the arbitrary, "really bad" method of apportioning stormwater costs "based on the size of the water meter service to each property," which had "no relationship at all to the cost of stormwater management" and was "down… around 2[nd] percent[ile]…." Appx0177 (301:20-302:8), Appx0179 (310:6-9); Appx0054; *see also* Appx0178 (305:19-25); Appx1078. Cyre explained that "[i]mpervious area is widely accepted as the parameter that best represents contribution to pollution," but not every method using it is reasonable. Appx0177 (303:17-20). Wilmington's method was "not at the 80[th] percentile," with the "absolute exactness or mathematical precision" he associated with the "ridiculous" notion of sending a tape measure-wielding army "to measure the impervious area on each and every property…," an act the United States stipulated would be infeasible. Appx0177 (304:6-15); *see*

Appx2032 (JSUF ¶21). In his expert opinion, Cyre "would put Wilmington's approach… at the 45[th] percentile. I think it's pretty darn good." Appx0059 n.25 (quoting Appx0178 (307:17-308:3)).

In colloquy with Cyre, the court acknowledged the complex relationship between choosing runoff coefficients for property classes and maintaining revenue neutrality and proportionality with properties' stormwater runoff contributions. *See* Appx0207 (422:4-423:6) (under simplified hypothetical, stormwater charges unaffected by arbitrarily halving runoff coefficients because dividing stormwater management program costs by 50% fewer Runoff Units would double cost-per-Runoff Unit); *id.* (423:15-424:18) (arbitrarily halving one class's 0.90 runoff coefficient would be unreasonably outside empirically derived 0.70-0.90 range); Appx0207-0208 (424:20-425:10) (retroactive appeals hinder revenue-neutrality and runoff proportionality).

Attempting to inject doubt using speculation and conjecture, the United States presented no evidence at trial regarding any property in Wilmington that established (a) actual impervious area differs (significantly or not) from the Ordinance's approximations, (b) the County's gross parcel area was incorrect, or (c) the County's land use classification

resulted in an incorrect stormwater property class assignment. *See* Appx0144 (170:8-16) ("possible" that Wilmington's estimated impervious area is significantly higher than Properties' actual impervious area), Appx0176 (297:5-12) (runoff coefficients may be "accurate or not accurate"), Appx0193 (365:1-8) ("possible" that "Wilmington may have" assigned properties to incorrect stormwater classes), Appx0198 (385:19-23 and 386:7-15) (using different means to assess residential and nonresidential properties "might" indicate technical flaw), Appx0198 (387:5-9) ("there is a risk" Wilmington underestimated residential properties' impervious area).

Trial suspended thereafter, and Wilmington's motion to admit into the record additional pieces of evidence (including the EPA's 2008 publication) was granted. *See* Appx2141-2142 (contemporaneous evidence admissible despite court's concerns it "may not be highly relevant to or dispositive of the legal issue in this case") (*City of Wilmington v. United States* (*Wilmington IV*), 153 Fed. Cl. 405 (2021)). Seeking judgment against Wilmington on all claims, the United States' RCFC 52(c) motion for judgment based on partial findings also asked the court to resolve its

affirmative defense, specifically whether its failure to exhaust Wilmington's administrative remedies, if obligated by 33 U.S.C. § 1323 to do so, should be excused. *See* Appx2156.

The court's Opinion and Order granting the United States' motion issued on January 26, 2022. *See* Appx0033 (*City of Wilmington v. United States* (*Wilmington V*), 157 Fed. Cl. 705 (2022)). Final judgment against Wilmington was entered the following day. Appx0083. Wilmington's timely notice of appeal was filed on March 25, 2022. Appx2143.

VIII. SUMMARY OF ARGUMENT

This Court should vacate the judgment; reverse the grant of the United States' motion for judgment based on partial findings and denials of Wilmington's motion for partial judgment on the pleadings, motion *in limine*, and motion to reconsider; remand for further proceedings, including completion of trial; and deem inadmissible any evidence the United States could have presented in Wilmington's appeal process.

The court should have assessed evidence under the preponderance-of-the-evidence standard, not "*de novo* review." The United States' admissions should have been considered binding until rebutted, and circumstantial and contemporaneous evidence should have received greater

weight than suspicion and conjecture. The court should have presumed the County's property records are accurate absent clear and convincing contrary evidence. The court should have presumed the Ordinance's methods for approximating runoff from properties in Wilmington were reasonable and found the Ordinance fairly approximated properties' proportionate contributions to stormwater pollution absent clear and convincing contrary evidence. The court improperly refused to infer that the Properties were vacant properties and contributed stormwater runoff like vacant properties based on Wilmington's unrebutted circumstantial evidence. Wilmington was only required to prove its stormwater charges were proportionate to stormwater runoff. The court should have based its rulings on actual charges, not hypothetical scenarios or remote, unproven possibilities.

Wilmington's administrative appeal process is both a local requirement and instance of administrative authority to which the United States is subject and with which it must comply. Should the United States have evidence tending to show the stormwater charges assessed on the Properties are not "reasonable service charges," the United States should not

be permitted to use it because it failed to exhaust Wilmington's administrative remedies—unless the United States proves that available remedies (a) involved only matters of legal interpretation and required no particular expertise, (b) involved no discretion, and (c) would have been futile at all times in establishing "reasonable service charges" if pursued. 33 U.S.C. § 1323(c)(1)(A).

Because RCFC 52(c) authorizes entry of judgment against Wilmington on issues for which it bears the burden of proof, the court erred by basing its judgment on the United States' affirmative defense.

IX. ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews the Court of Federal Claim's legal conclusions *de novo*, its evidentiary decisions for abuse of discretion, and its factual findings for clear error. *See F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1031 (Fed. Cir. 2000). "An abuse of discretion occurs when (1) the court's decision is clearly unreasonable, arbitrary or fanciful; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence on which the district court rationally could have based

its decision." *Heat & Control, Inc. v. Hester Indus.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986) (internal quotations and citations omitted).

In "reviewing whether the evidence supports a finding of fact on a 'clearly erroneous' standard…, the appellate court must first focus on what support is needed for the trial court determination and then review, in accordance with the standard of review permitted in the type of case, whether that finding is properly supported." *SSIH Equip. S.A. v. US. Int'l Trade Comm'n*, 718 F.2d 365, 383 (Fed. Cir. 1983) (Nies, J., concurring); *see Rodriguez v. VA*, 8 F.4th 1290, 1299 (Fed. Cir. 2021) (appellate court must ascertain the sufficiency of legally correct evidence "to save the findings from irrationality.") (internal citation omitted). Civil litigation traditionally "requires a plaintiff to prove his case by a preponderance of the evidence, using direct or circumstantial evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (internal citations and quotations omitted); *see Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1350 (Fed. Cir. 2006) ("[P]reponderance of the evidence" means "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it.") (citation omitted). Thus, a court's findings are

"clearly erroneous," notwithstanding some supporting evidence, if "contrary to the overwhelming weight of the unchallenged documentary and testimonial evidence" and leave this Court "with the definite and firm conviction that a mistake had been committed…." *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1581 n.46 (Fed. Cir. 1987) (citation omitted).

B. UNITED STATES' IMMUNITY FROM SUIT WAS WAIVED.

Absent its consent, the sovereign United States "is immune from suit." *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986). The Tucker Act undisputedly waived the United States' immunity from suit, and the court undisputedly had jurisdiction over Wilmington's claims of unpaid stormwater charges and interest on the Properties. *See* Appx0048 (citing 28 U.S.C. § 1491(a)(1); 33 U.S.C. § 1323(a)); Appx0003 (quoting *DeKalb County v. United States*, 108 Fed. Cl. 681, 695-96 (2013)). Having resolved that Wilmington can pursue its claims, the issue before the court was whether Wilmington has met "the statutory precondition[s] to maintain a suit against the [federal] government with respect to those" claims. *Walby v. United States*, 957 F.3d 1295, 1299-300 (Fed. Cir. 2020); *see DeKalb County*, 108 Fed. Cl. at 696 (If "plaintiff's case does not fit within

the scope of the source," she "loses on the merits for failing to state a claim on which relief can be granted.").

C. EVOLUTION OF 33 U.S.C. § 1323.

1. Congress' 1977 Amendments.

In back-to-back 1976 opinions, the Supreme Court resolved whether provisions of the Clean Air Act (CAA) and Clean Water Act (CWA) subjected federal facilities to state-imposed permit requirements. *See* CAA § 118, 42 U.S.C. § 1857f (1970, predecessor of § 7418); CWA § 313, 33 U.S.C. § 1323 (1970 ed., Supp. IV). In *Hancock v. Train*, the Supreme Court founded its analysis upon the Supremacy Clause's derivative corollary that the "immunity of the instruments of the United States" and associated "rights and privileges of the Federal Government" originating in the Constitution may not be "divested in favor of and subjected to regulation by a subordinate sovereign" absent "'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'" 426 U.S. 167, 178-79 (1976) (citations omitted). According to the Supreme Court, CAA § 118 was "notable for what it does not state. It does not provide that federal installations 'shall comply with ***all*** federal, state, interstate, and local requirements to the same extent as

any other person.'" *Id.* at 182 (emphasis in original). Due to CWA § 313's obvious similarities, the Supreme Court extended *Hancock*'s logic to conclude that the procedural step of "obtaining a state [discharge] permit" had nothing to do with the "control and abatement of pollution" and "that the 'requirements' language of Section 313 refers simply and solely to substantive standards, to effluent limitations and standards and schedules of compliance." *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 212-15 (1976) (quoting 33 U.S.C. § 1323 (1970 ed., Supp. IV); other internal quotations omitted).

Refuting *Hancock* and *EPA*'s narrow interpretations, Congress' amendment to CWA § 313 expanded its waivers of sovereign immunity in clear, unambiguous terms:

> Each department, agency, or instrumentality of … the Federal Government… engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants… shall be subject to, and comply with, all Federal, State, interstate, and local requirements, [and] administrative authority… respecting the control and abatement of water pollution in the same manner, and to the same extent ~~that any person is subject to such requirements,~~ 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), [and] (B) to

> the exercise of any Federal, State, or local administrative authority.... This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

Pub. L. 95-217, § 61(a), 91 Stat. 1566, 1598 (1977) (comparing amendment to preexisting language), codified 33 U.S.C. § 1323(a). Thus, Congress expanded "requirements" beyond "substantive" requirements defining "duties, rights and obligations," such as "effluent limitations and standards and schedules of compliance." *Azar v. Alina Health Servs.*, 139 S. Ct. 1804, 1811 (2019); *EPA*, 426 U.S. at 215.

2. Congress' 2011 Amendment.

Due to the Federal Government's failure "to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties," Senator Cardin proposed amending § 1323 to "remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees." 156 Cong. Rec. S. 4851, 4855-56 (2010). Signed into law on January 4, 2011, Senator Cardin's amendment made two changes. *See* Pub. L. No. 111-378, 124 Stat. 4128 (2011), *codified at* 33 U.S.C. § 1323(c). ***First***, "Congress adopted the basic framework of [the *Massachusetts v. United States*] test in the 2011 amendment to Section 1323" but substituted

"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)" for the *Massachusetts* test's original second element, "based on a fair approximation of use of the system." *DeKalb County*, 108 Fed. Cl. at 698; 33 U.S.C. § 1323(c)(1)(A); 435 U.S. 444, 466-67 (1978). Although not binding precedent here, *see* Appx0063-0066, the United States previously acknowledged the *Massachusetts* test's appropriateness "for determining the reasonableness" of "a state charge imposed on the federal government" under other statutes, *Jorling v. Dep't of Energy*, 218 F.3d 96, 100 (2d Cir. 2000) (discussing 42 U.S.C. § 6961(a)). ***Second***, Congress defined "reasonable service charges" so that if a charge were nondiscriminatory, reasonable, and compliant with § 1323(c)(1), the Federal Government must pay it even if "denominated a tax." 33 U.S.C. § 1323(c)(1)(B).

D. WILMINGTON'S UNREBUTTED EVIDENCE PROVED ITS STORMWATER CHARGES ASSESSED ON THE PROPERTIES MORE LIKELY THAN NOT COMPLIED WITH 33 U.S.C. § 1323.

1. Wilmington's Stormwater Charges Are Proportionate, Reasonable, and Nondiscriminatory.

The parties and the Court disagreed on the meaning of "proportionate" in § 1323(c)(1)(A). *See* Appx0055-0056. The Court concluded that "proportionate contribution" requires "some actual relationship between charges assessed against federal properties and their relative contribution to ***total stormwater pollution***," not relative to other properties. Appx0055-0056 (emphasis added). Conversely, the United States had argued that Wilmington must establish each charge is accurately "***proportional*** to (*i.e.*, commensurate with) the amount of stormwater ***originating or emanating*** from the Federal property." Appx2153-2154 (emphasis added). Both were partially correct. "Proportionate" means "proportioned" or "adjusted in proportion," and "proportion" means "[a]ppropriate… relation (of size, etc.) between things or parts of a thing…."[5] Be-

[5] *Proportionate*, Oxford English Dictionary (https://www.oed.com/view/Entry/152776) (accessed March 31, 2022); *id.*, *Proportion* (https://www.oed.com/view/Entry/152765); *see also Propor-*

cause a stormwater charge could be proportionate to ***either*** all stormwater pollution contributions in Wilmington or a given property's individual contribution thereto, § 1323(c)(1)(A) requires a federal property's stormwater charge be in proportion to ***both*** its "relative contribution to total stormwater pollution"—the sum of all properties' approximate pollution (in terms of runoff here) in Wilmington—***and*** a fair approximation (not an accurate assessment) of its individual contribution to stormwater runoff (based on its impervious area). 33 U.S.C. § 1323(c)(1)(A). The only way to know the "total stormwater pollution" contributed by all properties in Wilmington is to estimate each property's runoff contributions individually by using the Ordinance to determine their impervious area and then add them up. Appx0055; *see* Appx2032 (JSUF ¶¶21, 22) (United States stipulated to infeasibility of measuring stormwater pollution on all parcels).

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tion, Merriam-Webster Dictionary (https://www.merriam-webster.com/dictionary/proportion) (accessed April 8, 2022) ("harmonious relation of parts to each other or to the whole …."). Merriam-Webster defines "proportionate" by referencing its first sense of "proportional" (meaning "a number or quantity in a proportion"), but the court curiously quoted its second sense. *Compare Proportionate, Proportional*, Merriam-Webster Dictionary (11th ed. 2014) *with* Appx0055 (citation omitted); *see* B. Garner, *Garner's Modern English Usage* 739 (4th ed. 2016) (*proportional* and *proportionate* distinct despite being frequently interchanged).

Using evidence of how Wilmington's Ordinance assesses stormwater charges generally as ***circumstantial*** evidence of how stormwater charges were assessed specifically on the Properties, Wilmington proved that those charges were "based on some fair approximation of the proportionate contribution of the [Properties]… to stormwater pollution (in terms of… runoff [therefrom]…)." 33 U.S.C. § 1323(c)(1)(A); *see infra* Section VII.D.3. Wilmington's City Council adopted the Ordinance that assigned to vacant properties a 0.30 runoff coefficient, a value that empirical research established fairly approximates runoff from properties with similar land cover when multiplied by their respective gross areas. Appx0228; Appx0182-0183 (321:12-325:6); Appx2030 (JSUF ¶5). No record evidence contradicts the EPA's conclusion that Wilmington recovers "costs related to stormwater management on a fair and equitable basis," namely by relying on impervious area, "the most important factor influencing stormwater runoff," to maintain proportionality. Appx1079; *see also* City Code § 45-53; Appx0177 (303:17-19); Appx2032 (JSUF ¶22). No trial evidence demonstrated the County's property records' "vacant" classification of the Properties misrepresented their actual conditions. *See*

Section VII.D.3. Because Wilmington normalizes each Property's estimated impervious area by converting to Runoff Units and assessing charges per Runoff Unit, the stormwater charge assessed on a Property is proportionate to that Property's runoff. *See* Appx0445-0449; Appx1081-1082; Appx0407; City Code § 45-53; Appx0177 (303:17-19), Appx0181 (317:24-318:8), Appx0206 (417:12-420:10); *supra* pp.5, 12. Additionally, because the pro rata cost-per-Runoff Unit of Wilmington's stormwater management program is multiplied by the number of each Property's Runoff Units to derive its charge, the stormwater charges assessed on the Properties are proportionate to their relative contribution to Wilmington's total stormwater pollution. *See* Appx0445-0449; Appx1082; Appx0226; City Code § 45-53(d)(9); *supra* pp.7-10.

Notwithstanding the court's contrary findings, Wilmington's evidence clearly established its stormwater charges are "more than a guess, but less than absolute exactness or mathematical precision." Appx0054 (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 833

(Fed. Cir. 2010)). Cyre's unrebutted expert testimony clearly places Wilmington's method in the "reasonable certainty" analysis'[6] sweet spot for approximating the Properties' contribution to stormwater pollution, between one unreasonably arbitrary method and another unreasonably accurate method. *Id.*; *see supra* pp.23-24.

Absent evidence Wilmington's Ordinance unfairly approximates properties' stormwater pollution contributions, no court could conclude the Ordinance assesses "[dis]proportionate charges across different classes" merely by applying one method using runoff coefficients for nonresidential parcels and another for residential and/or condominium parcels. Appx0057; *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (Generally, "legislation is presumed to be valid…."); *Wilmington Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978) ("Every presumption is in favor of the validity of a legislative act and all doubts are

[6] Should "reasonable certainty" represent a higher burden of proof than "preponderance of evidence," the court had no legal basis for its application. *See Leizerowzki v. Eastern Freightways, Inc.*, 514 F.2d 487 (3d Cir. 1975) (reversing district court for applying higher "reasonable certainty" rule where only "preponderance of the evidence" is required); *but see United States v. Dyer*, 910 F.2d 530, 532 (8th Cir. 1990) ("The 'proof to a reasonable certainty' standard is… the functional equivalent of a preponderance-of-the-evidence standard….").

resolved in its favor; and if the question of the reasonable necessity for regulation is fairly debatable, legislative judgment must be allowed to control.") (citation omitted); 5 McQuillin Mun. Corp. § 18:24 (3d ed. Aug. 2020) (courts should defer to municipal authorities' discretion and judgment, not substitute their opinions regarding ordinances' reasonableness). Because Delaware law presumes the Ordinance makes "each contributor of runoff… pay to the extent to which runoff is contributed," the United States has the burden of proving Wilmington's Ordinance is "clearly unreasonable and arbitrary" based on "facts disclosed by the record…." Del. Code Ann. tit. 7, § 4005(c); *New Orleans Pub. Serv., Inc. v. New Orleans*, 281 U.S. 682, 686 (1930); *see also Heller v. Doe*, 509 U.S. 312, 320 (1993) (government not obligated to produce evidence to sustain rationality of a law's classification, which "may be based on rational speculation unsupported by evidence or empirical data.") (citation omitted). Even without this presumption, the EPA concluded that the Ordinance's different methods for estimating impervious area recovered "costs related to stormwater management on a fair and equitable basis." Appx1081. Moreover, Cyre testified that the Ordinance satisfied "the equity objective" in stormwater rate design of treating "similarly classes of properties

similarly and dissimilar classes of properties proportionately" and that its apportionment of charges amongst classes was appropriate. Appx0185-0186 (336:23-337:7); *see* Appx0185 (335:13-336:7) (discussing Appx0409). There is no record evidence to outweigh these unrebutted conclusions. *See* Appx0163-0164 (248:11-250:9).

Stated differently, the court objected to the Ordinance's use of different means to estimate runoff contributions because Wilmington is allegedly treating residential properties "better than it treats" the Properties, the very definition of actions that "discriminate against the Federal Government…." *Washington v. United States*, 460 U.S. 538, 544-45 (1983); *see* Appx0046. But this issue is not in dispute; the United States conceded, and the court found,[7] that Wilmington's stormwater charges are "nondiscriminatory." Appx0050 n.15 (quoting City Code § 45-53(d)); *see* Appx2006 (37:21-38:5); Appx0546-0547. Moreover, using different property classifications and methods is permissible. *See Permian Basin*

[7] The court also found that Wilmington established its stormwater charges were "used to pay or reimburse the costs associated with any stormwater management program[.]" Appx0050 n.15 (quoting 33 U.S.C § 1323(c), (c)(1)(B); citing Appx0187 (342:14-21); Appx2047-2048 (JSUF ¶¶115-119).

Area Rate Cases, 390 U.S. 747, 774 (1968) (treatment by class permissible); *id.* at 776-77 (ratemaking bodies "are not bound to the service of any single regulatory formula"). Additionally, because § 1323 mandates "nondiscriminatory" charges—i.e., cannot "discriminate against" nor for nongovernmental entities—the United States is entitled to treatment no better or worse "than others who are similarly situated." *Bostock v. Clayton County*, 140 S. Ct. 1571, 1740 (2020). The United States' Properties are not "similarly situated" with residential properties. *Id.*

Merely because "nondiscriminatory" and "proportionate contribution" can overlap does not render either superfluous. *Contra* Appx0067 n.31. For example, stormwater charges assessed on federal and private property alike based on "a property's metered water flow" arguably would not discriminate based on ownership but would not be proportionate because those charges would bear "no relationship to the stormwater runoff" a property generates. Appx1078; *see* Appx0177 (301:13-302:11). But exempting the United States from the administrative appeal deadlines applicable to other nongovernmental entities and allowing retroactive appeals exclusively for the Properties would arguably be discriminatory, albeit in the United States' favor. *See CSX Transp., Inc. v. Alabama*, 562

U.S. 277, 286-87 (2011) (granting exemption to one group but not another "discriminates against the latter").

2. The Contract Dispute Act's *De Novo* Review Is Inapplicable.

From the beginning, the Court of Federal Claims assessed issues under the *de novo* standard of review, confusing the "elementary but crucial difference between burden of proof and scope of review." *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 282 (1966); *see generally SSIH Equip. S.A. v. U.S. ITC*, 718 F.2d 365, 379-82 (Fed. Cir. 1983) (Nies, J., additional views) (discussing "recurring confusion… between standards of proof at the trial level and standards of review at the appellate level"). The court proceeded *de novo* in "a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken." *Spano v. Western Fruit Growers, Inc.*, 83 F.2d 150, 152 (10th Cir. 1936). The court justified the application of *de novo* review by analogy to the CDA, which has no legal application to Wilmington's civil suit under 33 U.S.C. § 1323. *See supra* pp.17-19. Absent "specific statutory authorization, a *de novo* review is generally not to be presumed," and no such authorization exists in § 1323, the Ordinance, Delaware law, or 28 U.S.C. § 1491. *Consolo v. Fed. Maritime Comm'n*, 383

U.S. 607, 619 n.17 (1966). The clear error of applying *de novo* review to this dispute tainted the entire proceeding, skewing the court's legal interpretation of Wilmington's Ordinance regarding the burden of proof for the United States' affirmative defense and how the court assessed the relevance and weight of trial evidence.

Application of *de novo* review led to the court's erroneous conclusion that Wilmington's "fee-adjustment process cannot provide the [federal] government's requested relief" because the Ordinance forbids "retroactive adjustment of past charges." Appx0076. Because "the parties start in court… with a clean slate" under *de novo* review, the court failed to consider any dates before trial where the United States could have appealed. *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994). The United States did not review Wilmington's stormwater charges for compliance with 33 U.S.C. § 1323 until 2016, long after Congress amended the statute in 2011. *See supra* p.13. But because the only relevant day in a *de novo* trial is its first, the court failed to consider the decade from 2011 to 2021 in which the United States could have appealed some or all disputed charges. By erroneously applying *de novo* review, the court summarily

concluded that Wilmington's appeal process was futile without examining the record evidence to determine whether, for example, the United States could have appealed within those first 73 days and obtained its requested relief, namely "retroactive adjustment of all past charges"—what specific adjustments would have been obtainable, without evidence, is speculation—without violating the Ordinance's prohibition on retroactive adjustments. Appx0076; Appx2155; *see* Appx0005-0006; *supra* pp.16-17; *see also Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("Proper exhaustion demands compliance with an agency's deadlines…."); *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) ("[U]nsworn attorney argument… is not evidence…."); *Karcher v. May*, 484 U.S. 72, 83 (1987) (controversy became moot when complaining party "declined to pursue its appeal."). The United States' appeal opportunities were not futile merely because it "decline[d] to take advantage of adequate procedures available" via Wilmington's administrative appeal process and Delaware's judiciary. *Carr v. Saul*, 141 S. Ct. 1352, 1360 n.6 (2021); *see Black v. New Castle County Bd. of License, Insp., & Review*, 117 A.3d 1027, 1030-1032 (Del. 2015) (judicial review via a writ of *certio-*

rari); *Murphy v. Wilmington*, 11 Del. 108, 138 (1880) (party may pay "under protest" and sue Wilmington in recovery); *Mr. Kleen, LLC v. New Castle County Dep't of Special Servs.*, 2014 Del. Super. LEXIS 435 (Del. Sup. Ct. August 19, 2014) (dismissing claims for retroactive reimbursement and equal protection violations regarding County's prospective-only appeal process). And it is "not for the courts to construct" or demand opportunities for retroactive remedies, especially if revenue neutrality and runoff proportionality may be affected. *United States v. Testan*, 424 U.S. 392, 403-04 (1976); *see* Appx0207-0208 (424:20-425:10).

The court also applied *de novo* review to deem irrelevant the 2008 EPA publication declaring as exemplary Wilmington's method for funding its stormwater management programs. *See* Appx0060-0061. The court incorrectly suggested that "Wilmington does not argue" that the 2008 EPA is "a binding factual admission," a conclusion rooted in *de novo* review. Appx0061; *see* Appx0028 (27:23-28:6); 41 U.S.C. § 605(a) (contracting officer's "specific findings of fact… shall not be ***binding*** in any subsequent proceeding.") (emphasis added). Because neither the CDA nor *de novo* review applies to this case, the 2008 publication of the federal

agency delegated by Congress to regulate stormwater pollution is a contemporaneous "evidentiary admission" creating a "rebuttable presumption" that Wilmington's "approach to establish a stormwater utility to recover costs related to stormwater management" did so on "a fair and equitable basis." *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 855 n.6 (Fed. Cir. 2004); Appx1081. This conclusion is relevant to assessing Wilmington's stormwater charges' reasonableness, which the court acknowledged "has been defined as '***fair***… under the circumstances[.]" Appx0058 n.24 (emphasis added) (citations omitted). However, the court treated the EPA's contemporaneous admissions of the fairness of Wilmington's stormwater utility and associated charges as prior conclusions of a federal agency it was free to disregard. *See* Appx0060-0061; *see also* Appx0016 (uncertain of relevance of federal "government's contemporaneous assessment" under "court's *de novo* review"). But the CDA's prohibition of making "a contracting officer's findings binding upon the [federal] government as strong presumptions or evidentiary admissions" is inapplicable here. *Wilner*, 24 F.3d at 1402 (citation omitted); *see George A. Fuller Co. v. United States*, 69 F. Supp. 409, 411 (Ct. Cl. 1947) (pre-

dating CDA, contracting officer's "letter constitutes an admission… that the contractor was in fact delayed….").

Because a "reasonable service charges" analysis under § 1323 presents a mixed question of law and fact, the court should have assessed the 2008 EPA publication as part of the "historical facts in the case at hand…" when determining whether Wilmington's stormwater charges "satisfy the legal test governing the question to be answered." *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1192 (Fed. Cir. 2018); *see Norfolk Monument Co. v. Woodlawn Mem'l Gardens, Inc.*, 394 U.S. 700, 702-03 (1969) (reasonableness of rules is factual question). Moreover, where "testimony is in conflict with contemporaneous" documentary evidence, the contemporaneous evidence, not evidence freshly assembled for the defense at trial, must be deemed most persuasive. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948); *see Cucuras v. Sec'y of Health & Human Servs.*, 993 F.2d 1525, 1528 (Fed. Cir. 1993). The absence of incentive to discredit Wilmington's rate methodology or bolster a defensive litigation position the United States now adopts only makes the EPA's 2008 admissions more reliable and trustworthy. *See* Appx0061; *Banks v. United States*, 721 F. App'x 928, 935-36 (Fed. Cir. 2017) (nonprecedential)

("The contemporaneous documentary evidence… continues a decades-long understanding of the [Federal] Government as to its liability…," which "only has changed upon the start of litigation…."). Therefore, the EPA's 2008 conclusion that Wilmington's reliance on "predefined storm-water coefficients" and "total property" area data obtained from County records allowed it "to recover costs related to stormwater management on a fair and equitable basis" was the United States' evidentiary admission regarding the reasonableness of Wilmington's stormwater charge methodology and, by extension, its charges on the Properties. Appx1081-1082.

Additionally, the 2008 EPA publication is evidence that Wilmington not only complied with industry standards and practices but set the standard other localities should follow. *See* Appx1081-1082; *see also* Appx0177 (303:10-20), Appx0186 (337:13-15), Appx0196 (377:20-22) (Wilmington's practices accepted by industry experts); *see also* Appx0233, Appx0227, Appx0237 (discussing industry practices). The court erred by concluding that evidence establishing Wilmington complied with industry standards and practices was irrelevant to determining whether rates

were fair, reasonable, and non-discriminatory, especially without evidence indicating industry standards have changed. *See* Appx0061-0062; *Permian Basin*, 390 U.S. at 789 (consistency with "prevailing practice or with other" regulatory programs bolsters reasonableness); *Sancom, Inc. v. Quest Communs. Corp.*, 683 F. Supp. 2d 1043, 1052 (D.S.D. 2010) (industry standards, practices relevant to determine whether rates were fair, reasonable, and non-discriminatory). The EPA's acceptance of Wilmington's reliance on runoff coefficients and County property records to estimate nonresidential properties' impervious area (as opposed to relying on a property's water usage, which "bears no relationship to the stormwater runoff it generates")—and its recommendation that localities follow Wilmington's lead—proves that Wilmington's charges are "based on some fair approximation of the proportionate contribution of the [Properties] to stormwater pollution (in terms of… runoff from the [Properties]." Appx1078, Appx1082; 33 U.S.C. § 1323(c)(1)(A). By disregarding the EPA's 2008 publication, the court committed "a clear error of judgment in the course of weighing proper factors." *Qwest Communs. Corp. v. Free Conferencing Corp.*, 837 F.3d 889, 899 (8th Cir. 2016).

3. The Court Improperly Rejected Circumstantial Evidence and Credited Conjecture and Speculation.

The court rejected Wilmington's "entire case-in-chief" by mistakenly believing that to prove its case, Wilmington must make a heightened showing of ***direct*** evidence "of the Properties' proportionate contribution to pollution" without resorting to ***circumstantial*** evidence. Appx0057. Even if Wilmington's (unrebutted) evidence were assumed to establish that Ordinance-based stormwater charges on vacant properties are generally reasonable and nondiscriminatory "in technical terms'" and "based on an approximation of the proportional contribution of… all the properties… to stormwater pollution," the court baselessly refused to infer that, "***by extension***, the charges at issue must be characterized as reasonable." Appx0058 (quoting Appx0187 (342:22-343:5)) (emphasis added). However, "circumstantial evidence is a set of facts from which another fact may be inferred, as opposed to direct evidence, which goes directly to the fact to be established." *Paulino v. Harrison*, 542 F.3d 692, 700 n.6 (9th Cir. 2008). "This inferential process distinguishes circumstantial evidence from mere speculation—the former yields a preponderant probability, the latter only a mere possibility." *Lublin Corp. v. United States*,

106 Fed. Cl. 669, 676 (2012). Because "the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence," the court's rejection of Wilmington's "entire case-in-chief" merely because it relied upon circumstantial evidence was clearly erroneous. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citation omitted); Appx0057.

The court's findings of fact rested on conjecture and mere possibilities of inaccuracies, which are not evidence that these alleged errors were probable for any property.[8] "Proof of fact inferred from circumstantial evidence cannot rest upon conjecture and speculation." *Rider v. Griffith*,

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[8] *See, e.g.,* Appx0046 ("measure of imperviousness ***may*** differ from the actual imperviousness that exists in a specific property"), Appx0051 ("***if*** a particular property is classified incorrectly…"; "***if*** other properties are classified incorrectly relative to the Properties…"; "no individualized effort to determine whether a different land category… ***might more accurately*** describe the characteristics of the Properties"; "'vacant' parcel ***may*** be defined" differently in "County's tax records"; "City ***may well be*** assigning an entirely erroneous runoff coefficient to the Properties…"; "Mr. Cyre explicitly conceded that ***possibility***…"), Appx0052 ("***for all the Court knows***, the coefficients… bear little to no relationship to the land category definitions in Dr. Chow's 1962 Study, let alone to the reality of the Properties' physical characteristics (in terms of runoff or pollution generation)"; "the coefficients ***may accurately*** reflect the percentage of a particular property generating runoff ***or they may not***"), Appx0053 ("***if*** there is wide variation in the actual characteristics of properties within a particular occupancy code, ***that could well mean*** that the [federal] government is being overcharged vis-à-vis other properties

154 F.2d 193, 197 (CCPA 1946); *see Kentwood Lumber Co. v. Ill. C.R. Co.*, 65 F.2d 663, 665 (5th Cir. 1933) ("[I]nferences must be based on probabilities, not on possibilities… and may not be the result of mere surmise and conjecture…."). Thus, the court's findings of fact were clearly erroneous without record evidence to outweigh Wilmington's circumstantial evidence that the Properties are, behave like, and were assessed stormwater charges as vacant properties. *See* Appx0163-0164 (248:11-250:9). By considering "an improper or irrelevant factor" but not "a relevant factor that should have been given significant weight," the court clearly abused its discretion. *Qwest Communs.*, 837 F.3d at 899.

4. The Court Improperly Rejected the Presumed Correctness of Public Records.

The court erroneously refused to presume the County's property records had been prepared correctly. *See* Appx0178-0179 (308:4-309:3) (overruling Wilmington's objection to court's question that assumed County records were incorrect because "plaintiff bears the burden of

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assigned the same code."), 23 ("City did not prove that the Properties' estimated runoff, and thus the stormwater charges, were ***remotely accurate***"), 27 ("***might*** '***not accurately*** reflect the demand the Corp's Properties place on the system'"; "City's application of a particular runoff coefficient to the Properties ***might*** '***not accurately*** reflect their impervious area'" (quoting Appx0196 (378:14-379:4))) (emphases added).

proof"), Appx0181 (320:14-27); Appx0050-0053, Appx0071; *but see President, Directors & Co. of Bank v. Dandridge*, 25 U.S. 64, 69-70 (1827) (public records presumed "rightly" prepared by proper officer "until the contrary is proved"); *Savantage Fin. Servs. v. United States*, 595 F.3d 1282, 1288 (Fed. Cir. 2010) ("[P]resumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law…. stands unless there is irrefragable proof to the contrary."). Thus, the County's characterization of the Properties as vacant is presumed correct, "cannot be overturned or rebutted by speculation or suspicion" and "can only be… overcome by convincing and uncontradicted evidence to the contrary…." *Charlson Realty Co. v. United States*, 181 Ct. Cl. 262, 278 (1967).

The court more generally assumed, without supporting precedent, that subjecting the United States to legal presumptions or duties to exhaust administrative remedies would "incorrectly reverse the burden of proof with respect to what is otherwise the City's money-mandating claim against" it. Appx0047 n.14; *see* Appx0062-0063; Appx0178-0179 (308:4-309:3), Appx0181 (320:14-27); *supra* pp.39-41. "'[B]urden of proof' encompasses the concepts of 'burden of persuasion' and 'burden of production,'"

with the former specifying "which party loses if the evidence is balanced" and the latter specifying "which party must come forward with evidence at various stages in the litigation." *Eurand, Inc. v. Mylan Pharms., Inc.*, 676 F.3d 1063, 1078 (Fed. Cir. 2012) (internal citations omitted). Instead of absolving a plaintiff's burden of proof, presumptions merely task the "party against whom a presumption is directed [with] the burden of producing evidence to rebut the presumption." Fed. R. Evid. 301; *see Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1352 (Fed. Cir. 2006). Neither the Tucker Act, the CWA, nor the Federal Rules of Evidence exempts the United States from existing presumptions. *See Jazz Photo*, 439 F.3d at 1352 (United States "did not offer any evidence, much less clear evidence to the contrary, that would rebut this presumption…."); Fed. R. Evid. 1101(a), (b). And the United States clearly bears the burden of proving its affirmative defense. *See infra* Section VII.E.

5. The Court Rejected Wilmington's Claims Based on Requirements Congress Never Demanded.

The court's other reasons why Wilmington's stormwater charges did not comply with § 1323 relied upon requirements not found in the statute. "If judges could add to, remodel, update, or detract from old stat-

utory terms inspired only by extratextual sources and [their] own imaginations, [courts] would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020); *see Arista Networks, Inc. v. Cisco Sys.*, 908 F.3d 792, 803 (Fed. Cir. 2018) (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)). When Congress amended § 1323 in 2011 to require charges on federal property to be "based on some fair approximation of the proportionate contribution of the property… to stormwater pollution," proportionality of "stormwater pollution" was to be assessed "in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property…." 33 U.S.C. § 1323(c)(1)(A). Notably absent from this list of options is any requirement to establish proportionality in terms of:

a) "measurable cost the Properties impose on the City's stormwater management system," Appx0059;

b) "use of the system," Appx0064 (quoting *Massachusetts v. United States*, 435 U.S. 444, 466 (1978));

c) "cost of benefits supplied," Appx0067 (quoting *United States v. Sperry*, 493 U.S. 52, 60 (1989));

d) "any measurable burden on Wilmington's local drainage infrastructure," *id.* (citation omitted);

e) contributions to TMDLs, *see* Appx0042, Appx0060; or

f) "the proportional demand or burden" the Properties place on three rivers spanning "three states, five counties, and 60 townships" within the Christina River Basin, Appx0042, Appx0060; Appx0147-0148 (184:9-185:2, 186:23-187:3).

Congress' only pecuniary requirement (which Wilmington satisfies) is that revenue from assessed charges must be "used to pay or reimburse the costs associated with any stormwater management program…." 33 U.S.C. § 1323(c)(1)(B). The court erroneously acted "as a board of revision to substitute its judgment for that of the legislature…." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936).

The court's demands for a property's ***actual*** characteristics or the ***accuracy*** of Wilmington's estimates of runoff are baseless for several reasons. ***First***, neither § 1323 nor typical assessments of the reasonableness of charges assessed by one government on another include such re-

quirements. *Compare* Appx0053-0054 *with* 33 U.S.C. § 1323(c)(1)(A); *supra* Section VII.C.2; *Brock v. Wash. Metro. Area Transit Auth.*, 796 F.2d 481, 485 (D.C. Cir. 1986) (*Massachusetts v. United States* never required fees to "represent retrospectively a close approximation of" actual, historical benefits) (citing 435 U.S. at 460, 465-66); *N.Y. Dep't of Environ. Conservation v. U.S. Dep't of Energy*, 850 F. Supp. 132, 142-43 (N.D.N.Y. 1994) ("fair approximation" test requires neither exact correlation between fees assessed and costs of services provided nor actual use thereof), *aff'd sub nom*, *Jorling v. U.S. Dep't of Energy*, 218 F.3d 96, 103 (2d Cir. 2000) (*Massachusetts* test "concerned with whether the challenged method for imposing charges fairly apportions cost of providing a service"; basing on payer's approximate contribution suffices as "adequate apportionment").

Second, the court's demand for accurate, actual data contradicts the parties' stipulated positions. The court provided a hypothetical "illustration" that, if assumed to have resulted from a "tape measure" analysis of one of the Properties, demonstrates the court's misunderstanding.[9] *See*

[9] The court's hypothetical does not "illustrate the City's system." Appx0044. Although the court omits any description of the hypothetical property, the context suggests it is in some nonresidential subclass. *See*

Appx0044; Appx0177 (304:6-15). In the court's hypothetical, the Property had impervious area consistent with a 0.4 runoff coefficient instead of the 0.3 value the Ordinance applies to vacant properties. Appx0044. If Wilmington had discovered such conditions using an individual analysis, this Property would be charged 25% more than other vacant properties. *Id.* If Wilmington conducted such an analysis only on federal property, the United States could argue that this targeted practice is a discriminatory result of requirements applied to the federal government but not nongovernmental entities. *See* 33 U.S.C. § 1323(a); *c.f., Dawson v. Steager*, 139 S. Ct. 698, 706 (2019) (providing benefits to state, not federal, retirees is discriminatory). Regardless, the United States conceded the infeasibility of requiring Wilmington to assess properties' "actual stormwater pollution, discharge, or runoff" contributions. Appx2032 (JSUF ¶¶20-21).

Appx0043-0044 (discussing Ordinance's calculations of stormwater charges on nonresidential properties); Appx0133 (126:15-127:8) (discussing runoff coefficients for nonresidential properties). No nonresidential property is assessed stormwater charges by the Ordinance using a 0.4 runoff coefficient. *See* City Code § 45-53(d)(3), Table 2. The court's "illustration" better describes a hypothetical administrative appeal with Wilmington. *See* Appx0133 (126:15-127:8); Appx0479-0480.

Third, the court assumes, without evidence, that acquiring more accurate data would reveal "a monumental difference between actual and correct charges -- say, one leading to a million-dollar overcharge…." Appx0057 n.22. The United States conceded the infeasibility of Wilmington acquiring accurate data on all properties but has identified not one inaccuracy in any assessed stormwater charge, the largest of which was under $30,000. *See* Appx2032 (JSUF ¶21); Appx0446. But so long as Wilmington's Ordinance applied stormwater charges in a nondiscriminatory manner across federal and privately owned property alike, the court's concerns about excessive charges are groundless. Like allegedly excessive taxes,

> where a government imposes a nondiscriminatory tax, judges can term the tax "excessive" only by second-guessing the extent to which the taxing government and its people have taxed themselves, and the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents.

South Carolina v. Baker, 485 U.S. 505, 525 n.15 (1988). Should an actual inaccuracy have occurred, the United States had at least 73 days to appeal all charges. *See supra* pp.16-17.

Fourth, the court's demand for accurate, actual data mistakenly presupposes that § 1323 obligates Wilmington to conduct a "tape measure" assessment of the Properties and then revise the Ordinance to assess charges on them separately. *See* Appx0062 n.28. However, the fact that Congress subjected federal properties to certain requirements "in the same manner, and to the same extent as any nongovernmental entity" indicates "an intent to integrate congressional permission" to assess "reasonable service charges" with established local "assessment and collection machinery." 33 U.S.C. § 1323(a); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210 (1946). In this instance, Congress was aware of existing state and local requirements and means for assessing reasonable stormwater charges on federal properties. *See Hitkansut LLC v. United States*, 958 F.3d 1162, 1167 (Fed. Cir. 2020) (quoting *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010)). Allowing local governments to regulate federal activity and require payment of reasonable stormwater charges, but requiring alteration of "their long-standing practice of assessments and collections, would create the kind of confu-

sion and resultant hampering of local" stormwater "assessment and collection machinery" that Congress certainly "did not intend." *Beaver County*, 328 U.S. at 210.

E. 33 U.S.C. § 1323 Obligates The United States to Exhaust Wilmington's Appeal Process, and Its Failure to Do So Is Inexcusable.

The court begins discussing Wilmington's administrative appeal process by repeating the United States' oversimplification of Wilmington's arguments. *See* Appx0072 ("Wilmington repeatedly has argued that the [federal] government cannot contest the City's stormwater charges because the [federal] government did not challenge the charges through the City's appeal process."). This is incorrect—the court previously acknowledged Wilmington's nuanced position that the United States could challenge Wilmington's "general methodology" without appealing but could not rely on the Properties' "site-specific" characteristics that could have been raised in an appeal. Appx0003 n.2; *see Carr v. Saul*, 141 S. Ct. 1352, 1360-61 (2021) (exhausting administrative remedies unnecessary if challenging laws and policies outside administrator's area(s) of expertise). But that is beside the point. Because trial was suspended before the United States presented actual evidence, there is no evidentiary

basis to presuppose that any assessed charges are inaccurate or appealable for any reason. *See* Appx0047 (quoting City Code § 45-53(d)(7)). Instead, the court focused on "conjectural or hypothetical" concerns, failed to ground its findings upon "actual" inaccuracies in specific stormwater charges assessed on any property, and engaged in an "academic exercise in the conceivable" stretching beyond what Article III's case-or-controversy requirement permits courts to entertain. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 566 (1992) (internal quotations and citations omitted); *see* Section IV.D.3, *supra* p.52 n.8.

The court erred by concluding § 1323 failed to waive the United States' immunity from and not make it subject to Wilmington's appeal requirements to the same extent as any nongovernmental entity. *See* Appx0071-0077. ***First***, the court's conclusion parallels *EPA v. California*, which held in 1976 that § 1323 required the United States to comply with "substantive" requirements like "effluent limitations and standards and schedules of compliance" but not procedural requirements like "obtaining a state [discharge] permit," which had nothing to do with the "control and abatement of pollution." 426 U.S. 200, 212-15 (1976); *see* Appx0073. This argument did not survive Congress' 1977 amendment to § 1323, because

"the meaning of 'requirement' cannot, as in *Hancock* and *EPA v. California*, be limited to substantive environmental standards--effluent and emissions--but must also include the procedural *means* by which those standards are implemented: including permit requirements, reporting and monitoring duties, and submission to state inspections." *Parola v. Weinberger*, 848 F.2d 956, 961 (9th Cir. 1988) (before 1977, Congress "stopped short of subjecting federal installations to state control") (quoting *Hancock*, 426 U.S. at 198-99) (emphasis in original).

The issue of first impression here is the "any other requirement, whatsoever" subcategory of "requirements"—not the "any requirements respecting permits" subcategory—and the "exercise of any… local administrative authority" respecting stormwater runoff control and abatement. 33 U.S.C. § 1323(a). Because § 1323 mandates compliance with "procedural" requirements, the United States is subject to the "process for enforcing rights and duties recognized by" any State and local "substantive law" "respecting the control and abatement of water pollution," as well as any State and local processes "for justly administering remedy and redress for disregard or infraction of them." 33 U.S.C. § 1323(a); *Hanna v. Plummer*, 380 U.S. 460, 464 (1965) (citation omitted).

The United States' subjugation to local "administrative authority" includes a State or local government's authority "to establish and administer" their water pollution control program. *See EPA*, 426 U.S. at 206 n.15 (quoting 33 U.S.C. § 1342(b) (1970 ed., Supp. IV)). The court gave no explanation why Wilmington's administrative appeal process was not an exercise of local administrative authority which the Federal Government "shall be subject to, and comply with…" beyond vague references to cases not involving appeals. Appx0074-0075; 33 U.S.C. § 1323(a). However, compliance with administrative authority requires exhaustion where administrators are empowered "to grant the relief requested." *Carr*, 141 S. Ct. at 1361; *see McKart v. United States*, 394 U.S. 185, 194 (1969) ("[E]xhaustion doctrine is… an expression of executive and administrative autonomy.") (citation omitted). To conclude that Wilmington's appeal is "a process respecting the revision of prospective *charges*" and "self-evidently, has nothing to do with 'the control and abatement of water pollution,'" the court had to disregard Wilmington's circumstantial evidence relating the Properties' stormwater runoff contributions to their stormwater charges. Appx0072, n.34 (quoting 33 U.S.C. § 1323(a)); *see* Section VII.D.3; *see also* Appx0050 n.15 (Wilmington's charges are "used to pay

or reimburse the costs associated with [its] stormwater management program.") (quoting 33 U.S.C. § 1323(c)(1)(B)). Because Wilmington's appeal process incentivizes lower stormwater pollution through lower stormwater charges, the appeal process' relationship to controlling and abating stormwater pollution is obvious. *See* Appx0479-0480. If § 1323(a), as amended, obligates the United States to comply with a state's procedural requirements to obtain an administratively issued discharge permit, *contra EPA*, 426 U.S. at 212-13, then it also obligates the United States to comply with Wilmington's procedural requirements administrating "the payment of reasonable service charges," 33 U.S.C. § 1323(a).

The allegedly supporting cases to which the court cited are inapposite for involving "requirement[s] respecting permits," only one aspect of the "requirements" addressed in § 1323(a)'s second sentence, and discussed neither "reasonable service fees" nor administrative appeals. Appx0073. These cases merely delineated "requirements" to include "objective, administratively predetermined effluent standard[s] or limitation[s]" but not "water quality standards," which are not "directly enforceable." *New York v. United States*, 620 F. Supp. 374, 382-84 (E.D.N.Y. 1985); *see In re ACF*, 467 F. Supp. 3d 1323, 1338-39 (N.D. Ga. 2020) (*EPA*

v. California limits § 1323(a)'s "requirements" enforceable against federal agencies "to objective state standards of control like effluent limits in permits" but not water quality standards); *Kelley ex rel. Michigan v. United States*, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (water quality standards not "requirements" without "objective, quantifiable standards subject to uniform application"). None discuss administrative remedies, let alone exclude them from 33 U.S.C. § 1323(a)'s subcategories "administrative authority" and "any other requirement, whatsoever…." Although "case law interpreting the term 'requirements' in Section 1323 is sparse…," none has held it inapplicable to requirements regarding administrative remedies. Appx0072. In fact, a federal district court concluded that § 1323 compels federal agencies to exhaust administrative remedies "as would any other nongovernmental actor who challenges the [government's] decisions on" CWA matters. *Ohio v. U.S. Army Corps of Eng'rs*, 259 F. Supp. 3d 732, 742 n.8, 750 n.23 (E.D. Ohio 2017).

Second, a successful appeal by the United States during the first 73 days after Congress amended § 1323 in 2011 could have lowered all disputed stormwater charges prospectively without violating the Ordi-

nance's prohibition on retroactive adjustments. *See supra* pp.16-17. Without "certainty of an adverse decision," no court could conclude that exhausting Wilmington's "administrative remedy would" have been "futile." *Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990) (internal citation omitted).

Third, the court erroneously assumed it had "judicial discretion" to excuse the United States from exhausting Wilmington's administrative remedies to obtain "the remedy it seeks in this forum" (whatever that might be). Appx0005-0006 (internal citation omitted); *see* Appx0014-0015; Appx0039. The United States' failure to use Wilmington's optional appeal was not jurisdictional. *See* Appx0005. "Nevertheless, even in this field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *see McKart*, 394 U.S. at 195 (Exhaustion "must be tailored to fit the peculiarities of the administrative system Congress has created."). To challenge an issue involving "facts not properly presented" in an administrative appeal, the

party's failure to exhaust administrative remedies is excusable only "where the issues do not involve administrative expertise or discretion and only a question of law is involved" or "administrative review would be futile…." *Levinson v. Del. Comp. Rating Bureau*, 616 A.2d 1182, 1190 (Del. 1992); *see McKart*, 395 U.S. at 197-98, n.14 (same); *Carr*, 141 S. Ct. at 1360-61 (issues raised "for the first time in federal court" are "untimely" if administrative proceeding exhaustion was required "to preserve them for judicial review"), n.6 (party cannot claim lack of recourse "if he declines to take advantage of the adequate procedures available to him."). Nothing in 33 U.S.C. § 1323 indicates Congress intended to alter the traditional burden of persuasion governing the exhaustion doctrine the United States would bear. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (burden of proving exemption generally rests on one who claims its benefits); *New Castle County v. Pike Creek Rec. Servs., LLC*, 82 A.3d 731, 762 (Del. Ch. 2013) (party seeking excusal of failure to exhaust administrative remedies faces "high burden" of proof), *aff'd* 105 A.3d 990 (Del. 2014). Because Wilmington's appeal process involves engineering expertise and discretion and would not necessarily have been futile, for example, if the United States appealed between January 4 and March

18, 2011, the United States waived its right to challenge Wilmington's stormwater charges "on the basis of facts not presented" in an appeal. *McKart*, 395 U.S. at 198 n.15; *see Carr*, 141 S. Ct. at 1360-61; *supra* pp.16-17, 44-46.

Fourth, by entering judgment against Wilmington based in part on the United States' affirmative defense, the court exceeded RCFC 52(c)'s grant of authority to enter judgment against a party on an issue for which that party bears the burden of proof. *See* Appx0076-0077. Wilmington long maintained the United States' failure to exhaust administrative remedies was inexcusable. *See supra* pp.15-16; *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1581 (Fed. Cir. 1988) ("Affirmative defenses are to be proved by the party asserting them."). The United States—not Wilmington—moved pursuant to RCFC 52(c) for judgment based on partial findings regarding its affirmative defense. *See* Appx2155-2156 (Def's Corrected Mot. For J. Based on Partial Findings at 44-45 (Dkt. No. 119)); Appx2146-2151 (Def's Resp. to Plf's Mot. For Partial Judgment on the Pleadings at 11-16).[10] The United States called

[10] *See supra* p.16 n.4.

Commissioner Williams in its defensive case-in-chief but failed to establish that an appeal would have been futile for at least 73 days in 2011 or involved neither Wilmington's discretion nor administrative (engineering) expertise. *See* Appx0139 (149:20-151:9); *supra* pp.16-17. Having failed to prove its affirmative defense, any evidence the United States could have presented in Wilmington's appeal process should be deemed irrelevant on remand because its failure to exhaust administrative remedies is inexcusable. *See* City Code § 45-53(d)(7); *DLJ Mortgage Capital, Inc. v. Sheridan*, 975 F.3d 358, 366 (3d Cir. 2020) (Rule 52(c) allows entering judgment against defendant if "provided with the opportunity to submit relevant and probative evidence bearing on" their defense); *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1565-66 (Fed. Cir. 1987) (because "burden of proving those necessary facts had been on appellee, reversal would not mean the appellate court found facts in defiance of Rule 52(a)," especially where "findings on which the [court's] conclusion rested are clearly erroneous and… nothing of record warrants a further exercise of the fact-finding function….").

F. 33 U.S.C. § 1323 Obligates the United States to Pay Interest Pursuant to Wilmington's Ordinance.

Concluding that the United States cannot owe Wilmington interest even if liable for the disputed charges, the court inferred that the "no-interest rule" applies by assuming an ambiguity belied by the word "any." Appx0078-0081; 33 U.S.C. § 1323(a); *see Patel v. Garland*, 596 U.S. __, slip op. at 8 (2022) ("[T]he word 'any' has an expansive meaning.") (citation omitted)). A delinquent owner is liable for interest and Wilmington's costs in collection suits on unpaid stormwater charges assessed under City Code § 45-53(d). *See* City Code § 45-176(c), (d), (f); Appx2004 (15:18-16:12) (admitting "sewer charges" encompass "stormwater charges"). The "traditional legal rule regarding the immunity of the United States from interest" is that "interest does not run on a claim against the United States" absent "specific provision by contract or statute" or Congress' "express consent…." *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986) (citations omitted). However, Congress expressly consented to Wilmington's interest claim in § 1323(a)'s third sentence, which states that § 1323(a) "shall apply notwithstanding any immunity… under any law or rule of law." 33 U.S.C. § 1323(a). This sentence—separate from the

Tucker Act's waiver of immunity from suit[11]—broadly waives ***all*** sovereign immunity the United States could assert against any "local requirements [and] administrative authority… respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity…" except for those immunities Congress excluded from the waiver, including civil penalties. *Id.*; *see U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 611 (1992). Therefore, neither "the traditional legal rule regarding the immunity of the United States from interest," *Shaw*, 478 U.S. at 317, nor the law codifying it, 28 U.S.C. § 2516(a), authorized denial of Wilmington's interest claim.

Congress can waive the United States' immunity from interest without writing the word "interest." *See United States v. S. Coast Air Quality Management Dist.*, 748 F. Supp. 732, 738-39 (C.D. Cal. 1990); *contra* Appx0079. Because Congress never said the Federal Government "shall comply with ***all*** federal, state, interstate, and local requirements

[11] The requirement that the "waiver of immunity for the cause of action" be distinct from any waiver of interest immunity is satisfied because the former is waived by the Tucker Act in view of § 1323(a)'s first sentence. *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1126-27 (Fed. Cir. 2004); *see DeKalb County v. United States*, 108 Fed. Cl. 681, 695-96 (2013) (quoting 28 U.S.C. § 1491(a)(1), 33 U.S.C. § 1323(a)).

to the same extent as any other person," the scope of "requirements" was ambiguous before 1977. *Hancock v. Train*, 426 U.S. 167, 182-83 (1976). Congress amended § 1323 to subject the United States to "all… requirements" and define "requirements" to mean "any requirement whether substantive or procedural (including… any other requirement whatsoever)…." Pub. L. 95-217, § 61(a), 91 Stat. 1566, 1598 (1977). Congress added the third sentence to § 1323 to clarify that this duty applied "notwithstanding any immunity… under any law or rule of law." The question, therefore, is not whether one can find the word "interest" in § 1323, but whether there is "a plausible interpretation of the statute that would not" waive the United States' immunity from interest awards. *FAA v. Cooper*, 566 U.S. 284, 290 (2012). There is not.

If the United States "were liable to Wilmington for the principal charges it assessed," there is no plausible construction of § 1323(a)'s broad waiver that would exclude immunity from interest. Appx0078; *see Patel*, slip op. at 9 ("[I]f Congress made [certain matters] an exception, it must have left *something* within the rule.") (emphasis in original). By using twelve "any's" in its first three sentences, Congress expressed an

unambiguous intent in § 1323(a) to waive all unexcepted immunities, including interest. *Compare* 33 U.S.C. § 1323(a) *with United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) (five "any's" suggest "Congress meant the statute to have expansive reach."). Section 1323(a)'s "notwithstanding any immunity… under any law or rule of law" provision renders distinguishable other cases construing patently ambiguous language. *See Smith v. Principi*, 281 F.3d 1384, 1387 (Fed. Cir. 2002) ("equitable relief" need not include interest); *Blueport Co. v. United States*, 71 Fed. Cl. 768, 780 (2006) (ambiguous whether "person" encompasses government). Although immunity waivers' scope "must be strictly construed," the court inferred an exception absent from § 1323's waiver. *Shaw*, 478 U.S. at 318; *see United States v. Kubrick*, 444 U.S. 111, 118 (1979) (no "authority to narrow the waiver that Congress intended.").

This is not a typical "negative implication argument" involving a typical immunity waiver. Appx0080-0081. Section 1323(a) is like the Federal Tort Claims Act (FTCA), which "makes the United States liable 'in the same manner and to the same extent as a private individual under like circumstances," but provides exceptions (including prejudgment interest) where immunity has not been waived. *Dolan v. U.S. Postal Serv.*,

546 U.S. 481, 485 (2006) (quoting 28 U.S.C. § 2674). The FTCA's "unusual statutory exclusion was necessitated by [its] specific reference to state law for the rules of decision, in order to make clear that the United States' immunity from interest does not turn on state law." *Shaw*, 478 U.S. at 318 n.6. Section 1323(a) similarly subjects the United States to state and local laws "in the same manner, and to the same extent as any nongovernmental entity" but lacks the FTCA's "statutory exclusion" for interest. *Id.*; 33 U.S.C. § 1323(a). And unlike the FTCA, § 1323(a) contains the "notwithstanding any immunity… under any law or rule of law" provision. 33 U.S.C. § 1323(a). Thus, the United States' sovereign immunity from interest is waived by 33 U.S.C. § 1323 in view of City Code § 45-176, and the court lacked "the authority to narrow the waiver that Congress intended." *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (citation omitted).

X. CONCLUSION

This Court should vacate the judgment; reverse the grant of the United States' motion for judgment based on partial findings; reverse the denials of Wilmington's motion for partial judgment on the pleadings,

motion *in limine*, and motion to reconsider; remand for further proceedings, including completion of trial; and deem inadmissible any evidence the United States could have presented in Wilmington's appeal process.

Date: May 26, 2022

Respectfully Submitted,

/s/Paul T. Nyffeler

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XI. ADDENDUM

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[12] The U.S. Court of Federal Claims' status conference transcript is included in conjunction with the orders appealed from, as the court's Order on Plaintiff-Appellant's Motion to Reconsider, Dkt. No. 98, references "the reasons discussed with the parties during that status conference" as the basis for the Order.

In the United States Court of Federal Claims

No. 16-1691C
(Filed: March 14, 2018)

* *	**Judgment on the Pleadings; Sovereign Immunity; Waiver; Exhaustion; Clean Water Act, 33 U.S.C. § 1323; Interest.**
CITY OF WILMINGTON, DELAWARE, *	
Plaintiff, *	
v. *	
THE UNITED STATES, *	
Defendant. *	
* *	

Christopher D. Pomeroy and Paul T. Nyffeler, Aqualaw PLC, 6 S. 5th Street, Richmond, VA 23219, and Luke W. Mette and Rosamaria Tassone, City of Wilmington Law Department, 800 N. French Street, 9th Floor, Wilmington, DE 19801, Of Counsel, for Plaintiff.

Chad A. Readler, Robert E. Kirchman, Jr., Deborah A. Bynum, Franklin E. White, Jr., and Douglas T. Hoffman, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, P.O. Box 480, Ben Franklin Station, Washington, D.C. 20044, for Defendant.

OPINION AND ORDER

WILLIAMS, Judge.

The City of Wilmington, a municipal corporation of the State of Delaware ("Wilmington"), brought the instant action to recover "reasonable service charges" under Section 1323 of the Clean Water Act for control and abatement of stormwater pollution. Plaintiff assessed service charges on five properties owned and operated by the Army Corps of Engineers within the Wilmington city limits from January 4, 2011, through December 19, 2016. Defendant does not dispute that it failed to pay those service charges.

Plaintiff moved this Court for partial judgment on the pleadings pursuant to Rule 12(c), asserting that Defendant waived its right to contest issues it could have raised if it had brought an administrative appeal under Wilmington City Code § 45-53(d)(7). Defendant did not bring an administrative appeal, and while Defendant could still bring an administrative appeal, the administrative tribunal can only adjust future fee assessments—not the past assessments at issue here. Plaintiff argues that because Defendant could have challenged the stormwater fee calculations "on the basis of site-specific, technical information" in an administrative appeal but

chose not to do so, it waived its right to raise such challenges here. Plaintiff asserts that this result is compelled by either the Clean Water Act or the exhaustion doctrine.

The Court denies Plaintiff's motion for partial judgment on the pleadings. The administrative appeal provided for by the Wilmington City Code is permissive, rather than mandatory. Accordingly, Defendant's failure to submit an administrative appeal did not violate the Clean Water Act, and the exhaustion doctrine does not preclude Defendant from challenging the City's assessments here.

Defendant also moved for partial judgment on the pleadings, asking this Court to find that Plaintiff cannot recover interest as a matter of law. Defendant contends that Section 1323 does not expressly waive sovereign immunity with respect to interest, and absent such an express waiver, interest is unavailable. Further, Defendant contends that Plaintiff has misapplied its own local law, which Defendant asserts does not provide for interest in this context.

The Court denies Defendant's motion for partial judgment on the pleadings. The issue of whether the Clean Water Act waives sovereign immunity with respect to interest is an issue of first impression in this Circuit that is not amenable to judgment at this preliminary stage, given that the parties dispute the meaning of the statute. Accordingly, while Defendant may renew its argument at a later stage, Defendant's motion is denied.

Background[1]

The City of Wilmington owns and operates a municipal storm sewer system that conveys only stormwater, and a combined sewer system that conveys a combination of stormwater and sanitary waste. Wilmington manages both systems with a goal of reducing stormwater pollutants discharged into rivers, streams, lakes, and other bodies of water. Wilmington assesses fees on property located within its city limits and places such fees in an enterprise fund used exclusively for the provision of stormwater services and facilities. Wilmington City Code § 45-53. Wilmington also assesses penalties and interest if property owners do not pay such fees in a timely fashion.

Defendant owns and controls five properties within Wilmington's jurisdiction that are at issue in this lawsuit. Plaintiff claims that it assessed stormwater fees against these five properties that in the aggregate totaled $1,577,368.40 as of December 16, 2016, plus interest of $1,185,929.24. In response to Defendant's motion for judgment on the pleadings, Plaintiff concedes that it is not entitled to $124,790.21 in penalties that were included in this amount, adjusting the principal it seeks to recover to $1,452,578.19. Pl.'s Opp'n 1. Defendant neither paid the amounts assessed when it received invoices from Plaintiff in 2011 through 2016, nor invoked the administrative appeal rights afforded it by the Wilmington City Code.

Plaintiff filed its Complaint on December 22, 2016, and Defendant filed its Answer on April 24, 2017. By motion dated October 4, 2017, the parties jointly asked the Court to permit them to file motions for partial judgment on the pleadings and to stay discovery until the motions

[1] This background is derived from the parties' respective motions for judgment on the pleadings. This background should not be construed as findings of fact.

are resolved. The Court granted the parties' motion by Order dated October 5, 2017, and briefing on the motions for partial judgment on the pleadings concluded on December 21, 2017.

Discussion

Jurisdiction and Legal Standards

The Court has jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491 (2012). The Tucker Act waives sovereign immunity and provides this Court with jurisdiction over specific categories of claims against the United States, including those claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . in cases not sounding in tort." § 1491(a)(1). "[T]he claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." United States v. Mitchell, 463 U.S. 206, 216-17 (1983) (internal citation and quotation marks omitted). Section 1323(a) of the Clean Water Act "may fairly be interpreted to mandate the payment of money by the government" because it mandates that the United States "shall" pay "reasonable service charges." DeKalb Cty., Georgia v. United States, 108 Fed. Cl. 681, 695-96 (2013) (explaining that the word "shall" generally makes a statute money-mandating).

RCFC 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The Court will only grant a motion for judgment on the pleadings where "it appears to a certainty" that the nonmoving party "is entitled to no relief under any state of facts which could be proved in support of [its] claim." Owens v. United States, 851 F.2d 1404, 1407 (Fed. Cir. 1988) (internal citation and quotation omitted). The Court must "assume each well-pled factual allegation to be true and indulge in all reasonable inferences in favor of the nonmovant." Id. "A motion for judgment on the pleadings should be denied unless it appears to a certainty that [the nonmoving party] is entitled to no relief under any state of facts which could be proved in support of [its] claim." Johns-Manville Corp. v. United States, 12 Cl. Ct. 1, 14 (1987) (internal citations omitted). See also Xianli Zhang v. United States, 640 F.3d 1358, 1376 (Fed. Cir. 2011) (affirming judgment on the pleadings in favor of defendant where the Court found that the governing statute subjected the plaintiff to the taxes at issue and it was not entitled to a tax refund as a matter of law).

Defendant is Not Precluded from Challenging Plaintiff's Fee Assessments in This Forum

Plaintiff asks the Court to rule that Defendant cannot "contest [Plaintiff's] stormwater calculation based on site-specific, technical information, namely land surveys, gross parcel area, total impervious area, type of surface material, and similar evidence" that could have been considered in an appeal under the Wilmington City Code § 45-53(d)(7). Pl.'s Mot. 2.[2] Plaintiff

[2] Plaintiff differentiates between "site-specific" challenges to the charges and challenges based on Plaintiff's "general methodology," and asserts that only the latter can be challenged in this forum. Regardless of whether its motion is granted, Plaintiff acknowledges it must prove that "the properties' stormwater charges are based on some fair approximation of the proportionate contribution of the properties to stormwater pollution" and Defendant could still contest "whether Wilmington City Code § 45-53 provides some fair approximation of the proportionate contribution of stormwater pollution by vacant properties like the properties at the center of this litigation."

raises two interconnected arguments in support of its position. First, Plaintiff argues that Section 1323(a) of the Clean Water Act obligates the Government to comply with local administrative procedures and that the Government violated this provision by failing to file an administrative appeal that Plaintiff claims was mandated by the local Wilmington Code. Second, Plaintiff argues that the exhaustion doctrine prohibits Defendant from raising arguments here that it could have—but did not—raise in an administrative appeal. The Court is not persuaded by either argument.

With respect to Plaintiff's first argument, Section 1323(a) of the Clean Water Act provides that the Federal Government:

> 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.

33 U.S.C. § 1323(a). According to Plaintiff, by referring to "local requirements, administrative authority, and process" and "procedural" requirements, the statute subjects Defendant to all local requirements, including the administrative appeal procedures in Section 45-53(d)(7) of the Wilmington City Code.

The Wilmington City Code provides for the assessment of a "[s]torm water charge," defined as "the monthly charge for storm water management assessed to a parcel within the city based on the use of the parcel on the last day of the month of the billing period." Wilmington City Code § 45-53(a). The Code further mandates that "[a]ll parcels that are within the city's corporate boundaries, shall be assessed a monthly storm water charge as per the provisions of this article." § 45-53(d). The Wilmington City Code provides for an administrative appeal of the assessment as follows:

> An owner of a parcel for which a storm water charge has been assessed, **may** appeal for that parcel: (1) the calculation of the storm water charge; (2) the assigned storm water class; (3) the assigned tier, if applicable; and (4) the eligibility for a credit. The appellant must file the appeal in writing to the commissioner of the department of public works.
>
> The appellant shall submit a land survey prepared by a registered surveyor showing dwelling units, gross parcel area, total impervious area, type of surface material, as appropriate, and any other information that the commissioner shall

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Pl.'s Mot 1-2. Further, Plaintiff agrees that Defendant could introduce "technical, site-specific information" as "evidence to show that Wilmington's runoff coefficient for Vacant properties is an unfair approximation of Vacant properties' proportional contribution to stormwater." Pl.'s Reply 15 n.5.

specify. The commissioner may waive in writing the submission of a land survey. An appeal **may** be filed at any time, but **any adjustment to the assessment in favor of the appellant shall only be applied prospectively. No retroactive adjustments to the storm water charge will be made in favor of the appellant**.

a. The burden of proof shall be on the appellant to demonstrate, by clear and convincing evidence the validity of the appeal.

§ 45-53(d)(7) (emphasis added).

Defendant failed to avail itself of the administrative appeal process provided by the Wilmington City Code. Because Plaintiff asserts that the Wilmington City Code mandated an appeal procedure which Defendant did not invoke, Plaintiff contends that Defendant violated the Clean Water Act. Due to Defendant's failure to utilize the Wilmington City Code appeal procedure, Plaintiff asks this Court to enter an extreme procedural ruling and hold that Defendant waived its right to address issues before this Court that it could have addressed in that administrative appeal. This Court rejects Plaintiff's claim that "[b]y failing to appeal the stormwater calculation, the owner loses the right to challenge the calculation of past charges." Pl.'s Br. 7. Such a draconian result is not dictated by the statutory framework here.

Although the Government is subject to local requirements, the Wilmington City Code does not require a property owner to pursue an administrative appeal. Rather, that appeal right is permissive. The Wilmington City Code clearly provides that a property owner "may" appeal an assessment. The Code does not suggest a party would waive its right to defend against an assessment if it did not utilize the administrative appeal process. Accordingly, the Clean Water Act does not preclude Defendant from challenging the assessment in this forum because it failed to invoke the Wilmington City appeal process.

In the alternative, Plaintiff invokes the exhaustion doctrine, which precludes "judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." McKart v. United States, 395 U.S. 185, 193 (1969) (internal quotation and citation omitted). Plaintiff contends that because Defendant failed to file an administrative appeal, Defendant cannot make arguments in this Court that it could have raised in such administrative appeal. This Court declines to apply the exhaustion doctrine in the manner Plaintiff suggests. Where "Congress has not clearly mandated the exhaustion of particular administrative remedies, the exhaustion doctrine is not jurisdictional, but is a matter for the exercise of 'sound judicial discretion.'" Maggitt v. West, 202 F.3d 1370, 1377 (Fed. Cir. 2000) (citing McCarthy v. Madigan, 503 U.S. 140, 146 (1992)). Here, the Wilmington City Code did not require that a property owner pursue an administrative appeal as a prerequisite to defending against or challenging the City's assessment in this Court.

Because Defendant was not required to pursue the City's appeal process, "[w]hether the doctrine of exhaustion should be invoked" is a matter for the Court's discretion and requires a case-by-case analysis of the competing interests of the parties. Maggitt, 202 F.3d at 1378. Invoking the exhaustion doctrine here would mean that a property owner's argument against the City's assessment of stormwater charges would "go unheard." Id. at 1377. Here, the Clean Water Act mandates that a property owner pay the City "reasonable" stormwater charges, and application of the exhaustion doctrine would bar the property owner—the United States—from challenging

the reasonableness of those charges in numerous respects. As such, Defendant would suffer serious prejudice in a manner not contemplated by the statute by being forced to pay whatever charges the City assessed without recourse.

Plaintiff asserts that invoking the exhaustion doctrine would further Plaintiff's interest in protecting its administrative authority and promote judicial economy because the administrative appeal process would have minimized the parties' litigation costs by "resolving factual details at the administrative level." Pl.'s Reply 11. While the City has articulated a legitimate interest that might prove to be paramount in some circumstances, that interest pales in comparison to Defendant's interest in being able to litigate the City's entitlement to the assessment. Additionally, the Wilmington administrative appeal would not have provided Defendant the remedy it seeks in this forum because the Wilmington City Code only grants prospective relief and does not permit parties to appeal fees that were already assessed. Wilmington City Code § 45-53(d)(7). Accordingly, the Court concludes that Defendant's interests outweigh Plaintiff's in this case, and declines to apply the exhaustion doctrine.[3]

Plaintiff's Entitlement to Interest is Not Amenable to Judgment on the Pleadings

Defendant contends that Plaintiff cannot recover interest because the United States has not waived its sovereign immunity with respect to claims for interest under the Clean Water Act. Plaintiff acknowledges the longstanding rule that the waiver of sovereign immunity "for pre- and post-judgment interest must be separate and distinct from the general waiver of sovereign immunity upon which the suit is based." Pl.'s Opp'n 2 (citing Marathon Oil Co. v. United States, 374 F.3d 1123, 1126-27 (Fed. Cir. 2004)). However, Plaintiff argues that the Clean Water Act unambiguously waives the United States' sovereign immunity regarding interest. The statute provides in relevant part:

> 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

[3] Defendant also makes a sweeping argument that the exhaustion doctrine is inapplicable as a matter of law because "it is [Plaintiff] and not the United States that is seeking a judicial remedy." Def.'s Resp. 9 (citing Palladian Partners, Inc. v. United States, 783 F.3d 1243, 1255 (Fed. Cir. 2015)). Defendant's reliance on Palladian is misplaced, as Palladian did not question whether the exhaustion doctrine could be invoked against a Defendant. Moreover, the exhaustion doctrine may apply to matters sought to be raised as a defense, as well as to a plaintiff's direct claim. See, e.g., McGee v. United States, 402 U.S. 479, 485-86 (1971) (in criminal prosecution for failing to appear for draft induction, petitioner was prohibited from raising a defense that he was exempt from the draft as a conscientious objector, where he failed to exhaust administrative remedies); United States v. California Care Corp., 709 F.2d 1241, 1248-49 (9th Cir. 1983) (healthcare providers were foreclosed from raising defense against Government suit for return of Medicare overpayments due to their failure to exhaust administrative remedy for challenging the Government's overpayment determination).

> 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.
>
> * * *
>
> This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

33 U.S.C. § 1323(a) (emphasis added).

Although the question of whether Plaintiff can recover interest from the Federal Government is purely a legal issue, the Court declines to resolve the issue at this preliminary stage of proceedings as it raises a thorny issue of first impression in this Court. "A motion for judgment on the pleadings should be denied unless it appears to a certainty that [the nonmoving party] is entitled to no relief under any state of facts which could be proved in support of [its] claim." Johns-Manville Corp., 12 Cl. Ct. at 14 (internal citations omitted).

Section 1323(a) of the Clean Water Act makes the Government "subject to" and requires it to "comply with" Federal, State, and local requirements "in the same manner, and to the same extent as any nongovernmental entity." Here, the United States is a property owner in the City of Wilmington subject to that locality's Code and is required to pay reasonable stormwater charges in the same manner and to the same extent as any nongovernmental entity.

Section 45-53 of the Wilmington City Code, which authorizes stormwater charges, is contained in Article II ("Sewers, Sanitary and Storm Water Rates and Charges") of Chapter 45 ("Utilities") of the Wilmington City Code. The interest provision, Wilmington City Code § 45-176(c), entitled "Water and sewer charges; interest, penalties and costs; limitation of actions," is contained in Article III, entitled "Water Supply and Service Regulations." The interest provision provides in relevant part that:

> if any water facilities charges or water usage charges, or sewer system charges, or any combination thereof, imposed pursuant to the provisions of this article and of article II of this chapter are not paid when due . . . interest shall become due and payable as of the first day of each month on the total amount of any such unpaid charges, but not including any penalties imposed, at the annual rate of 24 percent on the total amount of charges unpaid for up to one year and at the annual rate of 36 percent on the total amount of charges unpaid for more than one year . . .

Wilmington City Code § 45-176(c) (emphasis added).

The parties dispute whether this Code provision applies to the assessment at issue. Defendant contends that this provision "does not apply to storm water" related charges, which Defendant asserts are not "facilities charges," "water consumption," or "sewer charges." Def.'s Mot. 7-8. Plaintiff replies that "'[s]ewers' is a generic term that broadly encompasses conveyance of both of the referenced types of water – 'sanitary' wastewater (i.e., sewage) and storm water,"

and the Code permits interest to be assessed for stormwater charges against all property owners that fail to pay charges on time. Pl.'s Opp'n 9, 11.[4]

Given the parties' dispute as to whether stormwater charges under the Wilmington City Code § 45-53 constitute "water facilities charges or water usage charges, or sewer system charges, or any combination thereof" under Wilmington City Code § 45-176(c), and thus, are subject to interest on the unpaid stormwater charges at issue, Defendant's motion for judgment on the pleadings fails.

This Court recognizes that the United States District Court for the Northern District of New York found that the Clean Water Act does not permit the recovery of prejudgment interest against the United States. However, that Court was not called upon to address the language of the Clean Water Act requiring the Federal Government to be treated in the same fashion as nongovernmental entities, and the parties there did not dispute whether the interest provision of the local law applied to the charges at issue. New York State Dep't of Envtl. Conservation v. U.S. Dep't of Energy, 772 F. Supp. 91, 93, 104-05 (N.D.N.Y. 1991) (granting partial motion to dismiss). To this Court's knowledge, no other federal court has addressed whether the Clean Water Act waives the Government's sovereign immunity with respect to interest.

Conclusion

Plaintiff's motion for partial judgment on the pleadings is **DENIED**, and Defendant's motion for partial judgment on the pleadings is **DENIED**.

The parties shall file a joint proposed schedule for further proceedings by **March 23, 2018**. This schedule shall include deadlines for discovery, dispositive motions, as well as proposed trial dates, and the location of trial.

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

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[4] Plaintiff also cites an internal Government memorandum, which it claims suggests the Navy and DOD believed that while "[i]nterest, penalties, or late fees" levied prior to the amendment of the Clean Water Act in January 2011, were not payable because the statute does not apply retroactively, interest levied subsequent to the amendment could be payable. In this memorandum, dated April 9, 2012 and entitled "Payment of Reasonable Stormwater Service Charges," the Navy's Deputy Director for Energy and Environmental Readiness advised Navy installations that:

> A stormwater fee, charge, or assessment found to be reasonable under these criteria is payable even if it denominated a tax. Note that Clean Water Act amendments are not retroactive; only those reasonable service charges assessed after January 4, 2011 may be paid by DoD facilities. Interest, penalties, or late fees levied after January 4, 2011 for stormwater charges assessed prior to January 4, 2011 are also not payable.

Pl.'s Opp'n Ex. A, at 2.

In the United States Court of Federal Claims

No. 16-1691C

(Filed: March 4, 2021)

CITY OF WILMINGTON, DELAWARE,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

ORDER

***SOLOMSON*, Judge.**

This case involves a long-running legal controversy between Plaintiff, City of Wilmington ("Wilmington"), and Defendant, the United States, concerning five properties (the "properties") that the United States Army Corps of Engineers maintains in Wilmington, Delaware. ECF No. 1 ("Compl.") at 1–2. From 2011 through 2016, Wilmington assessed water pollution service charges on those properties, but the government thus far has refused to pay these fees. *Id.* at 1–2, 6. On December 22, 2016, Wilmington filed its complaint against the government, seeking to recover "the payment of reasonable service charges" assessed for "the control and abatement of water pollution" pursuant to the Clean Water Act,[1] as amended by the Federal Responsibility to Pay for Stormwater Programs Act of 2011, Pub. L. No. 111-378, 124 Stat. 4128, codified at 33 U.S.C. § 1323.[2] Compl. at 1–3.

[1] 33 U.S.C. §§ 1251 *et seq.*

[2] This case originally was assigned to Judge Williams, ECF No. 2, but, on February 5, 2020, was transferred to the undersigned Judge. ECF No. 73.

The parties have concluded discovery; trial is presently scheduled for April 2021. ECF No. 89.[3] Pending before the Court is Defendant's motion *in limine* to exclude testimony from Plaintiff's expert witness, Hector J. Cyre. ECF No. 68 ("Def. Mot."). Also pending before the Court is Plaintiff's motion *in limine* (1) to preclude Defendant from asserting certain arguments, (2) to exclude the testimony of Defendant's expert witness, Dr. Neil S. Grigg, and (3) to exclude several of its fact witnesses, including Robert Moore, Heather Sachs, and Daniel Kelly, from testifying. ECF No. 69 ("Pl. Mot."). The parties filed their respective response briefs, ECF Nos. 77 ("Pl. Resp."), 78 ("Def. Resp."), and the Court held oral argument on February 16, 2021. Minute Order (Feb. 8, 2021).

Pursuant to Rule 16 of the Court of Federal Claims ("RCFC"), this Court is authorized, among other things, to "consider and take appropriate action . . . [for] avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702." RCFC 16(c)(2)(D); *see Magnus Pac. Corp. v. United States*, 2016 WL 3960447, *9 (Fed. Cl. July 21, 2016) ("There is no question under RCFC 16, that this court, as a trial court, has the power to issue pretrial orders simplifying issues for trial." (modifications omitted)). A motion *in limine* "'enables a court to rule in advance on the admissibility of documentary or testimonial evidence and thus expedite and render efficient a subsequent trial.'" *Norman v. United States*, 56 Fed. Cl. 255, 267 (2003) (quoting *Weeks Dredging & Contracting, Inc. v. United States*, 11 Cl. Ct. 37, 45 (1986)). "[W]hen disposing of such motions, this court enjoys broad discretion." *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38, 49 (2011) (citing *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1360–61 (Fed. Cir. 2008)). Notably, given that this Court only conducts bench trials, we have "even greater discretion" to deny a motion *in limine* because "'there is no concern for juror confusion or potential prejudice.'" *RMH Tech LLC v. PMC Indus., Inc.*, 2018 WL 5095676, *3 (D. Conn. Oct. 19, 2018) (quoting *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 457, 457 n.1 (S.D.N.Y 2007)); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002) (noting that "concerns [about juror confusion] are of lesser import in a bench trial"); *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.").

For the reasons explained below, the Court **DENIES** both the government's motion *in limine* and Plaintiff's motion *in limine*.

[3] The parties filed their respective pre-trial memorandum of contentions of fact and law. ECF Nos. 60 ("Pl. Memo"), 64 ("Def. Memo."). The parties subsequently moved for leave of the Court to file responses to those memoranda. ECF Nos. 65, 67. Both motions hereby are **GRANTED**.

I. Defendant's Motion *In Limine*

The government argues in its motion *in limine* that the Court should exclude the expert testimony of Hector J. Cyre, president of Water Resource Associates, Inc., pursuant to Federal Rule of Evidence 702. Def. Mot. at 1. Wilmington intends to have Mr. Cyre testify as an expert witness at trial that Wilmington's rate methodology for calculating stormwater charges is consistent with generally accepted industry standards. *Id.* at 7–9. According to the government, Mr. Cyre's testimony is not relevant to the fact-specific determination as to whether the actual charges imposed by Wilmington on the properties are "reasonable." *Id.* The government further contends that his testimony is not useful for determining whether Wilmington's practice of estimating the stormwater charges for non-residential properties is appropriately "based on some fair approximation of the proportionate contribution of the property" within the meaning of 33 U.S.C. § 1323(c). *Id.* at 9–11.

"In general, Rule 702 is viewed as requiring the trial judge to ensure that proffered expert testimony is both reliable and relevant." *Murfam Farms, LLC v. United States*, 2008 WL 4725468, *1 (Fed. Cl. Sept. 19, 2008). Relevant evidence is that which "will help the trier of fact to understand the evidence or to determine a fact in issue" and "is based on sufficient facts or data." Fed. R. Evid. 702. While "the trial court acts as a 'gatekeeper' to exclude expert testimony that is irrelevant," *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391 (Fed. Cir. 2003), "doubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *Clark v. Heldrick*, 150 F.3d 912, 915 (8th Cir. 1998) (internal quotation marks omitted). Simply put, "an expert's opinion should be excluded only if it is so fundamentally unsupported that it can offer no assistance to the jury." *Wing Enters., Inc. v. Tricam Indus., Inc.*, 829 F. App'x 508, 512 (Fed. Cir. 2020) (internal quotation marks omitted). Of course, as noted above, in a bench trial such concerns are greatly attenuated. *See Seaboard Lumber Co.*, 308 F.3d at 1302; *Brown*, 415 F.3d at 1268–69; *RMH Tech LLC*, 2018 WL 5095676 at *3.

The Court finds that, at least at this stage, Mr. Cyre's proffered testimony is sufficiently reliable and relevant to be admitted. In that regard, the government does not contend that his opinion is unsupported by fact or data. *See* Def. Mot. at 7–10. Moreover, the Court agrees that Mr. Cyre's testimony may prove "relevant to helping the trier of fact assess whether the stormwater charges . . . are normal, customary, fair and/or moderate." Pl. Resp. at 19. Thus, at this pre-trial stage, the Court cannot conclude that Mr. Cyre's testimony is definitively irrelevant to the statutory question that will be addressed at trial. *See, e.g.*, *Wing Enters.*, 829 F. App'x at 513–14 (holding that expert testimony about industry standards can be relevant "even though the testimony did not address the exact facts at hand but instead provided a more general explanation"). On the other hand, the government's concerns may (and will likely) be

raised at trial to critique the usefulness of Mr. Cyre's testimony, "but the same concerns do not adequately convince this Court that the testimony should be excluded." *David Boland, Inc. v. United States*, 2020 WL 5641873, *2 (Fed. Cl. Sept. 22, 2020). The government's motion *in limine* is **DENIED,** accordingly.

II. Plaintiff's Motion *In Limine*

A. Plaintiff's Motion To Preclude Certain Arguments Made By Defendant

Wilmington contends in its motion *in limine* that the government should be precluded from arguing that: (1) the properties contain wetlands; (2) the properties qualify for stormwater credits; (3) the stormwater charges are discriminatory; and (4) the government assessed the reasonableness of the stormwater charges prior to the filing of Wilmington's complaint. Pl. Mot. at 1.

1. "Properties Contain Wetlands" Argument

Wilmington offers three arguments in support of its position that the government should not be permitted to argue that the properties at issue include wetlands, and that the assessed charges thus should be mitigated. Pl. Mot. at 2–10. The Court is not persuaded.

First, Wilmington asserts that the government should be judicially estopped from presenting evidence that the properties contain wetlands because when the government applied to the Delaware Department of Natural Resources and Environmental Control for a Water Quality Certification in 2007 (and, again, in 2010 and 2011), the government "did not check the boxes in the application denoting the presence of wetlands on the Properties." Pl. Mot. at 3. The doctrine of judicial estoppel is intended to prevent a litigant from "playing fast and loose with the courts" by assuming contrary positions in legal proceedings, *Def. Tech., Inc. v. United States*, 99 Fed. Cl. 103, 127 (2011); *see Housing Auth. of Slidell v. United States*, 149 Fed. Cl. 614, 643 (2020), and applies "just as much when one of the tribunals is an administrative agency." *Trustees in Bankr. of N. Am. Rubber Thread Co., Inc. v. United States*, 593 F.3d 1346, 1354 (Fed. Cir. 2010). The government counters, however, that there is no inconsistency in its positions because the two proceedings address distinct issues. Def. Resp. at 3–8. The government convincingly explains that the Water Quality Certification application sought to ascertain whether the properties are "wetlands," as that legal term is used by federal and state regulations. *Id.* In contrast, the evidence that the government wants to present at trial concerns the physical character of the properties in producing stormwater run-off for purposes of assessing the reasonableness of the stormwater

charges. *Id.* As judicial estoppel is applied only when a party's positions are "mutually exclusive and directly inconsistent[,]" *Egenera, Inc. v. Cisco Sys., Inc.*, 972 F.3d 1367, 1379 (Fed. Cir. 2020) (internal quotation marks omitted), the government may argue in this proceeding that its properties are wetlands for the purposes of defending against the stormwater charges to which Wilmington claims entitlement.

Furthermore, the representations that the government made in the Water Quality Certification application cannot give rise to judicial estoppel. Only when the statements made in the earlier proceeding involve the "truth-seeking function of the court" (or administrative tribunal) does judicial estoppel apply. *Egenera, Inc.*, 972 F.3d at 1379–80 (citation omitted). Simply put, judicial estoppel only applies to legal proceedings that are "'adjudicatory in nature.'" *Mony Life Ins. Co. of Amer. v. Loiza Dev. S.E.*, 2006 WL 8450729, *1 (D.P.R. Oct. 31, 2006) (quoting *United States v. Levasseur*, 846 F.2d 786, 792–93 (1st Cir. 1988)). For example, judicial estoppel does not preclude individuals from contradicting sworn statements made in a tax return. *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006); *see Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 715 n.2 (3rd Cir. 2001) ("[W]e know of no basis for crafting a theory of estoppel based upon sworn statements in a tax return . . . .").

Wilmington relies on a decision of our appellate court, the United States Court of Appeals for the Federal Circuit, in *Lampi, LLC v. American Power Products, Inc.*, 228 F.3d 1365 (Fed. Cir. 2000), for the proposition that judicial estoppel *does* apply to statements made in an application submitted to a government agency. Pl. Mot. at 4–5. In *Lampi*, the Federal Circuit held that judicial estoppel could be enforced based upon statements made in a trademark application in proceedings before the Patent and Trademark Office ("PTO"). 228 F.3d at 1377. Wilmington's reliance upon *Lampi* misses the mark. Statements made in a trademark application are subject to substantive analysis by an examiner and may be rejected, and thus this application process is similar to an adjudicatory proceeding. *See* 37 C.F.R. §§ 2.61–2.63. In *Lampi*, the PTO examiner twice rejected the trademark application; the company obtained a trademark only after the company made certain representations to the PTO examiner following the rejections. *See Lampi, LLC v. Am. Power Prods., Inc.*, 65 F. Supp. 2d 757, 776 (N.D. Ill. 1999). Thus, judicial estoppel properly could preclude the company from contradicting its earlier representations upon which the PTO examiner relied in issuing the trademark. This distinction is further confirmed in the Federal Circuit's recent decision in *Egenera, Inc. v. Cisco Systems, Inc.*, in which that court held that statements made in a petition for the correction of a named inventor in a patent, *see* 35 U.S.C. § 256, are not grounds for judicial estoppel because "[n]o substantive examination occurs, and the PTO does not consider the substantive adequacy of the petition." 972 F.3d at 1380–81 (citing 37 C.F.R. § 1.324(b)). Here, Wilmington has provided no facts even suggesting that the Water

Quality Certification application is subject to a substantive examination or proceedings of the type that would support a judicial estoppel claim. *See* Pl. Mot. at 3, 6.

Second, Wilmington contends that pursuant to the doctrine of exhaustion, the government should be precluded from arguing that the properties contain wetlands because the government did not utilize Wilmington's administrative appeal process to seek lower stormwater charges. Pl. Mot. at 6–9. This, however, is not the first time that Wilmington has made this argument. Indeed, Judge Williams, who previously presided over this case, rejected that very same argument in her ruling on the parties' motions for partial judgment on the pleadings in March 2018. *City of Wilmington v. United States*, 136 Fed. Cl. 628, 633 (2018) (ECF No. 28 at 5–6). Judge Williams specifically held that the Wilmington City Code does not require a landowner, including the government, to pursue an administrative appeal; nor would an appeal have provided the government with relief because "the Wilmington City Code only grants prospective relief and does not permit parties to appeal fees that have already been assessed." *Id.* Wilmington does not dispute that essential conclusion.

To the extent that Wilmington seeks to re-litigate that determination, it should have filed a motion for reconsideration consistent with RCFC 59(b), not a motion *in limine*. "Motions *in limine* are meant to deal with discrete evidentiary issues related to trial, and are not another excuse to file dispositive motions disguised as motions *in limine*." *Dunn ex rel. Albery v. State Farm Mut. Auto. Ins. Co.*, 264 F.R.D. 266, 274 (E.D. Mich. 2009) (brackets and citation omitted)); *see also Barnes v. Dist. of Columbia*, 924 F. Supp. 2d 74, 81–82 (D.D.C. 2013) (denying motion *in limine* used "as a backdoor motion to reconsider").

Moreover, "a reassignment to another judge should not be viewed as declaring open season on relitigating any prior rulings with which the party disagrees." *Applegate v. United States*, 52 Fed. Cl. 751, 765–66 (2002) (citing *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997)), *aff'd*, 70 F. App'x 582 (Fed. Cir. 2003). Indeed, the "law of the case" doctrine counsels against "relitigat[ing] matters already adjudicated absent some indication of extraordinary circumstances." *Applegate*, 52 Fed. Cl. at 765. Judge Williams carefully considered and rejected Plaintiff's exhaustion argument, *see City of Wilmington*, 136 Fed. Cl. at 633, and Wilmington does not suggest a compelling reason to revisit her conclusions. In any event, even if the undersigned were to reconsider Judge Williams' earlier decision, the outcome in all likelihood would be the same. The parties are free to argue about how to properly interpret and apply the statutory provisions at issue, but the Court will not revisit that question before trial to exclude particular arguments or testimony.

Third, Wilmington argues that the government failed to disclose in its interrogatory responses that it intended to raise factual issues at trial regarding the properties' wetland status. Pl. Mot. at 9–10. Wilmington contends that it learned of this defense for the first time in Dr. Grigg's expert report which was shared with Wilmington only after the close of fact discovery. *Id.* Wilmington accordingly seeks to have this Court impose a discovery sanction pursuant to RCFC 37, prohibiting the government from relying upon such facts or testimony during trial. *Id.* at 10 (citing RCFC 37(c)(1)). Wilmington acknowledges in its motion, however, that the government responded, in its answer to the relevant interrogatory, that the government "would provide its [complete] response *when expert disclosures were due*." *Id.* at 9. (emphasis added). Wilmington thus was on notice that the government could not identify all possible defenses until Dr. Grigg submitted his expert report.

To the extent Wilmington was unsatisfied by the government's interrogatory response, Wilmington should have filed a timely motion pursuant to RCFC 37 to compel discovery. Wilmington should not have waited until nearly the eve of trial to seek exclusion of the government's evidence.[4] A motion *in limine* is not to be used "as a substitute for motions to compel discovery or for discovery sanctions that should have been brought earlier." *Mixed Chicks LLC v. Sally Beauty Supply LLC*, 879 F. Supp. 2d 1093, 1094 (C.D. Cal. 2012); *see McCon v. Perez*, 2018 WL 4006971, *1 (S.D. Miss. Aug. 20, 2018) (denying a motion *in limine* seeking Rule 37(c) relief). In the absence of a timely motion to compel, this Court will not preclude the government from presenting evidence that the properties contain wetlands and, accordingly, the Court **DENIES** Wilmington's motion to exclude this argument.

2. "Properties Qualify For Stormwater Credits" Argument

Wilmington additionally contends that the government should be precluded, pursuant to the doctrine of exhaustion, from asserting that the properties are eligible for stormwater credits. Pl. Mot. at 11. In Wilmington's view, the government's failure to apply for stormwater credits through the city's stormwater credit application process forecloses the government's argument. *Id.* For the same reasons the Court rejected Wilmington's exhaustion argument above, *see supra* Sec. II.A.1, the Court **DENIES** the motion to exclude this argument, as well.

[4] Wilmington did previously file a motion to compel discovery pertaining to other matters in this case, ECF Nos. 36, 37, which, on January 3, 2019, Judge Williams granted. *See City of Wilmington v. United States*, 141 Fed. Cl. 558 (2019) (ECF No. 45).

3. "Stormwater Charges Are Discriminatory" Argument

Wilmington further argues that the government for the first time in Dr. Grigg's expert report contends that the city's stormwater charges are "discriminatory" as that term is used in 33 U.S.C. § 1323(c). Pl. Mot. at 11–13. Wilmington, again, seeks to have this Court preclude the government from raising such arguments at trial pursuant to RCFC 37. *Id.* Aside from this Court's reluctance to apply RCFC 37 sanctions at this stage, *see supra* Sec. II.A.1, the government in any event represents that it does not intend to argue that the charges are "discriminatory" in the manner that Wilmington assumes. Def. Resp. at 9–12. The government explains in its response, and further clarified this point during oral argument, that it is challenging the fairness of the stormwater charges generally. *Id.* The government does not intend to argue that the charges are "discriminatory" in that sense that Wilmington is targeting federal properties for unfair treatment. *Id.* Rather, the government intends to present evidence to support its view that the service charges associated with certain property classifications do not accurately reflect the relative benefits from the stormwater management program and contributions to stormwater run-off. *Id.* Accordingly, the Court **DENIES** the motion to exclude this argument as moot.

4. "Attorney-Client Privilege Documents" Argument

"Out of an abundance of caution," Wilmington asserts in its motion *in limine* that the government should be precluded from using any materials demonstrating or supporting the government's contemporaneous assessment that the stormwater charges were unreasonable. Pl. Mot. at 13–16. This is because, according to Wilmington, the government previously shielded those documents from Wilmington during discovery by invoking attorney-client privilege. *Id.* While the Court is unsure whether or how the government's contemporaneous assessment is relevant to the Court's *de novo* review of Wilmington's claim for payment pursuant to the statute at issue, the Court cannot conclude at this stage that the government's views at the time it declined to pay Wilmington's charges are irrelevant. In any event, the government represented to the Court at oral argument that the government does not intend to rely upon any privileged materials, not previously disclosed to Wilmington, during the trial. The Court will hold the government to that commitment during trial. Accordingly, the Court **DENIES** the motion to exclude this argument as moot, as well.

B. Dr. Grigg's Expert Testimony

Wilmington requests that the Court exclude portions of the expert testimony proffered by Dr. Neil S. Grigg, professor of civil and environmental engineering at Colorado State University. Pl. Mot. at 17; ECF No. 70-2 ("Grigg Rep.") at 1, 17. The

government intends to have Dr. Grigg testify that Wilmington's service charges related to the properties are unreasonable for nine reasons. *See* Grigg Rep. at 1–3. Wilmington primarily contends that opinion nos. 3, 8, and 9 of Dr. Grigg's testimony constitute hearsay because they rely on the opinions of other "undisclosed" and "non-testifying" experts who work for the Army Corps of Engineers and therefore should be excluded pursuant to Federal Rule of Evidence 703. Pl. Mot. at 17–24.

In opinion no. 3 of his expert report, Dr. Grigg concludes that Wilmington inaccurately calculated the stormwater charges based on an analysis of the physical characteristics and aerial photos of the properties. Grigg Rep. at 5–6. He additionally explained that "[t]he low contributions of the properties to stormwater pollution can also be demonstrated by their actual land use and by modeling results, which are included with this report as Appendix 6." *Id.* at 5. Appendix 6 contains site and hydrologic modeling data intended to "demonstrate how much runoff would leave the [properties] after a typical rainfall." *Id.* at 40–43. Robert J. Moore, a hydraulic engineer with the Army Corps of Engineers, provided this modeling information to Dr. Grigg. *Id.* at 42. The government did not disclose that Mr. Moore would be called to testify; rather, Dr. Grigg intends to utilize Mr. Moore's modeling as part of his expert testimony. Pl. Mot. at 22–24.

In opinion nos. 8 and 9, Dr. Grigg referenced Appendix 4 of his report, which contains data relating to the properties' measurements. Grigg Rep. at 11–14. In Appendix 4, Dr. Grigg indicated that the Army Corps of Engineers provided maps and accompanying analysis that demonstrate a different computation is warranted (*i.e.*, from that of Wilmington). *Id.* at 32–36. Heather M. Sachs, a realty specialist with the Army Corps of Engineers, provided that property information to Dr. Grigg. Pl. Mot. at 23–24. The government, however, did not disclose Ms. Sachs as a fact witness. *Id.*

Rule 703 of the Federal Rules of Evidence provides that an expert is permitted to rely on evidence that is otherwise inadmissible, "if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." The Advisory Committee Notes to the 1972 Proposed Rules permit a doctor to rely on "statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays." Fed. R. Evid. 703 Advisory Committee Note. "One expert may not, however, merely adopt another expert's opinions as his or her own reflexively and without understanding the materials or methods underlying the other expert's opinions." *U.S. Bank Nat. Ass'n v. PHL Variable Life Ins. Co.*, 112 F. Supp. 3d 122, 130–31 (S.D.N.Y. 2015); *see Mike's Train House, Inc., v. Lionel, L.L.C.*, 472 F.3d 398, 409 (6th Cir. 2006) ("Other circuits have squarely rejected any argument that Rule 703 extends so far as to allow an expert to testify about the conclusions of other experts."). Indeed, this would "allow a witness, under the guise of giving expert

testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion." *Brace v. United States*, 72 Fed. Cl. 337, 352 (2006) (internal quotation marks omitted).

While Wilmington correctly notes that there is case law supporting its position that expert testimony can become inadmissible when it is based on the opinions of another, Pl. Mot. at 19–20, those cases are not comparable to the case at hand. Those cases establish that an expert cannot submit a report as substantive evidence of his or her conclusions that was not used in formulating his or her expert opinion, *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1060–62 (9th Cir. 2003), and that one expert cannot testify in support of the conclusions of another non-testifying expert. *Mike's Train House, Inc.*, 472 F.3d at 409;[5] *United States v. Grey Bear*, 883 F.2d 1382, 1392–93 (8th Cir. 1989).

Wilmington relies extensively on *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002), but that case is not particularly helpful to Wilmington's argument. *Dura* involved an expert witness relying on the computer modeling his assistants created where the "underlying expert judgment is in issue" and where the models were "inherently not the most precise of scientific tools." 285 F.3d at 613–14. Further, the expert witness *admitted* that he was not qualified to discuss the modeling. *Id.* at 611–12; *see Uncommon, LLC v. Spigen, Inc.*, 305 F. Supp. 3d 825, 845–46 (N.D. Ill. 2018) ("In *Dura*, the plaintiffs' sole named expert admitted in depositions that his analysis relied upon mathematical models that he lacked the expertise to evaluate.").

In the present case, in contrast, Dr. Grigg intends to incorporate into his testimony the analysis of Mr. Moore and Ms. Sachs. Notably, Wilmington does not seriously contest either the accuracy or the soundness of the underlying computer modeling or mapping data that Dr. Grigg relies upon in his report; nor does Wilmington contend that experts in Dr. Grigg's field do not regularly rely on such analysis. *See* Pl. Mot at 17–24. Although Wilmington claims that Dr. Grigg does "not understand[] the software, methods, or data used . . . due to a lack of access to or competency in the methods employed by the [Army Corps] experts[,]" *Id.* at 21, Wilmington provides no factual basis to substantiate its bald assertion. Wilmington further asserts that "Dr. Grigg never worked with the [Army Corps] experts, had no input in choosing who would conduct the research, and did not supervise the activities of the [Army Corps] experts." *Id.* at 21–22. These all may be true criticisms. But none

[5] Indeed, in *Mike's Train House, Inc.*, the expert witness "testified *extensively* about the conclusions" reached by a different, non-testifying expert. 472 F.3d at 409 (emphasis added). In contrast, Dr. Grigg's report makes minimal mention of Mr. Moore's and Ms. Sachs' work. *See* Grigg Rep. at 5, 11–14.

of these alleged failures purport to show that Dr. Grigg does not understand Mr. Moore's or Ms. Sachs' analysis. Accordingly, Wilmington's criticisms "go to weight, not admissibility[,]" and may be explored on cross-examination.[6] *U.S. Bank Nat. Ass'n*, 112 F. Supp. 3d at 131.

Wilmington offers additional arguments in support of excluding other portions of Dr. Grigg's expert testimony. *See* Pl. Mot. at 25–37. Given that these arguments raise issues based either on the relevancy of Dr. Grigg's testimony or exhaustion of Wilmington's appeal process, the Court denies these parts of Wilmington's motion, for the reasons explained above. *See supra* Sec. I (relevancy of expert testimony); Sec. II.A.1–2 (exhaustion).

C. Mr. Kelly's Testimony

Finally, Wilmington seeks to exclude Daniel Kelly's testimony at trial, arguing that the government did not properly disclose him as a witness. Pl. Mot. at 37–38. But Wilmington critically undercuts its own argument. In its motion *in limine*, Wilmington concedes that the government included Mr. Kelly in its initial disclosures as one of 13 individuals who may possess discoverable information. *Id.* at 38. Wilmington also acknowledges that, in response to an interrogatory seeking a more definite list of trial witnesses, the government incorporated its initial disclosures by reference. *Id.*; Def. Resp. at 24. While Wilmington understandably would have preferred a more specific witness list at the outset, the Court cannot conclude that the government somehow failed to disclose Mr. Kelly as a potential witness. To the extent that Wilmington believes that it will be prejudiced by not having deposed Mr. Kelly, Wilmington should have filed a timely motion to reopen discovery for the limited purpose of taking Mr. Kelly's deposition and not wait until this late date to seek the exclusion of his testimony.

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[6] This conclusion also resolves the additional issue of Mr. Moore's and Ms. Sachs' testifying at trial. The government originally did not disclose that Mr. Moore and Ms. Sachs would be called as witnesses; rather, the first mention of their testifying was in the government's witness list submitted along with its pre-trail memorandum. *See* ECF No. 64-1. Wilmington, in its motion *in limine*, moved to have them excluded pursuant to RCFC 37. Pl. Mot. at 37. The government in response indicates that it included Mr. Moore and Ms. Sachs on the witness list only "out of an abundance of caution" because the government was concerned that "Wilmington might attempt the type of collateral attack on Dr. Grigg's report that it attempts with this motion in limine." Def. Resp. at 21 n.11. Because the Court will permit Dr. Grigg to address Mr. Moore's and Ms. Sachs' analysis, there is no need for them to testify at trial and, accordingly, Wilmington's motion to exclude their testimony is **DENIED** as moot.

CONCLUSION

The parties' motions for leave of the Court to file responses to the pre-trial memorandum of contentions of fact and law hereby are **GRANTED**. For the reasons explained above, the Court **DENIES** the government's motion *in limine* and **DENIES** Plaintiff's motion *in limine*.

IT IS SO ORDERED.

s/ Matthew H. Solomson
Matthew H. Solomson
Judge

In the United States Court of Federal Claims

No. 16-1691C

(Filed: April 6, 2021)

CITY OF WILMINGTON, DELAWARE,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

ORDER

On April 2, 2021, Plaintiff filed a motion for reconsideration of the Court's March 14, 2018 Order (ECF No. 28) and March 4, 2021 Order (ECF No. 91), pursuant to Rules 54(b) and 59(b) of the Court of Federal Claims. ECF Nos. 95, 96. On April 6, 2021, the Court held a status conference to discuss Plaintiff's motion. EFC No. 97. For the reasons discussed with the parties during that status conference, the Court hereby **DENIES** Plaintiff's motion for reconsideration.

IT IS SO ORDERED.

s/Matthew H. Solomson
Matthew H. Solomson
Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CITY OF WILMINGTON, DELAWARE, a municipal corporation of the State of Delaware, Plaintiff, vs. THE UNITED STATES OF AMERICA, Defendant.) Case No. 16-1691C

Tuesday, April 6, 2021
10:00 a.m.
Telephonic Status Conference

BEFORE: THE HONORABLE MATTHEW H. SOLOMSON

Transcribed by: Sara J. Vance, CERT

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P R O C E E D I N G S

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(Proceedings called to order.)

LAW CLERK: Okay, we are now on the record. Good morning, everyone. This is City of Wilmington vs. United States, Number 16-1691. The United States Court of Federal Claims is now in session. The Honorable Judge Solomson is presiding.

THE COURT: Good morning, everybody. Can you hear me okay?

MR. NYFFELER: Good morning, Your Honor.

MS. MOTTO: Yes, Your Honor.

THE COURT: Great, thank you. All right. Well, let's jump into this. I have a lot of questions here, mostly for Mr. Nyffeler, but a few for the Government. The first is just a little planning/procedural question here. I know that my law clerk, Mr. Schabes, was in communication with the parties about the pretrial scheduling order, and there were some dates involved, and the parties exchanged some dates.

And, so, my first question is for the Government. Ms. Motto, did Mr. Nyffeler let you know that this was going to be coming? Was this a surprise to you as it was to us?

MS. MOTTO: This was a surprise to us, Your

Honor.

THE COURT: Okay. Mr. Nyffeler, what gives? I mean, we had no idea that you were considering a 50-page motion two weeks out from trial. The Government didn't know. We had -- we were all dialoging about the schedule here, so can you just help me understand?

MR. NYFFELER: Yes, Your Honor. So the issue that we --

THE COURT: Wait. Wait a second.

MR. NYFFELER: Sorry.

THE COURT: Help me understand very briefly what is the concern that is motivating this? Please keep it simple. I don't want a summary of your 57 pages here. So just --

MR. NYFFELER: No, Your Honor. Essentially, what we were trying to raise was that there were arguments that we were not allowed to make in the past, and we --

THE COURT: Stop, stop.

MR. NYFFELER: -- wanted the Court --

THE COURT: What does that mean, not allowed to make?

MR. NYFFELER: So with regard to the motion, the motion for partial judgment on the pleadings, there were -- there were findings made by the Court after the

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briefings were concluded that were not raised in the parties' briefs, and so we were --
THE COURT: Who had the last word in that briefing?
MR. NYFFELER: What's that?
THE COURT: Who had the last brief in that briefing?
MR. NYFFELER: Wilmington did, Your Honor.
THE COURT: Okay.
MR. NYFFELER: But the issues --
THE COURT: What does that mean, then?
MR. NYFFELER: -- the issues that were raised and the Court ultimately decided the motion on were not raised by Wilmington or the United States. And, so it was not --
THE COURT: That was not -- the issues weren't raised, or the Court decided to resolve it on a different basis than what the parties briefed, which happens literally all the time, and not as my kids use the word "literally," but literally, literally.
MR. NYFFELER: I understand, Your Honor, but the problem was, is that because we weren't able to respond to those arguments ahead of time, we were not able to discuss why we believed those were not -- not -- a couple -- there were issues that we had with it.

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THE COURT: That was in 2018.
MR. NYFFELER: Yes, Your Honor.
THE COURT: It's now 2021. Why file this two weeks before trial? Why not in 2018, '19, or '20?
MR. NYFFELER: So we raised this issue in our pretrial brief that was filed in November of 2019. We also raised this issue in our motion in limine. We -- the United States raised this same issue in the joint status report filed -- was it in January, I think, of this year? -- about how the fact that there are issues that still -- we lack sufficient clarity on. And our understanding was, is that the way that -- and we drafted those briefs. They were drafted to Judge Williams, and we under- -- we thought we were on the same page with the way that she was approaching things.
Now, in terms of why the timing now, this was not -- this was not something that we planned. This was something that we intended to do at the time that we did. The problem is, is that after we had the oral hearing with Your Honor and then we got the ruling, our concern was that these arguments weren't presented in the record and the Judge has -- I mean, Your Honor, hasn't had a chance to consider those. And we prepared this as fast as we could. But, you know, we're trying to get -- I'm trying to get ready for trial. There's a lot going on.

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And I tried to get this --
THE COURT: Okay. In the future, my advice is to at least let the Court and the Government know that you're going to be filing this and to build it into the schedule, or I could have told you to save you time, because you wrote a lot of paper, and I can tell you that the likelihood that you succeed on this motion at the end of the day is relatively small.
All right. Let's jump into the substance. Please take a look at page 17 of your brief. It's ECF page 25 of 57 of Document 96.
MR. NYFFELER: Yes, Your Honor.
THE COURT: "Because the Court has" -- you say in the bottom of the first and only full paragraph on page 17, "Because the Court has already ruled that Defendant is subject to and must comply with the administrative appeal provision of Wilmington's ordinance, the United States has already acknowledged that it bears the burden of proving that its failure to exhaust its remedies should be excused," citing Judge Williams' 2018 opinion.
I've got it open. I want you to show me where she holds that and where the United States acknowledges that.
MR. NYFFELER: Well, so on page --

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THE COURT: Let me read to you from her opinion at Headnote 9 and 10, at least on the Westlaw version, on the same page that you cite, page 633, "Because Defendant was not required to pursue the City's appeals process..." Where does she hold that the Defendant is subject to and must comply with the administrative appeal provision?
MR. NYFFELER: So she held -- I've got to open up -- well, she ruled that the United States was subject -- Wilmington --
THE COURT: Yeah, just read it to me. Let's -- I want -- I want the quote.
MR. NYFFELER: Let me pull up the -- hang on a second, Your Honor.
THE COURT: Sure.
MR. NYFFELER: Okay. So on page 633, it's after the discussion of 1323(a), where it says Section 1323(a) of the Clean Water Act makes the Government "subject to and requires it to 'comply with' federal, state, and local requirements in the same manner, to the same extent, as any nongovernmental entity. Here, the United States is a property owner in the City of Wilmington subject to the locality's code." And, so, our code requires that you have to file an appeal.
THE COURT: Whoa, whoa, whoa, whoa, whoa, whoa. Show me where it says that the Government must comply

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with the administrative appeal provisions of Wilmington's ordinance.
MR. NYFFELER: What we said, what she said, was it's applied to the code, and our code requires that they have to -- that they have to appeal.
THE COURT: Because the Court has already ruled that Defendant is subject to and must comply with the administrative appeal provision, did she hold that? Did she hold, did she rule that the Government has to comply with the administrative appeal provision?
MR. NYFFELER: She ruled --
THE COURT: I'm reading the line that says because Defendant was not required to pursue the City's appeal process.
MR. NYFFELER: Yes, Your Honor. She said that because it had the word "may" in it that it was optional.
THE COURT: Show me where the United States has already acknowledged that it bears the burden of proving that its failure to exhaust its remedies should be excused.
MR. NYFFELER: Okay, that was in their brief that they filed.
THE COURT: Is that cited here in your brief?
MR. NYFFELER: Yes.
THE COURT: Where can I check that? No, no,

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no, on page 17.
MR. NYFFELER: Right. It's -- it's right above that, Your Honor. I said it should come as no surprise to the United States it must bear this burden. In its opposition to Wilmington's motion for partial judgment on the pleadings, the United States acknowledged "If the Court were to conclude the United States could waive its argument that a municipality's government charter was not a 'reasonable service charge,' by failing to participate in an appeal procedure that was required for the non-federal customer/taxpayer as a municipality, the United States intends to prove that it 'should be excused from the alleged failure by acknowledging Axiom --
THE COURT: In this sentence -- this sentence is, like --
MR. NYFFELER: -- under federal law."
THE COURT: -- ten lines long. Mr. Nyffeler, this is really inexcusable, this representation here. And if I see this happen, something like this again, it's not going to go well. Don't do this again. This is not an accurate representation of what Judge Williams held. I'm not sure that this is what the United States ever said, and I won't tolerate this kind of misrepresentation of what our Court has said or documents or pleadings. I just won't do it. Okay? I have to be able to trust what

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everyone writes, and I can't go having my clerks -- or I can't take the time to check every dot and tittle of everything that people say in their briefs.
MR. NYFFELER: I understand, Your Honor.
THE COURT: Am I understood?
MR. NYFFELER: Yes, sir.
THE COURT: Okay. Next issue. On the merits of this whole exhaustion thing, I think this has been well settled, and I think I made myself clear in the motion -- in the ruling on the motion in limine. Here is my current view, and I want to understand your different view, but my current view is that Judge Williams answered the question as a legal matter, and I answered the question as an evidentiary matter for trial. I have not weighed into the meaning of the statute or how it functions. All I said was that I would not preclude the Government from putting on whatever evidence it wants in order to show that the Plaintiff is incorrect about whether the invoiced charges or the billed charges or the assessed charges are reasonable, because what we have here is a plaintiff under a money-mandating statute that is trying to show that it is entitled to compensation under a statute that mandates a certain payment. The Plaintiff bears the burden of proof until demonstrated otherwise, and so you have to show that your client is

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within the class of plaintiffs and that it meets the statutory requirement and, therefore, deserves to be paid by -- by the Federal Government. And the Federal Government is here saying, nope, you haven't met the statutory criteria for payment, and we're not paying you. And, so, all I've said so far is the United States is free to put on whatever evidence it deems fit in order to show that the charges are not correct, the invoiced charges are not correct and that Plaintiff is not entitled to compensation under that statute.
As I understand Wilmington's argument, it's that there's a class of evidence that Wilmington doesn't think that the Government should be able to put on because as a matter of law, it is not relevant because they failed to exercise -- the Government failed to exercise Wilmington's administrative process. Do I understand the basic gist of that argument?
MR. NYFFELER: That is correct, Your Honor. It's not --
THE COURT: Okay.
MR. NYFFELER: -- it's not --
THE COURT: That has been answered as an -- for the purposes of trial. Done. It's over and finished. It's been done twice now, at least twice. Okay? So that is done. They're going to be able to put on their

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evidence. And what I said in the written decision on the motion in limine is that you are free to argue until final judgment, as you point out, that the statute has a certain meaning or that the combination of the United States Code and the Wilmington Code has a certain outcome to it that renders the evidence at the end not sufficient or somehow means that the Government can't show that it's -- that the charges were unreasonable, not that they have the burden to do that, but that the evidence wouldn't tend to show that, but I'm not precluding you from making that argument, and that has not changed.

MR. NYFFELER: Okay. And, Your Honor, that's -- thank you very much. That was a point that I wasn't -- that we weren't sure on, but whether -- whether we could, then, argue that the evidence that was presented at trial does not ultimately allow the United States to have bypassed what they did. That -- yes.

THE COURT: Tell me, how would that impact trial at all, though? You're not putting on any evidence. We know that they didn't exhaust that -- I don't want to use a loaded phrase. They didn't avail themselves of any administrative process. And you want to argue that that has a legal implication, but that doesn't affect the presentation of your evidence at trial in any way.

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MR. NYFFELER: That's correct, Your Honor. It does not.

THE COURT: So you needed 57 pages, seriously? All right. I have a substantive question on this very point, though. You say that -- well, actually, I'm not sure what you say. According to your view of the Wilmington Code provision that sets up the administrative appeals process, had the Government availed themselves of it and had they been successful in that administrative process, would their success apply to the charge they're appealing or only going forward for future charges?

MR. NYFFELER: It depends on when the appeal was done, okay?

THE COURT: After they received the charge.

MR. NYFFELER: Okay. So if -- so if we're talking about, you know, the first charge, 2011, if it shows up and they get the bill and they file the appeal in -- the bill was -- the first bill was January, February, March. They get the bill; they appeal in April. Okay? Under Wilmington's ordinance, if they were successful in the appeal, then their -- the changes that would be required if they succeeded to their charge would not be applied retroactively to the January/February/March, but it would be applied to the April/May/June bill and every bill thereafter.

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THE COURT: All right, I've already lost you. In the hypothetical, which -- what invoice are they appealing?

MR. NYFFELER: So they could have been appealing the January/February/March, or, like, that could be the bill that they submitted and said we want to appeal this assessment.

THE COURT: Are the bills done monthly, quarterly?

MR. NYFFELER: At that time it was quarterly.

THE COURT: So if they get a quarterly bill, let's just for the sake of argument, January, February, end of March --

MR. NYFFELER: Yes, sir.

THE COURT: -- April 1, they get a bill for the first three months.

MR. NYFFELER: Yes.

THE COURT: And they file an appeal on that quarter. Does the result of a successful appeal apply to January/February/March or not?

MR. NYFFELER: That bill's amount could not be lowered or changed in their favor. But if they were successful in establishing whatever error they believe was incorrect --

THE COURT: So it's your contention, then, that

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under the statute, if there was an entirely unreasonable discriminatory charge contained in a bill, the United States can't do anything about it under this administrative process for that quarter, that hypothetical quarter?

MR. NYFFELER: Well, the appeal process existed since 2007, so that could have been dealt with before.

THE COURT: Let's say they didn't want to deal with it before, and -- for whatever reason. Now they get a new invoice. You're not contending anywhere here, as far as I can tell, that just because you had a legal argument that you could have made in 2010 that now somehow you've waived that argument for a new charge. I mean, every recurring charge gives the United States -- gives any invoicee the right to file an appeal with respect to the new charge, right?

MR. NYFFELER: That -- that is correct. Yes.

THE COURT: Okay. So, again, they get -- the United States gets an invoice for January/February/March of 2011.

MR. NYFFELER: Yep.

THE COURT: They file an appeal; it only applies, as the United States says, prospectively, but not to the current invoice.

MR. NYFFELER: That is correct. The statute

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of --
THE COURT: Which means that your position -- which means that your position, as I think Judge Williams recognized, is that there would, in fact, be a draconian result, which means that no matter how unreasonable the charge is, Wilmington's view is that it's done and over.
MR. NYFFELER: With regard to that bill that they could have appealed before. And, so --
THE COURT: How? How can you appeal a bill before you get the bill?
MR. NYFFELER: Oh, they've been receiving the bill since 2007.
THE COURT: Right, but that goes back to the argument you already abandoned. It can't be that just because you had an argument that you could have made, a legal argument that you could have made with respect to an earlier quarter, that doesn't mean that you waived that argument for all future bills.
MR. NYFFELER: Okay. What I'm trying to say is for the January/February/March bill, if they had a problem with the way it was going to be billed, they could have appealed it in December; they could have appealed it in January.
THE COURT: How do you -- how? How do you know how you're going to be billed?

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MR. NYFFELER: Because they have all the other bills. They -- I mean --
THE COURT: Right, but that's the same -- we just went through this. Let me back up.
MR. NYFFELER: Okay.
THE COURT: In 2009, last quarter in two -- or, no, we were talking about 2011.
MR. NYFFELER: Yeah.
THE COURT: In 2010, last quarter, so that would be October, November, and December, so January 1 of 2011, you get a bill for the previous quarter, and the Government looks at the bill and says, hey, we think that this calculation is wrong because we have a lot of wetlands and we should really challenge this. And someone says, eh, it's for $1,000, it's not worth it, let's pay it and move on.
MR. NYFFELER: Okay.
THE COURT: Okay, great. So they say we're not going to challenge the wetland issue at all. Then, they get a $5 million bill in the first quarter of 2011.
MR. NYFFELER: Okay.
THE COURT: You just told me that when they, then, go to challenge that bill in -- that they received, I guess, January/February/March, they receive in April of 2011 in this hypothetical, they cannot challenge the $5

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million bill in the appeals process because that would be backwards. Now you're telling me that because they could have challenged the $1,000 bill they're out of luck on the $5 million. That's what I heard you say, and that is borderline insane.
MR. NYFFELER: Well, no --
THE COURT: Clinically.
MR. NYFFELER: -- the problem with -- forgive me. The problem with the hypothetical is is that the bill from the end of 2010 was no different than the bill in 2011. So it's the same.
THE COURT: Yep, okay.
MR. NYFFELER: And, so --
THE COURT: I'm sorry, what -- that's not a problem with the hypothetical. My question stands. What part of it -- what part of your argument am I missing, and what -- what part of the conclusion is wrong? Can they challenge the 5 million in your view of the law or no?
MR. NYFFELER: I mean --
THE COURT: I hear you saying no because they could have challenged the $1,000 the quarter before.
MR. NYFFELER: Right. So my question is, you know, did the City Council change the rates? I'm trying to understand how it goes from 1,000 to 5 million.

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THE COURT: Who cares? That's my hypothetical.
MR. NYFFELER: Sure. Well, it matters because if the City Council passed it then, you know, they would have had notice that it was coming. I guess my concern with your hypothetical is --
THE COURT: No, but you're contending as a matter of law that there's this exhaustion doctrine that they had to avail themselves of. And what Judge Williams said is that means that Congress could be authorizing a payout of an unreasonable sum simply because the government didn't follow the local appeals process.
MR. NYFFELER: That --
THE COURT: Which -- which is not retroactive, which is only prospective. So, then, that means the United -- what is the United States' remedy in the case where they disagree with the bill?
MR. NYFFELER: Oh, okay.
THE COURT: They had to appeal the first one that they got?
MR. NYFFELER: Okay. So what they could do is they get the bill for $5 million in April. They file the appeal with the City. And, then, maybe the City agrees and maybe the City -- well, first of all, if the City agrees that it was a mistake, at a minimum, that error will be corrected for the April/May/June bill and every

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bill after.
THE COURT: No, no, I'm talking about the $5 million charge in my hypothetical.
MR. NYFFELER: I understand. So but what I'm trying to say is it's not -- the prospective works for the forward-facing bills, but in terms of the $5 million, if the City would not change that bill on appeal for whatever reason it was presented, then the United States would have the ability to go to the Superior Court in Delaware through a writ of certiorari and -- and request a review of the overall -- the charge itself.
THE COURT: Wait, so can -- is that with or without following the appeals process
MR. NYFFELER: That -- that is part of the appeal process.
THE COURT: What about the for the bill that they already received, for the first quarter of 2011 in my hypothetical, the $5 million invoice?
MR. NYFFELER: Right.
THE COURT: Are they out of luck, it's binding, conclusive, and there's no way to dispute it? It's just a collections matter that Wilmington can -- if they were a private party -- forget the Government for a second.
MR. NYFFELER: Sure, sure, sure.
THE COURT: You know --

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MR. NYFFELER: They could -- they could --
THE COURT: -- Costco has a bunch of warehouses --
MR. NYFFELER: Sure.
THE COURT: -- and they get a stormwater charge. I don't know how this works, so --
MR. NYFFELER: Right.
THE COURT: -- are they out of luck for that quarter?
MR. NYFFELER: They could go to court and argue that the -- they could argue to the court that the charge is unreasonable, unconstitutional, whatever the -- I mean, whatever the reason or basis is that they would believe that that charge is too high.
THE COURT: So how is there exhaustion if they could go right to court?
MR. NYFFELER: No, no, no. I said they -- they first have to go through the appeal in the City.
THE COURT: No, no, I just -- we just established that there's no retroactive application to the $5 million quarter charge for January, February, and March.
MR. NYFFELER: That's right, but you --
THE COURT: So how do you challenge that, or is it not challengeable?

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MR. NYFFELER: It's challengeable after you appeal with the City and the City will then, in this scenario, deny it because they couldn't do it retroactively, and then it would go to the Superior Court and you could challenge the legality of the -- of the charge itself.
THE COURT: So I have to -- so your contention is that this ordinance requires a party that receives an invoice to file an appeal, lose the appeal, even though there's no relief that could be granted retroactively for the invoice received.
MR. NYFFELER: Under Delaware law, yes. That's the way it -- yes.
THE COURT: Okay, tell me how it works on page 19 of your brief, where you quote an 1880 case that says you have an -- a party has an adequate remedy at law because you can pay the protest -- you can pay under protest the amount demanded and then bring an action against the City to recover it back. First of all, does this 1880 case, which I have not reviewed, assume the stormwater ordinance appeal process? What is this 1880 case talking about?
MR. NYFFELER: This case -- it's the 18- -- oh, the 1880 case, sorry. Yes. So the purpose was that in order to --

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THE COURT: Well, tell me what the facts were in that case. When you're citing cases to me, what were the facts in Murphy vs. Wilmington?
MR. NYFFELER: Just a second. That case involved -- as I recall, that case involved a charge by the City of Wilmington attempting to require property owners to pay for installation of sewers, I think, in 1880. And the problem was that the court had ruled -- eventually ruled that the City of Wilmington didn't have a legal authority to require property owners to actually pay that. That should have been on, you know, the City's dime. They should have paid for that.
And, so, what the Supreme Court of Delaware ruled was in this instance, you should have paid what they asked and then sued and argued that the law -- or the actions of the City itself were unlawful or unconstitutional. And, then, the City would --
THE COURT: The case in 1880 addressed exhaustion? It seems to me that this case you cited suggests that exhaustion is not necessary, you can pay and sue.
MR. NYFFELER: I don't recall if there is -- there was an appeal process with the City in that case.
THE COURT: Okay, I think it's a serious problem with this argument and it continues to be and

will be in the long run with me if the -- if the result of your position, of the City's position, is that the United States has no remedy for retroactive bills and that even if you were to tell me that they could sue for a refund, the idea that Congress authorized only the payment of reasonable charges but what they have to do is pay an unreasonable and then sue for its return, the odds that you persuade me that that's a correct view of the statute is rather minuscule.

All right, I have one more comment about your argument here about de novo review versus the burden of proof. Frankly, I didn't follow your point almost at all. I want to give you a chance to explain what your concern is, but let me just tell you my view first. My view is that those are two separate questions. There's a -- standard of review and a burden of proof are separate concepts.

This is a trial court, and although sometimes this particular trial court does engage in administrative record review under the APA where there's deference to the agency and the like and where the agency may engage in factual findings to which we give some deference, that's not this case. This case is a case of whether or not you're entitled to compensation under a money-mandating statute. And your burden is to prevail on the

preponderance of evidence, which means you more likely than not –- given the facts, you're entitled to compensation.

The question about what the statue means is de novo. I'm not giving deference to Wilmington's view of what the statute means. And as far as I understand, there's no administrative process here from the agency or regulation that I'm deferring to about what the statute means. Now, maybe there are regulations that interpret the statute, in which case they'll get whatever deference the Supreme Court says we give to regulations, but I don't understand what your point is about de novo and preponderance of evidence. I just don't get it at all.

MR. NYFFELER: Sure. This is driven -- well, the issue of de novo review is not something that we raised in this case. The United States has been insisting on it, and we don't understand why this is coming up in the first place.

THE COURT: I can explain it to you, and then I'll let Ms. Motto tell me whether I got it right from her perspective. What they don't -- what their problem is, and this happens in CDA cases, is that you took discovery and got permission to get -- and got the permission to take discovery, as I would have as well, as to the contemporaneous view of the United States about

the reasonableness of the charges. This happens all the time when a CO, a contracting officer, in a CDA claim may have a view about whether a certain cost is reasonable or allowable. There's a legal question involved, though, and so oftentimes, plaintiffs want to get into evidence the admissions from some representative of the United States about the reasonability of a particular cost. But if as a matter of law the cost is not reasonable, who cares what the CO thought about it. That's at least going to be the United States' view.

So the fact that you were able to get discovery about what they thought about particular invoices and when, you know, yes, that might be reasonably calculated to the -- to lead to admissible evidence and, therefore, discoverable. That doesn't mean that it's probative of the answer as a matter of law as to whether or not the charges are recoverable.

Now, this is a bench trial, so the odds that I keep any of that out is minuscule in your favor, but ultimately the United States' point is going to be people weren't scrutinizing the invoices and, you know, if ultimately they didn't -- they weren't aware of the percentage of wetlands or whatever, who cares? Why is that relevant to the legal question about the reasonability of charges? And to that extent, it's de

novo, meaning none of the admissions that are made -- I mean, the admissions can be admissible as admissions, but that doesn't mean that they're binding admissions that somehow precludes the Justice Department from now arguing about what the United States' position is here as a matter of law.

Let me pause, Mr. Nyffeler, and I'm guessing I got that right from Ms. Motto's perspective, but I'll let her speak for herself.

MS. MOTTO: You got it right, Your Honor. That would be our position to a tee.

THE COURT: And that's what de novo review here means, and that's the same thing that happens in a CDA claim. It's de novo, meaning the Court is looking as to whether the plaintiff is entitled to compensation as a matter of law. And the fact that the CO might have thought something is not binding on the Government.

MR. NYFFELER: Right, Your Honor. I agree with -- with everything you said. The issue has to do with timing. So in 2011 when the first bill was due, the question is what did the agency believe when they didn't pay the charge. Now, it may be that there's evidence that they believe it should be paid and they still didn't do it, maybe there's not, but our point is the Supreme Court has said that when you look at the intent of the

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parties and what it was that they were doing at the time, it's the contemporaneous evidence that should be given more weight than arguments that are raised for the first time in litigation trying to explain what was done.

THE COURT: Right. I got no problem with that, and neither does Ms. Motto.

MR. NYFFELER: Okay. The United States, though, has taken the position in the past with this de novo review that not only is contemporaneous not -- evidence not relevant, but the Court -- I mean, the Court shouldn't even consider it at all. And that's my concern, is that -- it should all come in, and we want Your Honor to consider it. I know it's -- there's -- it's de novo and you're giving deference to no one.

THE COURT: Let me give you an example. Let me give you an example.

MR. NYFFELER: Sure.

THE COURT: If the person who's doing the invoices, I don't care if they're a regional administrator or a deputy secretary, is operating under the assumption that the charges look reasonable --

MR. NYFFELER: Mm-hmm.

THE COURT: -- and that they should be paid, and for whatever reason they're not paid, if the Government can then establish as a matter of law that

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there's a percentage of wetlands that should have been taken into account and were not, who cares that anyone thought that the charges were reasonable when they were received?

MR. NYFFELER: Well, the reason why that particular instance matters is because if at the time somebody looked at those charges and said, wait a minute, there's a wetland there, we can -- we should apply for a credit or we should make an appeal, then the issue then is that at that time, they had a legal window where they could have actually raised it at that time and not waived it.

THE COURT: Well, let's say it's -- let's say, I don't know, that there's a waiver, but put aside the waiver. We're talking about the evidentiary matter as to the weight of a particular government official's view at the time versus what the Court finds to be reality.

MR. NYFFELER: Right.

THE COURT: The point is is that what -- all de novo review means is that -- is that the Government is not bound by those views, and the Court is not bound by those views. I'm not required to give deference to them as a legal matter. As an evidentiary matter, it might be more -- you might argue that it's more probative of reality. For example, if the nature of the land's

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character shifted over time and for whatever reason we lacked evidence as to what the character of land was at the time, perhaps you're right that it would be more probative, not -- you know, not the litigation facts that you're putting into evidence now, but what you actually thought prior to litigation about the character of the lands. Okay, I might buy that, but let's assume the character of the lands are stable over nine years. Someone believed that there were no wetlands because they never visited, and now the government is here with experts saying, yes, there are wetlands. Is it your contention that I should disregard reality in favor of someone's mistaken belief that's contemporaneous?

MR. NYFFELER: No, Your Honor. You have -- in my view, you have the right -- you have the right grasp of all of these issues. You know, I guess our position would be in regard to -- I know the specific wetlands, our position would be -- is that, you know, the United States Army Corps of Engineers is in the best position of anyone to know what a wetland is. And, so, they -- if it was a wetland, they would have noticed it in 2011 and they could --

THE COURT: Right, but who's precluded -- I mean, like I said, you filed this huge motion, the Government moved in limine to exclude some amount of

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evidence that I granted. Well, I don't understand. Who's telling you you can't put on contemporaneous evidence or evidence of the Government's contemporaneous views of these invoices? Who said you couldn't do that?

MR. NYFFELER: In your recent order, you said it was unclear how the contemporaneous evidence -- forgive me, I'm paraphrasing --

THE COURT: Did I -- do I forget? Did I grant the Government's motion in limine in part? Did the Government file a motion in limine? I don't even remember what I resolved --

MR. NYFFELER: No. No, Your Honor. The question was about whether -- the question -- the question had to do with whether the United States would be allowed to raise new evidence and -- based on what their attorneys advised, and that was part of our motion in limine. And Your Honor said I don't -- something to the effect of I'm not sure how contemporaneous evidence would apply or something to the effect of something about de novo review. And, so, when -- you know, under a de novo review standard.

And, so, that's why I wanted to be very --

THE COURT: Well, a de novo review standard does apply. That's what I'm trying to tell you, is that it is de novo review. The Government -- the Government's

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contemporaneous assessment of those invoices, I'm not reviewing that -- that decision. That's not how this works. It's a trial. I'm making facts.

MR. NYFFELER: Yes.

THE COURT: I'm making factual findings on a blank slate.

MR. NYFFELER: That's correct.

THE COURT: And you can argue that the facts that you present are more probative of some particular conclusion. You're free to do that.

MR. NYFFELER: Okay.

THE COURT: But that is the nature of de novo review. Are you arguing for some other standard of review?

MR. NYFFELER: No. What I'm -- what I'm saying is, is that the de novo review that works under the CDA, that the United States seems to be pushing for, is not quite in line with what we understand --

THE COURT: No, no. There's only one de novo standard of review, only one. De novo means the same thing in both cases. And no one in CDA cases says that the CO's -- the contracting officer's contemporaneous view of a particular claim item or a particular request for adjustment or a claim for additional cost is inadmissible. But de novo review means that I am making

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factual findings without deference to the agency. Believe me, that's the standard you want.

MR. NYFFELER: I agree. I agree, Your Honor. That's fine.

THE COURT: Okay. I think we're now on the same page. Anyway, this motion's going to be denied in a one-page -- in a one-line order. And, again, you're free in your post-trial briefs to argue the meaning of the statute, the meaning of the -- of the statute and how it works with the -- Wilmington's Code. I think you've preserved the issue. I don't think there's anything to worry about for your appeal.

I'm telling you, though, you've got to, for your own sake, just some more common sense here about how this is going to work. You don't want to be going -- forget me. You're not going to be wanting to go upstairs and telling the Circuit that the Government is without a remedy if it gets an unreasonable bill and there's nothing they can do about it, other than pay the unreasonable bill and then sue for its return in state court.

That sounds bonkers to me. But, of course, if you can show me statutory languages or binding case law or even a hint of legislative history that suggests otherwise, I'd love to see it. I'm not buying that. It

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doesn't make any sense to me. And I'm not even sure I would have gone as far as Judge Williams did in the footnote about a defendant's being subject to -- to exhaustion. I think those cases are distinguishable and rather easily as well.

So, you know, we can -- I'm sure I'll end up writing about that in the post-trial decision, but as far as I'm concerned, I mean, this exhaustion issue, for me, is dead, since you're not going to be presenting evidence about exhaustion, that doesn't even make any sense here. And the Government didn't exhaust, so they're not going to be presenting evidence. This is a pure legal issue that's been resolved now for the third time. So we're done until post-trial briefs about exhaustion, right, because they stipulate there was no exhaustion. They did not use the process, and they don't maintain that they did. They maintain it's irrelevant. Great, so now we're clear.

For the purposes of this trial, you should assume you have the burden of proof to prove that your charges were reasonable. And if you want to argue upstairs that I mis-set the burden of proof or you want to argue in the post-trial brief that I should rejigger the burden of proof, please feel free.

MR. NYFFELER: All right. Thank you, Your

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Honor.

THE COURT: Ms. Motto, I turn it over to you.

MS. MOTTO: Well, thank you, Your Honor. We don't have, you know, much additional to say. I'll just keep it brief. Wilmington, you know, from the beginning of this lawsuit, has kind of run away with Subsection (a) of the statute and has, you know, run so far with it that now we're arguing that, you know, Delaware law exhaustion principles govern, you know, this case. And we haven't briefed, you know, what the statute means. We've always viewed that we will do that in post-trial briefing. And, so, you know, we've never been under the misunderstanding that Wilmington can't argue that we're still subject to it. All of the communications about, you know, what Mr. Homesley -- who is our witness on the communications with the Plaintiff -- what he thought, what the Corps thought, that's all in our joint exhibit list -- our joint list, not even Plaintiff's list; it's our joint list. So all of that's coming in trial. No one has suggested they can't make these arguments, and so I -- I'm not sure --

THE COURT: (Inaudible) one point in an attempt to limit discovery on those subjects, right?

MS. MOTTO: Yes, yes, and then Wilmington filed a motion to compel, and, you know, Judge Williams granted their motion to compel.

THE COURT: (Inaudible).
MS. MOTTO: So, yeah, we understand that evidence is --
THE COURT: In fact, I think I would have done, too, even though I would have made the Government's argument, if I were working there, and I would have ruled the way Judge Williams did working here, and I think that's the right outcome. And I think the best way to look at these issues -- now, this is like I'm just taking off the judicial hat for a second -- the best way to look at this issue is, I think, for Plaintiff's benefit is that, yeah, it's probative, but barely so. It's not going to get you a win, or the circumstances in which that kind of evidence gets you a win is a very narrow set of circumstances that I can't even contemplate right now.
But in the end, the reality of the answers to all these things, right, this happens all the time in contract cases, which I'm far more familiar with, obviously, but, you know, someone thinks a charge is proper under a contract, and all sorts of government officials agree, and then -- I mean, this is a classic de novo review question. This is probably the best metaphor I can come up with, Mr. Nyffeler. Then the government counsel comes in and says none of you all know how to read a contract. It's not allowable. The Court is

reviewing a contract meaning de novo. We interpret the contract as a matter of law. If the government counsel is correct that the cost is unallowable, you can line up, you know, the President of the United States. It wouldn't matter because the contract is what governs the collectability, not some government official's view as to the allowability. If anything, that's kind of classic parol evidence, right? I mean, it's just irrelevant. So, you know, you can get in -- you might be able to get in the testimony as being probative, but, again, barely. And maybe not. Maybe it's not probative in a contract-type case.
And that's all the Government's saying here, is the statute means what the statute means. So you want to put on this testimony, like, you can do it.
MS. MOTTO: Right. And --
THE COURT: It's a bench trial. Anyway...
MS. MOTTO: -- and --
THE COURT: I'm not sure in a jury trial, is what I'm saying, that it would even be -- whether it would be a good idea to admit. That's my point.
Anyway, yeah, keep going. Sorry, Ms. Motto.
MS. MOTTO: No, no. That's okay.
I was just going to say the parallel reference to the CDA is interesting by Mr. Nyffeler because there

is in the prior section of the statute a clear requirement that contractors exhaust their administrative remedies. I mean, that statute explicitly requires a written decision to be submitted to the contracting officer, you know, requesting a sum certain. Wilmington derives this exhaustion requirement from Subsection (a). It has, from the beginning, ignored Subsection (c) of the statute.
Subsection (a) was interpreted by the Supreme Court in the 1970s, that it is a narrow waiver of sovereign immunity for, you know, discharge limitations, laws equating -- laws related to compliance schedules. The Court has interpreted Subsection (a) to be a narrow waiver of sovereign immunity for pollution-control requirements because the --
THE COURT: You know what, Ms. Motto, it sounds to me like what Mr. Nyffeler is arguing is that Subsection (a), I think it is, combined with the Wilmington City Code is what makes that kind of CDA outcome where the failure to appeal renders the non-appeal a binding invoice.
MS. MOTTO: Right, but the United States is only subject to Wilmington's exhaustion requirement if Congress says so. And Mr. Nyffeler pulls -- you know, derives Congress' say-so from Subsection (a). And, you

know, this will be briefed in post-trial briefing. I would just be remiss if I didn't at least say --
THE COURT: Please.
MS. MOTTO: -- the Supreme Court has interpreted what Subsection (a) means because Subsection (a) is limited to local requirements respecting the control and abatement of water pollution. So the question is whether Wilmington's fee adjustment process is a local requirement respecting the control and abatement of water pollution. In post-trial briefing, we will say no, and the Supreme Court has interpreted what that word means. They have interpreted it to mean something narrow. It means a -- like I said, a compliance schedule, a discharge limitation, something to do with water or -- with water pollution laws, not this tenuous local process that Wilmington created.
And even if Subsection (a) isn't clear, you know, what Your Honor and Mr. Nyffeler discussed, Subsection (c) makes clear that Wilmington's system just cannot stand because Congress has said what a reasonable service charge must be, and not allowing the United States to challenge what would be an admittedly illegal, unreasonable charge is inconsistent with very basic notions of sovereign immunity. So we think Subsection (a) will dispense with their argument, and we think

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Subsection (c) just further bolsters that, that this appeal process, we're not subject to it. And even if we were, Wilmington's would be illegal as applied --

THE COURT: I do hope that the Government doesn't put me in the position of having to rest the decision on a narrow waiver and that there's something more than that because that, to me, is, you know, the ultimate tiebreaker, and I hate having a -- the idea of having to make a decision based on a mere tiebreaker. So I hope we can come up with a statutory construction that doesn't rely on just the canon of interpretation.

Let me ask you this, is the Government going to put on kind of an adjusted calculation, or is the Government's case that Plaintiffs can't show that the charges are reasonable and, therefore, judgment should be entered in zero?

MS. MOTTO: Good question, Your Honor. So we have alternate calculations. Our goal -- so we don't think Wilmington can meet their burden, and this is something, you know, that when a plaintiff doesn't meet their burden, they are entitled to nothing. But the Clean Water Act does waive our sovereign immunity for reasonable service charges. So the reasonable thing to do, you know, we came up with alternative calculations. That's what Dr. Grigg will present. He comes up with

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what a reasonable service charge should be for a quarterly charge, and that's what we will be -- that's what our case will be premised on, what a reasonable service charge should be.

THE COURT: And ballpark me, how far away is that calculation from the invoices?

MS. MOTTO: Wilmington -- so we based it off of the 2016 rate, because Wilmington's rate increases. And we don't address interest because the interest at this point has exceeded the principal, and we think we haven't waived sovereign immunity for interest so that is a separate issue, but when it comes to just the principal, Wilmington's quarterly charge was 67,000, the quarterly charge, so about 268,000 a year. Our quarterly charge is 13,000.

THE COURT: Oh. Well, that would make settlement difficult. Okay.

MS. MOTTO: It's about five times -- well, yeah, I mean, settlement was -- was a possibility, but this appeal issue --

THE COURT: Well, I was wondering over how much of a delta are we actually fighting here, but the answer is --

MS. MOTTO: They're five times apart.

THE COURT: -- yeah.

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MS. MOTTO: They're five times apart.

THE COURT: All right. That's fair. I was just making sure that everyone was being rational about this, but you are. Okay.

All right, well, then, fight away. So that's what we're here for. Okay. This makes a lot of sense.

Ms. Motto, any other legal issues here that you -- from the -- anything else in their filing that you want to respond to? You have the floor still.

MS. MOTTO: No. Thank you, Your Honor. I appreciate the opportunity.

THE COURT: Mr. Nyffeler, anything else you want to say?

MR. NYFFELER: Just to thank you, Your Honor, for taking the time to talk with us today about it. We really appreciate it.

THE COURT: Sure. Please, for the love of God, be careful with the assertions you make in your briefs.

MR. NYFFELER: Thank you, Your Honor, we will.

THE COURT: All right? Excellent.

All right. Well, everyone have a great day and continue to keep safe. In the meantime, if anything else comes up pretrial that you want resolved before filing anything -- I'm not mandating this, but shoot an email to Mr. Schabes and, you know, we might be able to dispense

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with paper and we can just get everybody on the phone and talk through the issues. It'll be faster for all of us.

Great.

MS. MOTTO: Thank you.

MR. NYFFELER: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

(Whereupon, the hearing was adjourned.)

In the United States Court of Federal Claims

No. 16-1691C

(Filed: January 26, 2022)

CITY OF WILMINGTON, DELAWARE,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

Paul T. Nyffeler, Chem Law PLLC, Glen Allen, VA, for Plaintiff. Of counsel were *Robert M. Goff* and *Rosamaria Tassone*, City of Wilmington Law Department, Wilmington, DE.

Ann C. Motto, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for Defendant. With her on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, Civil Division, *Martin F. Hockey, Jr.*, Acting Director, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

***SOLOMSON*, Judge.**

Shakespeare observed more than once that "the rain, it raineth every day."[1] It may not rain every day in modern-day Wilmington, Delaware ("Wilmington" or the "City"), but the City charges its property owners monthly stormwater management fees. This is a case about whether the United States government must pay, pursuant to the Clean Water Act, ten years of such fees the City assessed the government for five properties the United States Army Corps of Engineers ("USACE") owns in Wilmington.

[1] William Shakespeare, Twelfth Night, act 5, sc. 1; William Shakespeare, King Lear, act 3, sc. 2.

I. BACKGROUND

A. The Clean Water Act's Federal-Facilities Section — An Overview

The Clean Water Act requires federal property owners to comply with local water pollution laws. 33 U.S.C. § 1323 ("Federal facilities pollution control") (hereinafter the "Federal-Facilities Section"). Specifically, the Federal-Facilities Section subjects every "department, agency, or instrumentality of . . . the Federal Government" with "jurisdiction over . . . property" to "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution." *Id.* § 1323(a). Thus, federal property owners must "pay[] . . . reasonable service charges" imposed by local governments to recover costs of stormwater management. *Id.* The Clean Water Act, in turn, defines a reasonable service charge as (1) "any reasonable *nondiscriminatory* fee, charge, or assessment" that is (2) "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 (3) is "used to pay or reimburse the costs associated with any stormwater management program." *Id.* § 1323(c)(1)(B) (emphasis added).

Because the meaning and application of the Federal-Facilities Section is central to the outcome of this case, the Court briefly traces its development.

B. Clean Water Act History

In 1948, Congress passed the Federal Water Pollution Control Act ("FWPCA"), the Clean Water Act's initial ancestral legislation. Pub. L. No. 80-845, 62 Stat. 1155 (1948); *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 & n.2 (1976). The law empowered the Surgeon General to create, in tandem with Federal and state agencies, "comprehensive programs" to reduce water pollution. § 2(a), 62 Stat. at 1155. The FWCPA, however, spawned a scattered, state-based system of water pollution control "designed to determine what lakes and streams had become polluted" and identify who had polluted them. *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 115 (D.C. Cir. 1976). Attempts to unscramble the polluted eggs after the fact proved "impractical." *Id.*

Congress tinkered with the law in the following years. For example, Congress enacted the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903, which required states to implement water quality standards and empowered the then-Department of Health, Education, and Welfare to promulgate such standards where particular states failed to do so. Soon afterward, Congress passed the Water Quality Improvement Act

of 1970, Pub. L. No. 91-224, 84 Stat. 91, which required federal agencies to comply with water quality standards.

The first major revision of the FWPCA came with the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (the "1972 Amendments"). Together with the 1972 Amendments, the law is more commonly known today as the Clean Water Act. *See DeKalb Cnty. v. United States*, 108 Fed. Cl. 681, 685 (2013) (discussing the 1972 Amendments). Among other changes, the 1972 Amendments addressed the backwards-looking orientation of the FWCPA by directly restricting the amount of pollutants that could be released into a state's navigable waters in the first place. *See EPA*, 426 U.S. at 204. As a result, polluters had to obtain National Pollutant Discharge Elimination System ("NPDES") permits from the EPA or a state *before* releasing pollutants into such waters. *Id.* at 205. States also were required to establish "total maximum daily loads" ("TMDLs") for various pollutants allowed to enter state waters.[2] 86 Stat. at 848 ("Each State shall establish for the waters identified . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . .").

The 1972 Amendments also created the initial version of the Clean Water Act's Federal-Facilities Section, the current version of which is at issue in this litigation. In 1972, that section provided, in relevant part, that Federal agencies and instrumentalities "engaged in any activity . . . which may result, in the discharge or runoff of pollutants shall comply with . . . State . . . and local requirements respecting control and abatement of pollution . . . including the payment of reasonable service charges." 86 Stat. at 875.

In 1976, the United States Supreme Court's decision in *EPA v. California*, 426 U.S. 200 (1976), prompted Congress to further revise the Federal-Facilities Section. The Supreme Court held that although federal facilities must comply with state water pollution requirements like non-federal entities, the 1972 Amendments did "not expressly provide that federal dischargers must obtain state NPDES permits." *Id.* at 212. Rather, the Court held that the "requirements" the Clean Water Act imposed on federal property owners were only "effluent limitations and standards and schedules of compliance." *Id.* at 215.[3]

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[2] TMDLs "are the maximum amount of a pollutant that a waterbody can assimilate and still achieve water quality standards." Plaintiff's Exhibit ("PX") 24 at WILM0011513.

[3] The Supreme Court issued a similar decision, related to the Clean Air Act, the same day the Court issued *EPA v. California*. *See Hancock v. Train*, 426 U.S. 167, 168–69 (1976) ("The specific question is whether obtaining a permit to operate is among those 'requirements respecting control and abatement of air pollution' with which existing federal facilities must comply under

In response, Congress amended the Clean Water Act's Federal-Facilities Section again in 1977 to clarify that federal facilities also had to comply with permitting requirements. Clean Water Act of 1977, Pub. L. No. 95-217, §§ 60–61, 91 Stat. 1566, 1597–98 (the "1977 Amendments").[4] The 1977 Amendments finalized much of the language of the Federal-Facilities Section as currently codified at 33 U.S.C. § 1323. As noted above, Congress expressly required, among other things, that federal facilities "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." 33 U.S.C. § 1323(a). Federal facilities are thus subject:

> (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.

Id.[5] As noted above, and following the Supreme Court's terminology, we refer to that provision as "Section 1323" or the "Federal-Facilities Section." *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 614 (1992).

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s[ection] 118 of the Clean Air Act." (quoting 42 U.S.C. § 1857f (1976)). The Court held that the Clean Air Act, as written at the time, did not "subject[] federal installations to state permit requirements." *Id.* at 198.

[4] According to the Senate Report on the 1977 Amendments:

> The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.

S. Rep. No. 95-370, at 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392.

[5] Although the Court recognizes that legislative history cannot displace or otherwise add to a statute's plain language, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992), a contemporaneous Senate Report listed examples of "requirements" as including "requirements to obtain operating and construction permits, reporting and monitoring requirements, any

Finally, in 2011, Congress amended the Clean Water Act to define "reasonable service charges." Federal Responsibility to Pay for Stormwater Programs Act of 2011, Pub. L. No. 111-378, 124 Stat. 4128 (codified at 33 U.S.C. § 1323(c)) (the "2011 Amendments"). The statute now defines "reasonable service charges" as follows:

> (c) Reasonable service charges
>
> (1) In general
>
> For the purposes of this chapter, reasonable service charges described in subsection (a) include any *reasonable nondiscriminatory* fee, charge, or assessment that is —
>
> > (A) based on *some fair approximation* of the *proportionate contribution of the property or facility to stormwater pollution* (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and
> >
> > (B) used to pay or reimburse the costs associated with any stormwater management program (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.

33 U.S.C. § 1323(c)(1) (emphasis added).

C. Wilmington's Stormwater Ordinance: Wilmington Code § 45-53

Wilmington charges the owners of all properties within its corporate boundaries fees to recover the costs "related to all aspects of storm water management," including capital improvements, flooding mitigation, and watershed planning. Wilmington, DE Code ("Wilmington Code") § 45-53(d). The City first implemented the program in January 2007. Joint Exhibit ("JX") 14 at WILM0000443; ECF No. 81 (Joint Stipulations of

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provisions for injunctive relief and such sanctions imposed by a court to enforce such relief, and the payment of reasonable service charges." S. Rep. No. 95-370, at 67.

Undisputed Fact ("JSUF")) ¶ 5. The program's goal is "to enhance surface water quality by reducing the quantity and rate of stormwater runoff and the amount of pollutants discharged into the rivers, which occur as a consequence of separate stormwater discharges, [combined sewer overflows], and wastewater treatment plant discharges." JX 14 at WILM0000443. The fees Wilmington assessed the government — and that are at issue in this case — are based on this local ordinance.

II. PROCEDURAL BACKGROUND

A. The Complaint

Wilmington filed its complaint against the government on December 22, 2016, seeking to recover "the payment of reasonable service charges" assessed for "the control and abatement of water pollution" pursuant to the Federal-Facilities Section. ECF No. 1 ("Compl.") at 1–3. The City filed an amended complaint on April 16, 2021, primarily to update the amounts for which Wilmington seeks to hold the government responsible. ECF No. 101 ("Am. Compl.").

The USACE owns five properties in Wilmington (the "Properties"), and Wilmington has assessed the USACE stormwater management fees for the Properties "from January 4, 2011 to present." Am. Compl. at 5–13. The City alleges that its stormwater management charges for the Properties are "reasonable service charges properly payable by the United States in accordance with Congress'[s] waiver of sovereign immunity under the Clean Water Act, 33 U.S.C. § 1323(a)." Am. Compl. at 4.

Wilmington claims that the government owes the City $2,577,686.82 in principal charges and $3,360,441.32 in interest for "stormwater fees properly assessed to [the government's] property and facilities." Am. Compl. at 4, 14.

B. Discovery and Summary Judgment Briefing

Earlier in this case, the parties cross-moved for judgment on the pleadings. *See* ECF Nos. 15–17, 24–27; *see also City of Wilmington v. United States* (*Wilmington I*), 136 Fed. Cl. 628 (2018) (Williams, J.) (ECF No. 28). Wilmington argued that the government, by not pursuing Wilmington's administrative appeal process under Wilmington Code § 45-53(d)(7), waived any challenge to the reasonableness of Wilmington's charges. *Wilmington I*, 136 Fed. Cl. at 629–30. On March 14, 2018, Judge Williams denied both parties' motions. *Id.* at 635. Judge Williams rejected Wilmington's claim for two primary reasons: (1) Wilmington's appeal system is permissive, not mandatory; and (2) requiring the government to exhaust its local administrative remedies would severely prejudice the government. *Id.* at 623–33.

The undersigned agreed with — and continues to agree with — Judge Williams' conclusion that the Wilmington Code does not provide that a party waives its right to defend against an assessment outside of the appeal process; nor, for that matter, does the Clean Water Act otherwise operate to preclude the government from defending against the City's charges in this Court. *Wilmington I*, 136 Fed. Cl. at 632. Relatedly, Judge Williams held that the government is not required to "exhaust" the City's administrative appeal process before defending itself in this Court against the City's claims on the grounds that its assessed charges are unreasonable and, thus, are *not* owed pursuant to what is otherwise a money-mandating provision of law. *Id.* at 632–33 (explaining that when Congress has not explicitly required the exhaustion of a particular administrative remedy, "sound judicial discretion" governs the application of the exhaustion doctrine).

Judge Williams reasoned that if Wilmington charged the government unreasonable fees, and the government did not appeal, an exhaustion requirement effectively would force the government to pay unreasonable fees, something the Clean Water Act's limited sovereign immunity waiver for "reasonable" charges does not require and, therefore, does not permit. *Wilmington I*, 136 Fed. Cl. at 633. Put differently, the Clean Water Act is only money-mandating with respect to "reasonable" charges and the government necessarily may defend against Wilmington's claims on the ground that the charges at issue are not reasonable and thus not owed pursuant to law.

Finally, the City's appeal process only permits adjustments to *future* billing cycles. Accordingly, even if the government had pursued the City's appeal process successfully — and this is an issue Wilmington continues to gloss over — that process would not have resulted in any change to the previously assessed fees at issue in this matter. *Wilmington I*, 136 Fed. Cl. at 632–33 (holding that the City's appeal process would not have provided the government with any remedy and that the government's true first opportunity to defend itself is in the instant case).

Following the discovery period, *see* ECF Nos. 30, 42, 54, 56, the parties filed their pretrial memoranda. ECF Nos. 60, 64.

On January 30, 2020, the United States filed a motion *in limine* to exclude the expert testimony of Mr. Hector J. Cyre. ECF No. 68. On January 31, 2020, Wilmington filed a motion *in limine* to (1) preclude the government from asserting certain arguments, (2) exclude the testimony of the government's expert witness, and (3) exclude several of its fact witnesses. ECF No. 69. On February 5, 2020, this case was reassigned to the undersigned judge. ECF Nos. 72, 73. On March 4, 2021, after both motions *in limine* were fully briefed, ECF Nos. 77, 78, the Court denied them. *City of*

Wilmington v. United States (*Wilmington II*), 152 Fed. Cl. 373 (2021) (ECF No. 91). In *Wilmington II*, the Court once again rejected the City's administrative exhaustion argument that was rehashed from *Wilmington I*. *Wilmington II*, 152 Fed. Cl. at 379–80.

On April 2, 2021, less than three weeks before trial was scheduled to begin, Wilmington filed a motion for reconsideration of *Wilmington I* and *Wilmington II*. ECF No. 95. The Court denied Wilmington's motion for reconsideration on April 6, 2021. ECF No. 98.

C. The Trial

On April 19, 2021, trial commenced via videoconference due to health and safety considerations related to the COVID-19 pandemic. ECF No. 89; ECF No. 93 (Pre-Trial Order) at 1 n.1. Over two days, Wilmington presented evidence from one fact witness and one expert witness. The City's lone fact witness, Ms. Kelly Williams, testified in her official capacity as the Commissioner of Public Works for the City. *See* ECF Nos. 104, 105, Transcript of Proceedings ("Tr.") 40:10–11. She testified, *inter alia*, as to the origins of the City's stormwater charge system, the process by which customers can appeal the City's charges, and the extent to which the Properties contribute to the City's stormwater pollution. Tr. 39:20–248:3.

The City's expert witness, Mr. Hector Cyre, president of the engineering firm Water Resource Associates, testified regarding his professional experience within the stormwater management industry. Tr. 279:10–282:3. His testimony focused on the general reasonableness of Wilmington's stormwater methodology. Tr. 274:15–425:23.

D. The Parties' RCFC 52(c) Briefing and Evidentiary Motions

On April 20, 2021, following the close of Wilmington's case-in-chief, the Court suspended trial to permit the government to file a motion for judgment on partial findings pursuant to Rule 52(c) of the Rules of the United States Court of Federal Claims ("RCFC"). Tr. 441:5–444:8; *see also* ECF No. 102. On May 4, 2021, Wilmington filed a timely motion to admit portions of the RCFC 30(b)(6) deposition testimony taken from the government's witness, Craig Homesley, Chief of the USACE's Project Support Branch, as well as Plaintiff's Exhibits ("PX") 1, 4, 28, and 43. ECF No. 106. On May 18, 2021, the government filed its response to Wilmington's evidentiary motion. ECF No. 112. The government did not object to admitting the selected portions of Mr. Homesley's deposition, but sought to counter-designate and admit yet other portions of his deposition for context. *Id.* at 3–4. The government, however, opposed admitting Wilmington's four exhibits into the record. *Id.* at 5–10.

On June 8, 2021, the Court granted Wilmington's motion to admit portions of Mr. Homesley's deposition testimony, in addition to the four exhibits: PX 1, PX 4 (but not pages numbered COE000077 and COE000080–82), PX 28, and PX 43. *City of Wilmington v. United States*, 153 Fed. Cl. 405, 410 (2021) (ECF No. 115). The Court also granted the government's request to enter its counter-designated portions of Mr. Homesley's deposition testimony into the evidentiary record. *Id.*

On June 21, 2021, the government filed a motion for judgment on partial findings pursuant to RCFC 52(c). ECF No. 117. On June 22, 2021, the government filed a corrected motion for judgment on partial findings. ECF No. 119 ("Def. Mot."). On August 5, 2021, Wilmington filed a response to the government's corrected motion for judgment on partial findings. ECF No. 121 ("Pl. Resp."). On August 11, 2021, the government moved for leave to file a reply, ECF No. 122, which the Court granted, Minute Order (Aug. 11, 2021). On August 13, 2021, the government filed its reply to Wilmington's response. ECF No. 123 ("Def. Reply").

III. FACTUAL FINDINGS[6]

A. The Properties, Runoff, and Wilmington's Stormwater Management System

The USACE's five Wilmington Properties comprise a dredge material disposal area that the USACE uses in its work dredging the waterways near the City. JSUF ¶¶ 3, 121; JX 2. The Properties measure nearly 11,888,000 square feet, which translates to more than 270 acres. JSUF ¶¶ 133, 140, 147, 154, 161.

Some portion of precipitation that falls on the Properties runs off them and ultimately into the Christina or Delaware Rivers. JSUF ¶ 127; JX 17. Wilmington is subject to federal pollution requirements, including TMDLs, and runoff can increase the flow of pollutants into nearby water.[7] JX 14 at WILM0000443; JX 34 at WILM0010073–74. The City maintains a system of infrastructure to "enhance surface water quality by reducing the quantity and rate of stormwater runoff and the amount of pollutants discharged into the [nearby] rivers." JX 14 at WILM0000443; JSUF ¶¶ 6, 11 (describing the stormwater management program). The system consists of a stormwater collection

[6] This section constitutes the Court's principal findings of fact in accordance with RCFC 52(a) and 52(c). Other findings of fact and rulings on questions of mixed fact and law are contained in the discussion sections of this opinion, *see infra* Sections V and VI.

[7] The Christina Basin, "a 565 square mile basin" which "spans three states, Delaware, Pennsylvania, and Maryland," and includes the Christina River, is subject to TMDLs imposed by the EPA. PX 24 at WILM0011513.

and conveyance system and a wastewater treatment facility. JSUF ¶¶ 7, 11. The City's system is designed to protect surface water bodies, including the Brandywine River, the Christina River, and the Delaware River. JSUF ¶ 8; JX 14 at WILM0000443; Tr. 178:21–25.

The stormwater collection and conveyance system is comprised of a combined sewer system and a municipal separate storm sewer system. JSUF ¶ 11. In times of heavy rainfall, stormwater runoff can combine with wastewater in amounts too great for the combined sewer system pipe capacity. Tr. 179:1–5. This can cause a combined sewer overflow event, during which wastewater and stormwater both flow into the rivers, polluting them. Tr. 43:18–44:7.

While stormwater from at least one of the Properties "flows directly into [a nearby] [r]iver," it does so "with no use of the City's sewer system." JX 17. As a result, no stormwater from the Properties contributes to combined sewer overflows. JSUF ¶ 15; Tr. 179:6–9. Additionally, stormwater from the Properties does not enter Wilmington's combined sewer system or its municipal separate storm sewer system. JSUF ¶ 14; Tr. 176:21–177:5. In fact, the City is unaware of any pipes on the Properties that even "connect to [Wilmington's] stormwater collection and conveyance system." Tr. 145:8-13. The Properties also do not use, or burden, the City's wastewater treatment plant. Tr. 178:4–20. The City does not know the proportional demand or burden, if any, that the Properties place on the nearby rivers. Tr. 185:13–187:3. The City does not know to which TMDLs the Properties contribute, if any. Tr. 189:17–21.

B. Wilmington's Stormwater Charges: Purpose and Origins

The City imposes a monthly stormwater charge on the owner of each parcel of land in Wilmington.[8] Wilmington Code § 45-53(d). The City hired an engineering firm, Black & Veatch, to help develop its stormwater charge system, and Wilmington based its stormwater charge methodology on recommendations from that firm. JSUF ¶ 5. Wilmington created the stormwater charge to, *inter alia*, recover costs of operating, managing, and upgrading stormwater infrastructure, including combined sewer overflows, and to comply with federal water pollution standards. JX 34 at WILM0010075–76, WILM0010100–01; Tr. 159:24–160:13.

The stormwater charge provides Wilmington a revenue source with which to fund the stormwater management system for surface water quality management. JSUF

[8] The City recently changed its billing cycle from quarterly to monthly. *See* Wilmington Code § 45-53(d) ("All parcels . . . shall be assessed a *monthly* storm water charge . . . ." (emphasis added)). Some of the parties' filings refer to the previous quarterly billing system.

¶¶ 17–18. The City maintains revenue from stormwater charges in a fund separate from other City funds and uses the revenue exclusively for stormwater management purposes. JSUF ¶¶ 115–19.

C. Wilmington's Stormwater Charge Formula

The City has enacted statutory provisions that govern its method for calculating stormwater charges; the applicable formula varies depending upon the type of property. Wilmington Code § 45-53(d)(1)–(3). The City cannot feasibly measure actual stormwater runoff or pollution for which each property in its jurisdiction is responsible; thus, the City's statutory stormwater charge formula attempts to approximate runoff or pollution attributable to each property. JSUF ¶¶ 20–22. But, as discussed below, the City's estimating and charging methodology differs depending on the type of property.

Specifically, to calculate the stormwater charge for nonresidential properties including the Properties at issue, the City uses a multifactor formula. First, a property's total area (its "gross parcel area") is multiplied by a "runoff coefficient"[9] used to estimate the percentage of a property's surface area that generates water runoff based on the property's physical nature and topography. Wilmington Code § 45-53(a); JSUF ¶¶ 40–41, 44; Tr. 125:23–127:8. This produces the property's "impervious area,"[10] a number meant to approximate the surface area from which stormwater runs off the property. Wilmington Code § 45-53(a). That impervious area is then divided by an

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[9] A "runoff coefficient" is a multiplier used to estimate impervious area. Wilmington Code § 45-53(a). Runoff coefficients range from .95 — a high multiplier used for relatively impervious properties like "parking structures," where most water runs off — to lower multipliers like the .25 used for properties like parks and cemeteries which presumably absorb more water. *Id.* § 45-53(d)(3) (as delineated in Table 2); JSUF ¶¶ 40–41, 44; Tr. 125:23–127:8. A coefficient of 1, for example, would mean all of the water runs off the property in question, while a coefficient of zero would mean that no water runs off but rather is completely absorbed.

[10] "Impervious area" is defined as:

> the total square feet of hard surface areas including buildings, driveways, any attached or detached structures, and paved or hard-scaped areas, or other surface areas that behave like an impervious area under wet weather conditions, that either prevent or restrict the volume of storm water that can enter into the soil, and/or thereby cause water to run off the surface in greater quantities or at an increased rate of flow than what would have occurred under natural undisturbed conditions.

Wilmington Code § 45-53(a); *see also* JSUF ¶ 23 (citing Wilmington Code § 45-53(a) for its definition of "impervious area").

"equivalency stormwater unit," or "ESU," of 789 square feet — which represents the size of the median single-family home in Wilmington. JSUF ¶¶ 24–26. The ESU serves as a common denominator of sorts to help property owners conceptualize the runoff for which their property is responsible, as compared to the size of the City's median property. Tr. 79:6–80:8; 221:1–222:2; 326:1–327:19. The impervious area divided by the ESU produces a property's ESU factor. Wilmington Code § 45-53(a); JSUF ¶¶ 25–26, 45–47. Finally, the property's ESU factor is multiplied by the specified charge rate per ESU, producing the City's monthly charge to the property owner. JSUF ¶¶ 48–49; Tr. 326:9–22.

To illustrate the City's system, assume a hypothetical property of 100,000 square feet gross parcel area with a runoff coefficient of .4 — meaning that 40% of the property's area is estimated to be an impervious area from which stormwater runs off and presumably enters the City's stormwater management system. *See* JSUF ¶ 40; Tr. 126:15– 127:8. Because 40% of 100,000 is 40,000, the hypothetical property's estimated "impervious area" would be 40,000 square feet. That estimated impervious area of 40,000 divided by the ESU of 789 produces an ESU factor of 50.697 — meaning that the property is about 50.697 times larger than the median single-family residence in Wilmington. *See* Tr. 221:22–25. If the rate per ESU for this property's categorization was $15, the property owner would owe $760.46 per month in stormwater charges.

The City obtains the first factor in the nonresidential formula — a property's "gross parcel area" — from the New Castle County (the "County") Department of Land Use. JSUF ¶ 36. The City assigns a "runoff coefficient" to a property based upon the stormwater class into which the City has categorized a property. JSUF ¶ 37; Wilmington Code § 45-53(d)(3). The City does not visit, or otherwise independently assess, properties, but rather categorizes them within a stormwater class based on an occupancy code the County has assigned to a particular property. JSUF ¶¶ 38–39.

Black & Veatch, the engineering firm the City hired to help develop its stormwater charge system, recommended the fee methodology the City ultimately adopted. JSUF ¶ 5. Black & Veatch developed the runoff coefficients the City employs based on a set of coefficients outlined in a 1962 study called "Hydrologic Determination of Waterway Areas for the Design of Drainage Structures in Small Drainage Basins," authored by Dr. Ven Te Chow (the "1962 Study"). JX 14 at WILM0000451, WILM0000460.[11]

[11] William J. Hall & Marcelo H. García, *Ven Te Chow*, University of Illinois Urbana-Champaign, The Grainier College of Engineering, https://cee.illinois.edu/about/history/history-excellence/ven-te-chow (last visited Jan. 19, 2022).

At trial, the City's expert, Mr. Cyre, admitted that he did not know whether the occupancy codes reflected in the County's records — upon which the City based its stormwater classes and thus assigned impervious area coefficients — assumes the same stormwater characteristics as the categorizes used in Dr. Chow's 1962 Study or those used by the City. Tr. 373:9–22. Instead, Mr. Cyre merely "assume[d]" that Black & Veatch "had some basis" for correlating the City's land classes and the County's occupancy codes. Tr. 373:18–21. The City, however, is not involved in the County's process for setting occupancy codes, and the City does not verify the accuracy of the County's occupancy codes as applied to properties to calculate their stormwater charge. JSUF ¶ 33; Tr. 132:18–20.[12]

Wilmington also assesses interest on unpaid stormwater charges. The City charges "1% for the first three months of nonpayment of charges, 1.5% for the second three months of nonpayment of charges, 2.5% for the third three months of nonpayment of charges, 3% for the fourth three months of nonpayment of charges, and 3% for each subsequent month after twelve months of nonpayment of charges." JSUF ¶ 64 (citing Wilmington Code § 45-176(c)).

D. Wilmington Applied Its Formula to the Federal Properties

For the five federal Properties at issue, Wilmington used the above-described formula to calculate and invoice the government $2,577,686.82 in stormwater charges (and $3,360,441.32 in interest) between January 1, 2011, and April 16, 2021. Am. Compl. at 5–14; JSUF ¶¶ 138, 145, 152, 159, 166.

The City calculated those charges after assigning the Properties at issue to the "vacant" category. JSUF ¶ 123. The City defines a "vacant parcel" as "a parcel upon which there is no structure except for some marginal structure such as fencing, and which is assigned a 'Vacant' occupancy code in the assessor's records of the New Castle County Department of Land Use." Wilmington Code § 45-53(a); JSUF ¶ 50. The "vacant" class includes properties that "are not similar at all to one another" in terms of "land cover and size." Tr. 165:20–166:5.[13] Wilmington, moreover, has never visited the Properties. Tr. 116:21–25. Outside of categorizing the Properties into a stormwater class — based upon the County occupancy codes — and utilizing the Black & Veatch-assigned runoff coefficient, the City has not analyzed the Properties to

[12] Instead, the City's engineering firm examined the County's land categories, "made an engineering judgment" about which City runoff category (*e.g.*, commercial, residential) those land categories translate to, and applied to each runoff category "the high end of the [runoff coefficient] range" from Dr. Chow's 1962 Study. Tr. 324:22–325:6.

[13] This singular fact proves fatal to Wilmington's case, as explained in detail below.

determine the volume or content of their stormwater runoff. JSUF ¶¶ 179–180. The City has never analyzed the Properties' actual impervious area. Tr. 121:7–12. Nor has the City ever analyzed whether the runoff coefficient assigned to the Properties reflects their physical characteristics. Tr. 163:21–25.

In sum, the City's stormwater charges at issue in this litigation are "not based on any separate analysis by Wilmington, or any other entity, of the Properties' stormwater runoff." JSUF ¶ 178.

E. General Limitations on the Accuracy of Wilmington's Formula

Wilmington believes that visiting the federal Properties to assess actual runoff would be "discriminatory" to other properties in the City unless USACE files a fee-adjustment application, Tr. 109:8–17, but the result is disparate treatment nevertheless: Wilmington calculates impervious area more accurately for residential than nonresidential properties. For residential properties, impervious area calculations are "based on actual data on impervious area." JSUF ¶ 34; *see also* JSUF ¶ 35 ("Impervious areas for condominium properties are based on 'actual impervious areas.'"). In contrast, to calculate impervious area for residential properties, the City obtains from the County records the actual square footage of structures on the property, but does not count "paved surfaces, such as driveways or patios or sidewalks." Tr. 122:10–19; 123:13–19. The County tax assessment system does not maintain that data for nonresidential parcels. JSUF ¶ 31. For example, with respect to the 60 condominium properties that existed when the City's engineering firm developed its stormwater user fee methodology, Wilmington used "a combination of [Geographic Information System] and aerial imagery to individually determine impervious areas." Tr. 125:1-9. The City did not use that or any similar method to calculate the impervious area of the Properties at issue. Tr. 125:10-13.

Accordingly, while Wilmington "does not differentiate between Federal and private properties" when levying stormwater charges, JSUF ¶ 172; Tr. 107:10–13, the City admits that "it is likely in some situations, the resulting measure of imperviousness may differ from the actual imperviousness that exists in a specific property." JX 14 at WILM0000452; *see also* Tr. 169:17–22 (Commissioner Williams agreeing that it is "likely in some situations that Wilmington will assess a charge that is based on the wrong impervious area measurements"); Tr. 169:23–170:13 (Commissioner Williams testifying that she does not believe the Properties were assigned a "significantly higher" measure of imperviousness than their actual imperviousness).

Wilmington has not changed or amended its stormwater methodology since the 2011 Clean Water Act amendments updated the statute to define the term "reasonable service charges." Tr. 106:18–107:9; *see also supra* Section I.B.

F. Wilmington's Appeal System

As explained above, the City provides a limited appeal process for stormwater charges; nonresidential property owners can file fee adjustment requests with the City if they believe there was an error in the charge calculations. JSUF ¶¶ 103–04. Property owners can appeal: "(1) the calculation of the storm water charge; (2) the assigned storm water class; (3) the assigned tier, if applicable, and (4) the eligibility for a credit." Wilmington Code § 45-53(d)(7). The appeal process is limited, however, because it applies *solely to future charges*. JSUF ¶ 112 ("Wilmington's appeal process only applies prospectively (or only on a 'go-forward' basis)."); Wilmington Code § 45-53(d)(7)(b) ("The filing of a notice of appeal shall not stay the imposition, calculation or duty to pay the storm water charge; the appellant shall pay the storm water charge, as stated in the billing."). The City confirmed this at trial. Tr. 71:1–6, 102:23–103:4. The appeal process simply does not provide for adjustments of prior billing cycles. JX 40 at WILM0012020 ("There will be no retroactive adjustments for prior billing periods.").

Moreover, a property owner must pay all fees before the City will even consider an appeal. JX 40 at WILM0012021 ("All stormwater charges that are outstanding at the time of the application must be paid in full prior to the City commencing the technical review. Any storm water charge bill that is received during the adjustment appeal application review process need[s] to be paid in full."); Tr. 103:5–15 (Commissioner Williams testifying that the City "will not consider an application unless . . . your outstanding fees are up to date").[14]

G. The United States Refuses to Pay

The United States did not pay the stormwater charges or associated interest Wilmington assessed on the five Properties. JSUF ¶¶ 139, 146, 153, 160, 167. The United States did not appeal the charges assigned via the City's appeal process. JSUF ¶ 168; *Wilmington I*, 136 Fed. Cl. at 630 ("Defendant did not bring an administrative

[14] Thus, if Wilmington were correct that the government is required to follow the City's appeal process, the government would have to pay its assessed fees — whether reasonable or not — and then sue for their return irrespective of whether the appeal process was successful (because the appeal process does not impact charges already assessed). In the Court's view, the City's position makes little sense and would incorrectly reverse the burden of proof with respect to what is otherwise the City's money-mandating claim against the government pursuant to the Clean Water Act's Federal-Facilities Section.

appeal . . . ."); *Wilmington II*, 152 Fed. Cl. at 380 ("the government did not utilize Wilmington's administrative appeal process").

Wilmington thus claims it is owed the amounts it has invoiced the government for its Properties. Am. Compl. ¶¶ 2, 29, 34, 39, 44, 49.

IV. JURISDICTION AND STANDARD OF REVIEW

The Tucker Act is this Court's primary jurisdictional statute; it provides, in relevant part, as follows:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States *founded either upon the Constitution, or any Act of Congress or any regulation of an executive department*, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (emphasis added). Where a plaintiff seeks compensation from the government based upon a provision of the Constitution, a statute, or regulation, this Court only has jurisdiction where the plaintiff demonstrates that its claim is based on a substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 219 (1983). Such a claim is called a money-mandating claim. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 590 U.S. --, 140 S. Ct. 1308, 1328 (2020) (holding that a statute falls within the Tucker Act's sovereign immunity waiver when it "creates 'a right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained'" (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003))); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (noting that, for money-mandating claims, "the allegation must be made that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum").

This Court already has concluded, and the parties do not dispute, that the Clean Water Act's Federal-Facilities Section, 33 U.S.C. § 1323, is a money-mandating statute. *See Wilmington I*, 136 Fed. Cl. at 631 ("Section 1323(a) of the Clean Water Act 'may fairly be interpreted to mandate the payment of money by the government' because it mandates that the United States 'shall' pay 'reasonable service charges.'" (quoting *DeKalb Cnty.*, 108 Fed. Cl. at 696)). This Court thus has jurisdiction to decide

Wilmington's claims that the government owes the City money pursuant to that statute. *See* Am. Compl. ¶ 3.

Pending before the Court is the government's motion for judgment on partial findings pursuant to RCFC 52(c), in which the government argues that Wilmington failed to meet its burden of proof at trial. *See* RCFC 52(c) ("If a party has been fully heard on an issue during trial and the court finds against the party on that issue, the court may enter judgment against a party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue."). In particular, the government argues that Wilmington did not demonstrate that the stormwater charges it assessed the government for its Properties were "reasonable service charges" pursuant to the Federal-Facilities Section, 33 U.S.C. § 1323(c). Def. Mot. at 2.

In resolving the government's motion, "the judge, as the sole trier of fact, may weigh the evidence and is not required to resolve all issues of evidence and credibility in the plaintiff's favor." *Persyn v. United States*, 34 Fed. Cl. 187, 195 (1995), *aff'd*, 106 F.3d 424 (Fed. Cir. 1996). Rather, after hearing the plaintiff's evidence, the Court "determine[s] whether or not the plaintiff has convincingly shown a right to relief." *Fifth Third Bank of W. Ohio v. United States*, 56 Fed. Cl. 668, 683 (2003) (quoting *Howard Indus., Inc. v. United States*, 115 F. Supp. 481, 485 (Ct. Cl. 1953). "The trial may end at the close of a plaintiff's case if a plaintiff has failed to maintain its claim, RCFC 52(c), because '[a] plaintiff has no automatic right to cross-examine a defendant's witnesses for the purpose of proving what the plaintiff failed to establish during the presentation of its case.'" *Columbia First Bank, FSB v. United States*, 60 Fed. Cl. 97, 101 (2004) (quoting *Cooper v. United States*, 37 Fed. Cl. 28, 35 (1996)); *see also Penna v. United States*, 153 Fed. Cl. 6, 18 (2021) (discussing the procedure and standard of review for RCFC 52(c) motions). In other words, "[t]he time for plaintiff to prove its case is during its case-in-chief." *IMS Eng'rs-Architects, P.C. v. United States*, 92 Fed. Cl. 52, 75 (2010) (citing *Cooper*, 37 Fed. Cl. at 35).

V. THE COURT GRANTS THE GOVERNMENT'S RCFC 52(C) MOTION

As explained above, the Clean Water Act only waives the federal government's sovereign immunity to Wilmington to sue for "reasonable service charges." 33 U.S.C. § 1323(a), (c); *DeKalb Cnty.*, 108 Fed. Cl. at 695. The "reasonable service charges" for which the United States is liable include only "reasonable nondiscriminatory fee[s], charge[s], or assessment[s] that [are] . . . based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution . . . and . . . used to pay or reimburse the costs associated with any stormwater management program[.]" 33 U.S.C. § 1323(c)(1). Wilmington failed to carry its burden

to prove that its charges were "reasonable service charges" within the meaning of the statute. *Id.* Therefore, the government is not liable pursuant to the Clean Water Act to pay Wilmington's service charges as assessed and claimed in this suit, and the government is entitled to judgment.[15]

Simply put, the facts demonstrate, if anything, that the City's charges to the government do not represent "some fair approximation" of the Properties' relative (*i.e.*, "proportionate") contribution to stormwater pollution.

A. Wilmington Failed to Prove that Its Stormwater Charges Are "Reasonable Service Charges" Pursuant to the Clean Water Act

Although the charges Wilmington assessed the government for the Properties are the product of a statutory scheme that may be facially reasonable in some general, layman's sense, the Court concludes that the City's charges fail the statutory definition of "reasonable services charges." The relevant question, in that regard, is not whether the City's methodology has some logical basis, whether it appears fair in some general sense, or whether an expert believes it is "good enough for government work," *Brown v. Plata*, 563 U.S. 493, 562 (2011) (Scalia, J., dissenting), as the pejorative saying goes; rather, the issue is whether the City's methodology as applied to the Properties at issue produced charges to the government that meet the money-mandating requirements of the Federal-Facilities Section. In deciding that issue, this Court is mindful of the United States Supreme Court's "established practice of construing waivers of sovereign immunity narrowly" and thus we "decline [the] invitation to read the statutory language [as] broadly" and as permissively as Wilmington has urged throughout this litigation. *Lane v. Pena*, 518 U.S. 187, 195 (1996).

To be clear, the Court takes no issue with Wilmington's general approach — *i.e.*, the use of property categories and runoff coefficients. The problem, however, is that for Wilmington's charges to be found "reasonable," the City's evidence must show, at a minimum, that the County's tax records properly categorize the Properties for

[15] Section 1323(c)(1)(b) further requires that charges be "used to pay or reimburse the costs associated with any stormwater management program[.]" 33 U.S.C. § 1323(c)(1)(b). Wilmington has met this requirement. *See* JSUF ¶¶ 115–19; Tr. 342:14–21 (Mr. Cyre testifying that the City's stormwater charges are used to pay the cost of the stormwater program). The government also does not contest that the City's charges meet Section 1323(c)'s "nondiscriminatory" requirement. *See* Wilmington Code § 45-53(d) ("All parcels that are within the city's corporate boundaries, shall be assessed a quarterly storm water charge[.] . . . ."); ECF No. 106-1 at A13–A14, 37:21–38:5; JX 61 at 3–4 (government interrogatory response agreeing that "[t]he United States does not presently so contend" that Wilmington's stormwater charge is discriminatory).

stormwater purposes, including relative to other properties or classes of properties within the City's jurisdiction. Relatedly, Wilmington also must show that Dr. Chow's 1962 Study — from which the City's consultants derived the runoff coefficients Wilmington utilizes in its formula — assumes the same land category definitions as the County's records. As discussed in more detail below, the City failed to meet its burden of proof on those factual questions and, thus, has not properly tailored its stormwater charge program to the Federal-Facilities Section's requirements.

First, the City failed to offer any testimony or evidence to prove that the County's tax records properly categorize the Properties — either individually or in comparison to other properties. The tax records are critical because they drive the selection of the runoff coefficient and the resulting charges. Thus, if a particular property is classified incorrectly (*i.e.*, there is no demonstrable connection between a County classification and a property's actual runoff characteristics) — or even if other properties are classified incorrectly relative to the Properties — the resulting charges cannot represent a fair approximation of contribution to stormwater pollution. The fatal problem for the City's claim is that the County land-record tax classifications have nothing to do with stormwater runoff; instead, the County assigns land-use codes based on occupancy permits, *see supra* Section III.C, and Wilmington fails to demonstrate any ties between the labels assigned by occupancy permits and a property's actual topography, its runoff characteristics, or its contribution to stormwater pollution. *See* Wilmington Code § 45-53(a) (defining "Vacant parcel" as "a parcel upon which there is no structure except for some marginal structure such as fencing, and which is assigned a 'Vacant' occupancy code in the assessor's records of the New Castle County Department of Land Use.").

Put differently, the City makes no individualized effort to determine whether a different land category from Dr. Chow's 1962 Study might more accurately describe the characteristics of the Properties. Wilmington's system merely assumes that the County's tax records reflect land categories whose definitions mirror those described in Dr. Chow's 1962 Study, from which Black & Veatch derived the runoff coefficients the City uses. Simply put, a "vacant" parcel may be defined one way in Dr. Chow's 1962 Study but a different way in the County's tax records. If that were the case, the City may well be assigning an entirely erroneous runoff coefficient to the Properties at issue. In fact, Mr. Cyre explicitly conceded that possibility:

> [THE COURT]: How do we even know that, when [Dr. Chow's 1962 Study] uses the range of .10 to .30, that that's what the [County's] tax records are talking about in terms of the character of the land?

> [MR. CYRE]: I don't know that. I would assume that Black & Veatch, in allocating those . . . land use classes, those occupancy codes, had some basis for doing so. But I do not personally know that, sir.

Tr. 373:13–22. Wilmington cannot sustain its claim against the government on Dr. Cyre's admitted assumption about Black & Veatch's work, which he made no independent attempt to substantiate. Wilmington provided no evidence to fill that gap in the record and, for all the Court knows, the coefficients assigned to the Properties bear little to no relationship to the land category definitions in Dr. Chow's 1962 Study, let alone to the reality of the Properties' physical characteristics (in terms of runoff or pollution generation). Accordingly, the Court concludes that the coefficients may accurately reflect the percentage of a particular property generating runoff or they may not. That problem alone is sufficient to defeat Wilmington's claim here.[16]

Second, Wilmington failed to prove that the variation of the actual characteristics of properties within a particular tax-record category is relatively small. Again, Mr. Cyre conceded this at trial:

> [DEFENDANT'S COUNSEL]: And it's accurate to say that — as I believe you've testified, that you have not performed any analysis of the properties that comprise these three occupancy codes; correct[?]
>
> [MR. CYRE]: That is correct.
>
> [DEFENDANT'S COUNSEL]: And isn't it fair to say that, without doing any analysis of the properties that are in these three occupancy codes, that you cannot conclude that the

[16] A related problem is that the "gross parcel area" used in the City's calculations also comes from New Castle County tax assessor's office, but the City does not verify the accuracy of that data either. JSUF ¶ 33 ("New Castle County provides the property land use occupancy codes, Wilmington does not check the property land use occupancy code unless an appeal is filed, and Wilmington is not involved in New Castle County's process for setting property land use occupancy codes."). The City does not know what land covers or property characteristics actually exist on the Properties, Tr. 129:9–12, and it does not know if the County's data is accurate, Tr. 132:18–20; *see also* Tr. 309:17–21 (Mr. Cyre testifying that "in the specific applied sense, it would be productive to validate the accuracy of any data source that you are using, in this case the . . . New Castle County database"). None of this means that Wilmington's formula is generally unlawful or otherwise improper as applied to other properties with the City's jurisdiction. Rather, the Court holds only that the City's charges to the United States at issue here do not meet the requirements of the Federal-Facilities Section.

> properties in that vacant class have similar land use characteristics? That's fair; correct?
>
> [MR. CYRE]: I think that's fair.

Tr. 360:23–361:8.

Given that admission, Wilmington fails to demonstrate that all the properties within a particular class should be assigned the same coefficient, although that is exactly what the City's charging methodology does for the Properties. Again, assigning all properties with a certain occupancy code the same coefficient assumes that the properties have the same (or nearly the same) runoff characteristics. But, if there is wide variation in the actual characteristics of properties within a particular occupancy code, that could well mean that the government is being overcharged vis-à-vis other properties assigned the same code. Absent testimony or other evidence either substantiating the degree of similarity within an occupancy code or tying the coefficients to the reality of the Properties' physical characteristics, Wilmington cannot prove that its charges are "based on some fair approximation of the proportionate contribution of the property . . . to stormwater pollution[.]" 33 U.S.C. § 1323(c)(1)(A).

Other aspects of Mr. Cyre's testimony further undermine Wilmington's case:

- Mr. Cyre did not ever examine, or even visit, the Properties. Tr. 380:18–23; 383:21–384:7. Nor did the City. Tr. 116:21–24 ("[DEFENDANT'S COUNSEL]: Wilmington has never been to the dredge disposal sites to determine what is actually on the properties; right? [COMMISSIONER WILLIAMS]: That is correct."). Accordingly, Mr. Cyre was unable to offer testimony about the Properties in particular. Tr. 283:6–13; *see also* Tr. 347:25–348:3 (confirming that Mr. Cyre's "focus was not on the individual properties at issue").

- Mr. Cyre was unable to explain to what extent the City's impervious area estimate correlated with the Properties' actual impervious area. Tr. 349:14–21; *see also* Tr. 381:10–17 ("[DEFENDANT'S COUNSEL]: To be clear, you do not offer an opinion that the .30 runoff coefficient is a fair approximation of the stormwater pollution that the Corps' properties at issue contribute to Wilmington's stormwater system; correct? MR. CYRE: Other than by that assumed extension from the class level to the individual members of the class, that is correct.").

- Mr. Cyre admitted that it is impossible to know if the assigned runoff coefficient for a given property is accurate unless and until the City examines that property. Tr. 297:5–12.

Although the Court acknowledges that Wilmington's charges must represent only a "*fair approximation* of the proportionate contribution of the property or facility to stormwater pollution," the City's expert conceded too much ground for the City to prevail. 33 U.S.C. § 1323(c)(1)(A) (emphasis added). In that regard, the Court takes no issue with the City's contention that the Clean Water Act permits the City to assess stormwater fees against the United States based on estimates, Pl. Resp. at 29.[17] The Court concludes, however, that such estimates must be based on facts anchored in reality.

Legal questions about approximations and estimates are not unique to this case. For example, in *Precision Pine & Timber, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit, our immediate appellate court, considered, "with respect to damages[,] . . . whether the evidence adduced at trial was sufficient to enable the fact finder . . . to make a 'fair and reasonable approximation.'" 596 F.3d 817, 833 (Fed. Cir. 2010) (quoting *Nat'l Australia Bank v. United States*, 452 F.3d 1321, 1327 (Fed. Cir. 2006)). The party charged with proving a fair approximation of damages "has the burden of proving them with 'reasonable certainty.'" 596 F.3d at 833. "As the phrase itself suggests, *reasonable certainty* requires more than a guess, but less than absolute exactness or mathematical precision." *Id.* (emphasis added) (citing *Bluebonnet Sav. Bank v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001)). Based on the facts as found above, the Court concludes that, in this case — on the spectrum of proof between guess and "reasonable certainty" — Wilmington's evidence is closer to the former than the latter and, thus, the calculated fees at issue do not constitute a "fair approximation of the proportionate contribution of the property or facility to stormwater pollution." 33 U.S.C. § 1323(c)(1)(A).[18]

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[17] Specifically, Wilmington contends that "Congress's choice of the phrase 'based on *some* fair approximation of the proportionate contribution of the property or facility to stormwater pollution' necessarily implies that more than one approximation may be fair." Pl. Resp. at 29 (quoting 33 U.S.C. § 1323(c)(1)(A)). The Court takes no issue with that specific assertion, either.

[18] *Cf. Boeing Co. v. United States*, 86 Fed. Cl. 303, 314 n.8 (2009) ("While consideration of a hypothetical negotiation 'necessarily involves an element of approximation and uncertainty,' . . . an expert should be able to hazard something more than a guess, or at least show how, despite all reasonable efforts, his estimate is the best that could be derived." (quoting *Unisplay, S.A. v. Am. Elec. Sign Co.*, 69 F.3d 512, 517 (Fed. Cir. 1995))).

Accordingly, the City did not prove that the Properties' estimated runoff, and thus the stormwater charges, were remotely accurate in any sense of that word. This Court simply cannot, on this record, conclude that the City's charges were "based on some *fair approximation* of the proportionate contribution of the propert[ies] . . . to stormwater pollution." 33 U.S.C. § 1323(c)(1)(A) (emphasis added).

Wilmington's proof at trial also failed to focus on the object of the requisite "fair approximation" — *i.e.*, "the proportionate contribution of the property or facility to stormwater pollution." 33 U.S.C. § 1323(c)(1)(A). Neither the Supreme Court nor the Federal Circuit appear to have defined "proportionate" or "proportional" for the purposes of the Clean Water Act. Merriam-Webster defines "proportionate," not surprisingly, with reference to "proportional"; it defines "proportional" as "corresponding in size, degree, or intensity." *Proportionate*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/proportional (last visited Jan. 24, 2022).[19] A straightforward reading of 33 U.S.C. § 1323(c) therefore indicates that stormwater charges assessed against a federal property must be tied to the property's relative (or "corresponding") contribution to stormwater pollution. Even without resorting to a dictionary definition, however, the Court finds it obvious that the statute requires some actual relationship between charges assessed against federal properties and their relative contribution to total stormwater pollution.[20]

It is true, as Wilmington notes, that Congress appears to have adopted the 2011 Amendments "out of frustration with increasing Federal agency resistance to paying local stormwater charges." Pl. Resp. at 21 (citing 156 Cong. Rec. H979 (Dec. 22, 2010)). But neither the plain language of the Federal-Facilities Section nor its legislative history suggests that Congress made the government liable for anything more than stormwater pollution costs for which federal properties are proportionately responsible. In other words, the Federal-Facilities Section only mandates that the federal government pay for its relative contribution to pollution — a connection that Wilmington did not prove at

[19] Merriam-Webster's definition comports with that of other dictionaries. *See, e.g.*, *Proportionate*, Oxford Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/english/proportionate (last visited Jan. 25, 2022) ("increasing or decreasing in size, amount or degree according to changes in something else"); *Proportionate*, Oxford English Dictionary (3d ed. 2007), https://www.oed.com/view/Entry/152776 (last visited Jan. 25, 2021) ("[p]roportioned, adjusted in proportion; that is in (due) proportion, proportional (*to*); appropriate in respect of quantity, extent, degree, etc.").

[20] *Cf. Hospice of New Mexico, LLC v. Sebelius*, 691 F. Supp. 2d 1275, 1291 (D.N.M. 2010) (concluding that "[t]he word 'proportion,' within the context of 42 U.S.C. § 1395f(i)(2)(C), refers to the mathematical relation of a part to the whole; in other words, it specifies a ratio or a fraction"), *aff'd*, 435 F. App'x 749 (10th Cir. 2011).

trial. The fact that Congress was concerned with the United States paying for its fair share of stormwater runoff does not mean that Congress commanded payment for just any reasonable guesstimate of costs that a locality seeks to impose on property owners within a jurisdiction. Rather, the government is on the hook for fees correlating with the approximate stormwater pollution to which the government actually contributes (with the caveat that, as the Court already has acknowledged, such contributions may be reasonably estimated).[21]

In sum, the statutory phrase "proportionate contribution of the property or facility to stormwater pollution" requires some link between the charges Wilmington seeks to impose and a property's (estimated) stormwater pollution relative to total pollution. Charges without such a link cannot be reasonable under the statute. For example, the total cost of the City's stormwater management system cannot simply be allocated over a base of property area because the quantity of attributable pollution cannot be derived from the size of a property alone. In that regard, the City acknowledges, at least implicitly, that the specific physical characteristics of a property must be taken into account. As explained above, the City relies upon County tax records and runoff coefficients to accomplish that, but despite the statute's plain language, Wilmington did not present any evidence linking the Properties to any particular amount of stormwater pollution, proportional or otherwise, and there is no evidence that the proxies for relative pollution contribution — tax record categories and runoff coefficients — yield a fair approximation for the purpose of computing a charge.

In its response brief, Wilmington elaborates on its interpretation of the Federal-Facilities Section, arguing that the City's charge regime keeps proportionality "within a given Nonresidential class using parcel area," "between Nonresidential classes using impervious area," and across different classes. Pl. Resp. at 30. This interpretation of proportionality is not what the statute demands; rather, the statute demands a demonstrated relationship between the charges and the Properties' relative stormwater

[21] This Court generally is less than enthusiastic about relying on legislative history, and that is particularly true where the statutory language is relatively clear and the history in question is comprised of statements from individual legislators. *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("[G]iven the straightforward statutory command, there is no reason to resort to legislative history."); *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. --, 137 S. Ct. 929, 943 (2017) ("floor statements by individual legislators rank among the least illuminating forms of legislative history"). Nevertheless, because both parties cite to the legislative history in their briefs — see Def. Mot. at 18–19, 22, 25–26, 28, 31, 34, 41–42; Pl. Resp. at 18–21, 29, 35 — the Court has reviewed it and concludes that the legislative history, if anything, corroborates the straightforward textual reading the Court applies in this decision.

pollution (even if that quantity is estimated).[22] This can be seen from the language of the statute itself, which implicitly requires that a property's "contribution . . . to stormwater pollution" be assessed "in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility." 33 U.S.C. § 1323(c)(1)(A). As a result of the City's erroneous statutory interpretation,[23] however, the City did not provide evidence that it calculated charges for the Properties based on the Properties' relative contribution to the City's stormwater pollution.

Nor for that matter, as explained *supra*, does the Court accept Wilmington's contention that its charging scheme results in proportionate charges across different classes for the simple reason that Wilmington estimates impervious area for all nonresidential properties using a runoff coefficient approach but does not use runoff coefficients to determine impervious area for residential parcels. Tr. 122:2–9.

B. Wilmington Attempted to Prove the General Reasonableness of Its Service Charge Methodology, Which Is Insufficient for Recovery

Wilmington focused its entire case-in-chief on proving that the methodology the City uses to calculate stormwater charges for all properties in the City — residential, commercial, and Federal — is generally reasonable. This strategic choice at trial meant Wilmington did not provide evidence of the Properties' proportionate contribution to pollution, either estimated or actual. Given that choice, Wilmington's case may have been doomed from the outset, given how the Court reads the statute (as explained above). Nonetheless, some discussion of the City's case-in-chief is warranted to

[22] The City confirmed at trial that it would not label as unreasonable any gap, no matter how large, between a property's actual impervious area and its estimated impervious area unless the government followed the City's appeal process to dispute the City's estimate. Tr. 193:13–19. The implications of this position are striking; unless the government files an appeal, a monumental difference between actual and correct charges — say, one leading to a million-dollar overcharge — would not be considered unreasonable under Wilmington's approach.

[23] Wilmington also presented differing interpretations of the proportionality requirement during its case-in-chief. *Compare* Tr. 236:9–24 ("[DEFENDANT'S COUNSEL]: So[,] it's your testimony that a class with totally different, you know, properties in it, with totally different characteristics, the resulting charge would still be proportional? [COMMISSIONER WILLIAMS]: Yeah. I believe — I believe that the system is a fair approximation of it. Yes."), *with* Wilmington Code § 45-53(a) ("Storm water class means classes of uses defined such that customers within a class have similar land use characteristics"); *see also* Def. Mot. at 25 n.7 (citing Commissioner Williams' testimony at Tr. 236:19–25 as proof that "Wilmington fundamentally misunderstands the proportionality requirement").

demonstrate the gap between what the City showed and what it needed to show to recover.[24]

The thrust of the City's evidence was that: (1) Wilmington's system is, overall, "reasonable . . . [and] nondiscriminatory in technical terms"; (2) its charges, generally, are "based on an approximation of the proportional contribution of . . . *all* the properties . . . to stormwater pollution"; and (3) by extension, the charges at issue must be characterized as reasonable. Tr. 342:22–343:5 (emphasis added). To this end, the City's sole expert witness, Mr. Cyre, testified as to various apparently sensible aspects of the City's charge regime. For example, he testified that the impervious area — the proxy the City uses to help estimate how much water runs off a property — provides "one fair approximation of the contribution to stormwater pollution." Tr. 302:25–303:3. He testified that more than three quarters of methodologies in use today by localities incorporate impervious surface area in some manner, and that impervious area "is widely accepted as the parameter that best represents contribution to pollution." Tr. 303:10–20; *see also* JX 14 at WILM0000446 (discussing the widespread use of impervious area in stormwater rate setting).

Mr. Cyre defended various aspects of the City's methodology. He testified, for example, that the County's tax databases — upon which the City relies to determine a property's gross area — "are generally among the best in terms of reflecting what is real." Tr. 309:12–25. Regarding the City's use of coefficients to determine impervious area, Mr. Cyre testified that Dr. Chow's "hydrology coefficients of runoff," upon which the City bases its own runoff coefficients, are "accepted by the engineering and hydrology fraternity totally." Tr. 337:13–15. Mr. Cyre further testified that he "think[s] Wilmington's system is achieving the appropriate objectives," citing the use of classes for properties and based upon *the assumption* that the County's tax database is "good." Tr. 336:20–337:12. He testified that the system "treats similar classes of properties similarly and dissimilar classes of properties proportionately." Tr. 337:3–5. He testified that from a technical standard, the "stormwater charges *to the classes* of properties in Wilmington bear a substantial relationship to the cost of the stormwater management program," Tr. 337:16–22 (emphasis added), and that the system as a whole is "approximately and reasonably proportional to the cost of the program," Tr. 338:1–10.

[24] "Reasonable" has been defined as "fair, proper, or moderate under the circumstances[.]" *Ayesta v. Davis*, 584 U.S. --, 138 S. Ct. 1080, 1093 (2018) (citing *Reasonable*, Black's Law Dictionary (5th ed. 1979)). The 2019 edition of Black's Law Dictionary defines the term identically.

All this testimony is beside the point. Wilmington's evidence may show that its stormwater charge methodology is reasonable in some general sense.[25] But the Clean Water Act does not require the government to pay service charges merely because a locality employs a methodology that may be generally characterized as reasonable or because a locality's methodology is similar to others adopted in different jurisdictions. Rather, the statute provides that the federal government must pay charges only if they are "based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution." 33 U.S.C. § 1323(c)(1)(A). Mr. Cyre did not opine, other than in a conclusory fashion, on how Wilmington's methodology meets the statutory requirements. Indeed, Mr. Cyre admitted that both of the following can be simultaneously true — the City's stormwater methodology could be "within a reasonable spectrum of approaches" and yet the charges that system produces for the Properties at issue might "not accurately reflect the demand [the] Corps' Properties place on the system." Tr. 378:22–379:4. Relatedly, he also indicated that the City's use of runoff coefficients to estimate impervious area can be consistent with general industry practice, while the City's application of a particular runoff coefficient to the Properties might "not accurately reflect the[ir] impervious area." Tr. 378:14–21. Those admissions fundamentally undermine Wilmington's case.

The Court further finds it impossible to determine that the Properties' charges are "based on a proportionate contribution . . . to stormwater pollution" absent a preponderance of evidence that the Properties impose any burdens on, or contribute any pollution to, Wilmington's stormwater management system. 33 U.S.C. § 1323(c)(1)(A). In particular, Wilmington failed to identify *any* measurable cost the Properties impose on the City's stormwater management system. *See, e.g.*, JSUF ¶ 14 ("Wilmington does not contend that stormwater from one or more Properties entered (or is entering) Wilmington's [combined sewer system] and [municipal separate storm sewer system]."); JSUF ¶ 15 ("The Properties do not contribute to Combined Sewer Overflows[.]"). Wilmington's trial witnesses made this clear. Mr. Cyre did not render an opinion on whether the Properties "imposed *any* additional costs on Wilmington's system or program." Tr. 291:12–292:7 (emphasis added). Specifically, Mr. Cyre admitted that he was unaware of: (1) any City analysis regarding the demand the Properties impose on Wilmington's system, Tr. 393:6–10; (2) any drainage infrastructure the City provides to service the Properties, Tr. 393:15–18; or (3) any infrastructure to

[25] On the other hand, even that may be a rosy assessment of Wilmington's evidence: Mr. Cyre went on to testify that he would put Wilmington's methodology "at the 45[th] percentile," adding "it's pretty darn good. . . . I think it could be a lot better. . . . I think it's good enough." Tr. 307:21–308:3. Accordingly, the Court does not conclude that Wilmington's methodology is generally reasonable; rather, the Court merely assumes it is for the purposes of this decision.

improve water quality that the City maintains as a result of the Properties. Tr. 393:19–22.

Similarly, Commissioner Williams testified that the Properties do not contribute water to any of Wilmington's pipes, its combined sewer system, the municipal separate storm sewer system, combined sewer overflows, or the wastewater treatment plant. Tr. 177:14-18 (pipes); Tr. 176:21-25, (combined sewer system); Tr. 177:1–5 (municipal separate storm sewer system); 179:6–9 (combined sewer overflows); Tr. 178:4–20 (wastewater treatment plant). She also testified that the City is unaware of any pipes on the Properties "that connect to [Wilmington's] stormwater collection and conveyance system." Tr. 145:8-13. Finally, Commissioner Williams testified that the City does not know the proportional demand or burden, if any, that the Properties place on the rivers or to which TMDLs the dredge disposal sites contribute. Tr. 185:13–23, 186:23–187:3 (rivers); Tr. 189:17–21 (TMDLs).

In sum, Wilmington's reliance on Mr. Cyre's and Commissioner Williams' testimony to prove that the Properties contribute to stormwater pollution (and associated costs) — and were charged accordingly — is unavailing, particularly given the City's burden of proof in this case.

* * * *

In the end, Wilmington concentrated its fire away from the correct statutory target (as delineated in the Federal-Facilities Section), failed to produce evidence demonstrating proportionality, and, thus, failed to meet its burden to prove facts necessary to show that it is entitled to the claimed fees.

C. The Court Rejects Wilmington's Remaining Arguments

Wilmington advances several alternative arguments in an attempt to show that its charges qualify as reasonable under the Federal-Facilities Section. None of them succeeds.

1. The 2008 EPA Brochure Is Irrelevant

Wilmington insists that the EPA's inclusion of Wilmington's stormwater utility in a 2008 brochure, in which the EPA labeled the program "fair and equitable," imbues Wilmington's charges with *per se* reasonableness under the Clean Water Act. ECF No. 112-3 at 5; Pl. Resp. at 22–23 ("The EPA's conclusion has not been withdrawn or rebutted."). The brochure certainly favors Wilmington's position, but cannot save the City's claims. The EPA's label of "fair and equitable" is irrelevant as a matter of both fact and law.

First, even if an agency's description of a charging methodology in a public publication was somehow meant as a binding factual admission — something that Wilmington does not argue here — EPA could not have used the phrase to refer to Section 1323(c)(1) because the 2008 brochure was published well before the 2011 Clean Water Act Amendments. *See* Pl. Resp. at 23 ("[T]he EPA's description of Wilmington's stormwater charges as being 'fair and reasonable' predates Congress' 2011 amendment to 33 U.S.C. § 1323 . . . ."). Thus, the EPA's brochure cannot show, as a factual matter, that the government intended (in 2008) for Wilmington's charges to be deemed reasonable under the definition of "reasonable service charges" enacted years later.

Second, while a charitable interpretation of the City's argument may be that EPA's praise for Wilmington's program somehow should preclude the government from refusing to pay Wilmington's charges based on an estoppel theory, binding precedent forecloses such an argument here. In general, a plaintiff cannot rely upon erroneous advice from government personnel to obtain payment where it is otherwise unauthorized. *See, e.g.*, *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990) ("[J]udicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.").[26] Thus, even if Wilmington invokes the EPA brochure as the basis for some sort of an estoppel argument, the Court rejects it.

2. Industry Practice Is Inapposite to the Statutory Requirements

Wilmington further argues that its charges are reasonable because its engineering firm developed the City's approach to be consistent with industry practice. Pl. Resp. at 23 ("The fact that Wilmington's Ordinance assesses stormwater charges consistent with prevailing standards and practices is itself evidence of the charges' reasonableness."). The Court is not unsympathetic to the City's point in a general sense, but it is inapposite to the statutory requirements. Nothing in the statute makes Wilmington's charges

[26] This is particularly true in the absence of any allegation of affirmative misconduct — something Wilmington does *not* allege here. *See Lua v. United States*, 843 F.3d 950, 956 (Fed. Cir. 2016) ("Appellants must show 'affirmative misconduct [as] a prerequisite for invoking equitable estoppel against the [G]overnment'" (quoting *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000))). Wilmington alleges only that the EPA "reviewed Wilmington's stormwater utility . . . and concluded . . . that Wilmington had 'establish[ed] a stormwater utility to recover costs related to stormwater management on a *fair and equitable* basis.'" Pl. Resp. at 22–23 (quoting PX 28 at 4). It does not allege affirmative misconduct and nowhere claims that Wilmington developed its stormwater utility in reliance on EPA's brochure. In any event, the Court doubts that such allegations would make sense, as the EPA's brochure was published after Wilmington's stormwater utility provisions were enacted. PX 28 at 4 ("Wilmington has a combined sewer system and used a three-step approach to establish a stormwater utility . . . .").

reasonable for payment purposes just because the City's approach is similar to that of other localities.

Moreover, even if the Court were to assume that the City's process followed the industry standard at the time the ordinance was passed,[27] a practice that fails to satisfy a current legal requirement for payment cannot be saved by conformance with a years-old industry standard.[28] Rather, to recover its charges in this case, Wilmington must, but does not, demonstrate that its charges properly qualify under the money-mandating statute at issue, 33 U.S.C. § 1323.

3. The Charges Do Not Have a "Presumption of Reasonableness"

Wilmington further argues that its stormwater charges must be presumed reasonable as a matter of law. Pl. Resp. 24–27. Specifically, the City argues that because its stormwater charges were "assessed in strict accordance with the elements of City Code § 45-53" they are "presumed reasonable as a matter of law" and are subject only to "rational basis" review. *Id.* at 24. Wilmington thus seems to argue that virtually any charges it develops under its own Code would be legally reasonable under the Clean Water Act, without regard to the statutory definition of "reasonable service charges" contained in the Federal-Facilities Section. This is patently incorrect. Because 33 U.S.C. § 1323(c) clearly defines when state and local charges are "reasonable," this Court may not presume that Wilmington's charges are "reasonable as a matter of law." Wilmington, as the plaintiff in this action, bears the burden of proof and cannot shift that burden to the government. *See, e.g.*, *Banks v. United States*, 78 Fed. Cl. 603, 616 (2007) (noting that "[p]laintiffs bear the burden of proof in civil proceedings" and they "meet that burden only if they establish by a preponderance of the evidence the cause of action for which they have sued" (internal quotations and citations omitted)), *vacated in part on other grounds*, 721 F. App'x 928 (Fed. Cir. 2017).

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[27] The government disputes this claim, labeling the testimony of Wilmington's expert on the matter conclusory: "There is no evidence in the record that 'the practices [of] Black and Veatch' in formulating Wilmington's utility are consistent with industry standards. . . . There is no evidence before the Court that Wilmington's ordinance is consistent with prevailing standards." Def. Reply at 6 (quoting Pl. Resp. at 23).

[28] Congress amended the Federal-Facilities Section to define "reasonable service charges" in 2011, after Wilmington already instituted the formula it used to generate the charges for which it seeks compensation here; it is perhaps unsurprising that Wilmington ultimately fails to demonstrate that its charges to the government qualify under the relevant statute because Wilmington never updated its charging methodology accordingly. Tr. 106:18–107:9.

Relatedly, the City contends that the Clean Water Act "did not exempt the United States from the burdens of overcoming . . . long-established presumptions accompanying local ordinances" like Wilmington's "complete powers of legislation and administration" and its "power to enact ordinances . . . necessary and proper for carrying into execution of any of its express or implied powers." Pl. Resp. at 26–27 (quoting Wilmington Code § 1-101 ("Powers of the city — Generally")). This argument also fails. The government does not challenge the City's general power to enact ordinances, nor does the government contest the validity of Wilmington's statutory scheme for stormwater charges. Rather, the only issue here is whether the City has proven that the government must pay assessed charges pursuant to the Federal-Facilities Section of the Clean Water Act. The City's power to enact ordinances is simply irrelevant to that question, which the Court answers in the negative.

4. The Supreme Court's "*Massachusetts* Test" is Inapplicable

Next, Wilmington argues that the Supreme Court's decision in *Massachusetts v. United States*, 435 U.S. 444 (1978), and its progeny, should control the outcome of this case. According to Wilmington, those cases teach that the City only has to demonstrate that its charging methodology is "generally reasonable" because: (1) "the words 'accurate' or 'actual' are not found in 33 U.S.C. § 1323"; and (2) "the law has never held [local] governments to any semblance of accuracy under the 'fair approximation' test or otherwise." Pl. Resp. at 32–33 (discussing *Massachusetts* and citing other cases). The Court is unconvinced that *Massachusetts* rescues the City's claims.

In *Massachusetts*, the Supreme Court considered an annual registration tax Congress imposed on all civil aircraft that fly in the navigable airspace of the United States; the tax was enacted "[a]s part of a comprehensive program to recoup the costs of federal aviation programs from those who use the national airsystem." 435 U.S. at 446. The case involved the "*constitutional* question" of "whether this tax, as applied to an aircraft owned by a State and used by it exclusively for police functions, violates the implied immunity of a state government from federal taxation." *Id.* (emphasis added). The Supreme Court concluded "that it does not." *Id.* In so holding, the Supreme Court explained:

> The principles that have animated the development of the doctrine of state tax immunity and the decisions of this Court in analogous contexts persuade us that a State enjoys no constitutional immunity from a nondiscriminatory revenue measure, . . . which operates only to ensure that each member of a class of special beneficiaries of a federal program pay a

> reasonable approximation of its fair share of the cost of the program to the National Government.

Id. at 454–55 (noting that "the immunity of the Federal Government from state taxation is bottomed on the Supremacy Clause, but the States' immunity from federal taxes was judicially implied from the States' role in the constitutional scheme").

In sum, the Supreme Court held:

> So long as the [federal] charges do not discriminate against state functions, *are based on a fair approximation of use of the system*, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied, there can be no substantial basis for a claim that the National Government will be using its taxing powers to control, unduly interfere with, or destroy a State's ability to perform essential services.

Massachusetts, 435 U.S. at 466–67 (emphasis added).

This Court understands the facial appeal of the *Massachusetts* decision to Wilmington's position. The Supreme Court in that case indeed acknowledged that a "fair approximation" of a user's proportional share of the cost of a system does not require a precise calculation. 435 U.S. at 465–66 (discussing the general insignificance of "[t]he possibility of a slight overcharge"). The government does not dispute that premise. Def. Resp. at 9 (conceding that the Clean Water Act's Federal-Facilities Section "does not require exact precision"). And neither does this Court. But that premise does *not* lead to the ineluctable conclusion that the reasoning in *Massachusetts* applies here to save Wilmington's money-mandating claim. In that regard, we must be clear about the context of that case and the precise issue before the Supreme Court — *Massachusetts* did not define the term "fair approximation" for all purposes, but rather addressed whether fees the federal government imposed on a state passed constitutional muster:

> If the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system. The resulting increment in a State's actual fair share might well be greater than any overcharge resulting from the present fee system. But the complete answer to the Commonwealth's concern is that even if the flat fee does cost it somewhat more than it would have to pay under a perfect

> user fee system, there is still no interference with the values protected by the implied constitutional tax immunity of the States. The possibility of a slight overcharge is no more offensive to the constitutional structure than is the increase in the cost of essential operations that results either from the fact that those who deal with the State may be required to pay nondiscriminatory taxes on the money they receive or from the fact a jury may award an eminent domain claimant an amount in excess of what would be "just compensation" in an ideal system of justice.

Massachusetts, 435 U.S. at 466.

The Supreme Court thus held that a tax representing a "fair approximation" of "use" — or perhaps, more accurately, an allocation of cost of use — satisfied constitutional requirements. 435 U.S. at 461 ("A nondiscriminatory taxing measure that operates to defray the cost of a federal program by recovering a fair approximation of each beneficiary's share of the cost is surely no more offensive to the constitutional scheme than is either a tax on the income earned by state employees or a tax on a State's sale of bottled water."). Applying that "fair approximation" standard to the tax at issue, the Court in *Massachusetts* concluded that it was constitutional: "the tax satisfies the requirement that it be a fair approximation of the cost of the benefits civil aircraft receive from the federal activities." *Id.* at 467. Although the Court noted "[a] probable deficiency in the formula" — insofar as "not all aircraft make equal use of the federal navigational facilities or of the airports that have been planned or constructed with federal assistance" — the Court nevertheless determined the taxation "scheme . . . is a fair approximation of the cost of the benefits each aircraft receives." *Id.* at 468–69 ("The four taxes, taken together, fairly reflect the benefits received, since three are geared directly to use, whereas the fourth, the aircraft registration tax, is designed to give weight to factors affecting the level of use of the navigational facilities."). The Supreme Court further determined that "the tax is not excessive in relation to the cost of the Government benefits supplied." *Id.* at 469.

Although this Court agrees with Wilmington that *Massachusetts* plausibly may be read to operationally define the phrase "fair approximation," we cannot graft that concept from a case involving the constitutionality of a tax onto the later-enacted, money-mandating statute at issue in this litigation. To the extent the Supreme Court defined "fair approximation," the definition is hardly plug-and-play. In that regard, the United States Court of Appeals for the Eighth Circuit explained the difficulty with exporting the *Massachusetts* analysis to a different context:

> As far back as the landmark case of *McCulloch v. Maryland,* 4 Wheat. 316, 4 L.Ed. 579 (1819), it was recognized that the federal government is immune from taxation by the states

> absent Congressional authorization. Federal immunity from state taxation is based on the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2. Unlike the states' immunity from federal taxation, which is somewhat limited, the United States' immunity from state taxation is a "blanket immunity." . . . The immunity question in *Massachusetts* arose in the context of a state's immunity from federal taxation. The states' immunity from federal taxation is more limited than the federal government's immunity from state taxation, and is based on a different constitutional source. Generally, the states are immune from federal taxation that would unduly burden essential state functions. Federal immunity from state taxation, however, is a blanket immunity and is not subject to the same limits.

United States v. City of Columbia, 914 F.2d 151, 153–54 (8th Cir. 1990) (internal citations omitted) (quoting *South Carolina v. Baker,* 485 U.S. 505, 518 n.11 (1988), and discussing *Massachusetts,* 435 U.S. at 459–60). Thus, there is a distinction this Court must draw — at least as a matter of constitutional law — between the degree of precision that the federal government must use when imposing a tax or fee on states, on the one hand, and the severe constraints upon states seeking to charge the federal government, on the other.

Wilmington fails to explain how the constitutional principles controlling what the federal government may charge users for its services translate to how this Court must interpret 33 U.S.C. § 1323(c).[29] Again, the Supreme Court in *Massachusetts* was concerned with whether a federal tax or user fee constituted a "fair approximation" of the cost of benefits received by a user of a government program or system — a judicially-created test formulated specifically to analyze the constitutionality of a federal tax (or fee). Indeed, the Supreme Court itself has read *Massachusetts* as standing only for the proposition that "the amount of a user fee [need not] be precisely calibrated to the use that a party makes of Government services." *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) ("Nor does the Government need to record invoices and billable hours to justify the cost of its services."). Rather, "[a]ll that [is] required is that the user fee be

[29] *Cf. United States v. Sperry Corp.,* 493 U.S. 52, 61 n.7 (1989) (distinguishing *American Trucking Assns, Inc. v. Scheiner*, 483 U.S. 266 (1987), on the grounds that "[t]he Court there was faced with particular constitutional restrictions on fees and taxes not present in this case" and explaining that *American Trucking*'s reasoning "cannot be extended outside the context of the Commerce Clause" which imposes a more "exacting requirement" than the Just Compensation Clause).

a 'fair approximation of the cost of benefits supplied.'" *Id.* (quoting *Massachusetts*, 435 U.S. at 463 n.19).[30]

In contrast to the constitutional questions addressed in *Massachusetts*, this Court is faced with a clear statutory directive — and we cannot simply ignore the object of the "fair approximation" in the Clean Water Act's Federal-Facilities Section, in which Congress expressly commanded payment of local service charges only where they are based on "the proportionate contribution of the property . . . to stormwater pollution." 33 U.S.C. § 1323(c)(1)(A). As discussed above, Wilmington's charging methodology is entirely untethered to the Properties' proportionate contribution to stormwater pollution. Again, the City is free to estimate the Properties' proportionate contribution to stormwater pollution (*i.e.*, to employ a "fair approximation"), but there is little, if any, evidence — and certainly no preponderant evidence — that Wilmington's scheme does that with *any* degree of accuracy.

Indeed, the Court agrees with the government that Wilmington would lose even if the Court were to apply the *Massachusetts* test. *See* Def. Reply at 10. As the government notes, "*Massachusetts* requires charges be based on some fair approximation of use" or cost of use. *Id.* (citing *Massachusetts*, 435 U.S. at 464). Wilmington, however, "did not present any evidence at all showing that the Properties use Wilmington's system or impose any measurable burden on Wilmington's system," and the Properties "indisputably do not use Wilmington's local drainage infrastructure." Def. Reply at 10 (citing JSUF ¶ 14 and explaining that "[t]o the contrary, the evidence strongly shows the opposite, that the Properties are not being charged an approximate amount proportionate to their contributions to stormwater pollution").[31]

Wilmington cites other cases applying *Massachusetts*, but they are inapposite or support the government. *See* Pl. Resp. at 33 (citing, *e.g.*, *Jorling v. Dep't of Energy*, 218

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[30] The Supreme Court thus "recognized that when the *Federal Government* applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we declined to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation for airport and airway use[.]'" *Sperry*, 493 U.S. at 61 (emphasis added) (citing *Massachusetts*, 435 U.S. at 468).

[31] The Court further agrees with the government that Wilmington also appears to "equate[] 'proportionate' with 'nondiscriminatory,' arguing that proportionate simply means fair and equitable apportionment between different governments." Def. Rep. at 10 (citing Pl. Resp. at 34). The government correctly explains, however, that "[S]ection 1323(c) *separately* requires stormwater charges be nondiscriminatory" and that "[i]f Wilmington were right, there would be no need to separately require proportionality if 'nondiscriminatory' and 'proportionate' denoted the same meaning." *Id.* Thus, the Court agrees that "Wilmington's interpretation renders the word 'proportionate' superfluous" and "must be rejected." *Id.*

F.3d 96 (2d Cir. 2000), and *Brock v. Wash. Metro Area Transit Auth.*, 796 F.2d 481, 485 (D.C. Cir. 1986)).[32]

In *Jorling*, the United States Court of Appeals for the Second Circuit held that hazardous waste charges New York State imposed on federal installations under the Resource Conservation and Recovery Act ("RCRA") constituted "reasonable service charges" pursuant to 42 U.S.C. § 6961(a) because they met the *Massachusetts* "fair approximation" test. 218 F.3d at 103–06. In particular, the Second Circuit concluded that such charges were "reasonably designed to fairly approximate [the] use of [the New York State Department of Environmental Conservation]'s services and thereby to roughly approximate the cost of supplying these services to transporters of waste[.]" *Id.* at 105. As explained above, this Court does not agree that *Massachusetts*' constitutional concerns — and its "fair approximation" standard — may be transported and applied directly to the Clean Water Act's Federal-Facilities Section. More significantly, however, *Jorling* is distinguishable because RCRA does not contain the same (or even an analogous) definition of "reasonable service charges." *Compare* 42 U.S.C. § 6961(a), *with* 33 U.S.C. § 1323(c)(1).

As amended, RCRA provides that each department, agency, and instrumentality of the federal government

> engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . , respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of *reasonable service charges.*

42 U.S.C. § 6961(a) (emphasis added). "In 1992, Congress clarified the scope of the waiver of sovereign immunity in this provision," *Jorling*, 218 F.3d at 100, by adding the following language:

> The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any . . . reasonable service charge). The reasonable service charges referred to in this subsection

[32] Plaintiff also cites *N.Y. Dep't of Env't Conservation v. U.S. Dep't of Energy*, 850 F. Supp. 132, 142–43 (N.D.N.Y. 1994), but that decision was affirmed in *Jorling* and so this Court does not separately address the district court decision.

> include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program.

Federal Facility Compliance Act of 1992, Pub. L. No. 102–386, § 102(a)(3), 106 Stat. 1505, 1505 (codified at 42 U.S.C. § 6961(a)).

RCRA thus manifestly does not define "reasonable services charges" *per se*; it merely provides examples of what the federal government may be charged in the limited context of waste disposal. While RCRA references the permissibility of "other nondiscriminatory charges," RCRA contains nothing similar to the limiting language of proportionality of contribution to pollution that Congress included in the Clean Water Act's Federal-Facilities Section. The absence of such specific language at least enables this Court to understand why, for the purposes of RCRA, the parties and the Second Circuit resorted to the *Massachusetts* analysis regarding what constitutes a fair approximation *of use*. *See Jorling*, 218 F.3d at 102 ("The Supreme Court's application of the fair approximation test in *Massachusetts* to uphold the challenged aircraft registration tax appears to tilt the analysis toward consideration of use.").[33] Congress has instructed, however, that the "fair approximation" that is relevant for the Clean Water Act is not some generic "use" given over to judicial definition, but rather must be an approximation of "the proportionate contribution of the property . . . to stormwater pollution." 33 U.S.C. § 1323(c)(1)(A). Because Wilmington's claims are governed by more clearly defined, and more restrictive, statutory language than that of RCRA, the Second Circuit's reliance on the *Massachusetts* analysis of "fair approximation" does not persuade this Court to apply *Massachusetts* in this case.

In *Brock v. Washington Metro Area Transit Authority*, the United States Court of Appeals for the District of Columbia Circuit considered the District of Columbia's workers' compensation regime, pursuant to which "all employers (or their compensation carriers) contribute to a Special Fund from which the Secretary of Labor . . . makes a variety of payments to injured workers." 796 F.2d at 481–82 (citing 33 U.S.C. § 944). The Washington Metropolitan Area Transit Authority ("WMATA") stopped contributing to that Special Fund, asserting, among other things, "that the

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[33] *See also Jorling*, 218 F.3d at 103 ("Ultimately, of course, the *Massachusetts* test is concerned with whether the challenged method for imposing charges fairly apportions the cost of providing a service, but by framing the second component of the test in terms of 'use,' the Court made clear that a method for imposing charges based on each payer's approximate use will pass muster as an adequate apportionment of costs.").

constitutional doctrine of intergovernmental tax immunity (here, state immunity from federal taxation) shelters it from liability for Special Fund contributions." *Id.* at 482.

Applying *Massachusetts*, the D.C. Circuit explained as follows:

> . . . *Massachusetts* held only that the method used to calculate the fee must rationally be designed to approximate prospectively the benefit to the user. The levy held constitutional in *Massachusetts* illustrates this meaning of "fair approximation." The fee was a flat registration tax for all civil aircraft, introduced to help finance federal aviation programs; the amount of the fee was based on the size and type of aircraft, but not the aircraft's actual use of the airways or the facilities and services supplied by the United States. . . .
>
> The *Massachusetts* opinion acknowledged that a fee based on actual use would measure the benefit to the user more accurately. The Court emphasized, however, that an actual use measurement method would be more costly to administer. Furthermore, the Court observed, the measurement method employed does bear a fair relationship to the benefit: bigger planes are more expensive for the federal safety system to accommodate. Finally, the Court noted that all users receive certain ambient or indirect benefits from the federal aviation system: the federal services are available to, and make the airspace safer for, all users.

Brock, 796 F.2d at 485–86 (discussing *Massachusetts*, 435 U.S. at 468–69, 451 n.9).

Like *Jorling*, the *Brock* decision similarly relied upon *Massachusetts* to focus on whether a fee had some approximate or fair relationship to the benefit received by the entity charged. But, again, in *Brock* — just as in *Massachusetts* itself — there was no statutory command defining the *object* of "fair approximation," in contrast to the Clean Water Act's Federal-Facilities Section at issue here. Rather, the D.C. Circuit adapted and applied the *Massachusetts* analysis to hold "that the payments in question entail a fair approximation of projected benefits, and, moreover, relate to a 'proprietary' function," such "that WMATA cannot tenably claim constitutional immunity from the Special Fund assessment." *Brock*, 796 F.2d at 487.

Brock is thus inapposite to Wilmington's claim, insofar as (1) constitutional immunity is not at issue in this case, and (2) the federal government's general "use" of the City's stormwater management program is not the relevant consideration (for

which there is no evidence in any event). Rather, the issue here is whether the City's fees are "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)." 33 U.S.C. § 1323(c)(1)(A). As explained above, Wilmington's assessed fees — for which it seeks a judgment here — are not based on some fair approximation of the government's proportionate contribution to stormwater pollution.

If anything, *Brock*'s explanation of *Massachusetts* demonstrates the problems with Wilmington's methodology, at least vis-à-vis its money-mandating claim in this case. As noted above, the D.C. Circuit in *Brock* highlighted that "the measurement method employed" in *Massachusetts* "does bear a fair relationship to the benefit: bigger planes are more expensive for the federal safety system to accommodate." 796 F.2d at 485–86 (noting that, in *Massachusetts*, "the amount of the fee was based on the size and type of aircraft, but not the aircraft's actual use of the airways or the facilities and services supplied by the United States"). In contrast, Wilmington presented *no* evidence explaining the relationship between the size and nature of the Properties and their proportionate contribution to stormwater pollution — and that is precisely the type of evidence the Federal-Facilities Section requires in order for the government to be on the hook for the service charges at issue. Viewed through the prism of *Massachusetts*, Wilmington's service charges would be akin to the government charging fees based not on the verified size and type of aircraft, but rather on a mere listing of aircraft, imported from a third party without verification, that may or may not accurately reflect the aspects of the aircraft generating the charges. This Court cannot find such charges payable pursuant to 33 U.S.C. § 1323.

D. The City's Fee Adjustment Process Does Not Qualify as a "Local Requirement" for Purposes of 33 U.S.C. § 1323(a)

Since the outset of this case, Wilmington repeatedly has argued that the government cannot contest the City's stormwater charges because the government did not challenge the charges through the City's appeal process. The Court consistently has rejected that argument. *See Wilmington I*, 136 Fed. Cl. at 631–33 (rejecting Wilmington's arguments that (1) Section 1323(a) compels the government to file an appeal, and (2) the exhaustion doctrine prevents the government from raising in litigation any arguments it could have raised in that administrative appeal); *Wilmington II*, 152 Fed. Cl. at 379–80 (rejecting Wilmington's argument that the government should be precluded from arguing at trial that the Properties contain wetlands because the government never sought lower stormwater charges through the City's appeal process). At trial, Wilmington nevertheless continued to assert that its charges must be presumed reasonable because the government did not file a fee adjustment application. Tr. 193:8–

12. In its response brief, Wilmington once again advances the same position, with equally unpersuasive arguments. Pl. Resp. at 38–42.

As this Court already has explained, Wilmington's permissive administrative appeal process, which allows property owners to appeal only future charges — and only after all assessed fees, no matter how unreasonable, have been paid to the City — does not cloak its stormwater charges in *per se*, statutory reasonableness for the purposes of the Federal-Facilities Section. Nor for that matter is the appeal process a "requirement[]" to which the government must adhere pursuant to 33 U.S.C. § 1323(a).

The statute's plain language, case law interpreting the statute, and even the statute's legislative history all mandate rejection of Wilmington's argument. The Court evaluates each of these before turning to Wilmington's arguments.

We begin with the statute's text. Section 1323(a) instructs agencies to comply with "local requirements . . . respecting the control and abatement of water pollution." 33 U.S.C. § 1323(a). As an initial matter, a straightforward reading indicates that Wilmington's appeal process does not govern, does not involve, and thus is not "respecting the control or abatement of water pollution."[34] The Wilmington Code describes the appeal process as one property owners can undertake to dispute the amount of their charges. Wilmington Code § 45-53(d)(7). Appealing a charge, self-evidently, has nothing to do with "the control and abatement of water pollution." *See id.* (describing the following grounds for appeal: "(1) the calculation of the storm water charge; (2) the assigned storm water class; (3) the assigned tier, if applicable; and (4) the eligibility for a credit").

Although the case law interpreting the term "requirements" in Section 1323 is sparse, it supports defining "requirements" in a way that does not include Wilmington's appeal process. The Supreme Court, for example, in *EPA v. California*,

[34] Wilmington cites *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. --, 138 S. Ct. 1752, 1759 (2018), for the following dictionary definition of "respecting": "in view of: considering; with regard or relation to: regarding, concerning." Pl. Resp. at 38. That definition does not help Wilmington, as the City does not explain — and the Court does not see — how Wilmington's appeal process is "regarding" or "concerning" the control or abatement of water pollution. Indeed, the City then references "the illustrative fee adjustments appeal example in Wilmington's [Storm Water Credits and Fee Adjustments Appeals] Manual," in which a hypothetical commercial property owner "obtained a revised runoff coefficient." *Id.* The City argues that this illustration shows that a property owner could "[r]eplace more of asphalt or gravel with grass, and the City would reward the efforts to further limit stormwater pollution with still lower stormwater charges." *Id.* This example, however, merely clarifies that Wilmington's appeal process is both optional (rather than a "requirement") and a process respecting the revision of prospective *charges*, not respecting stormwater pollution.

adopted the view of the United States Court of Appeals for the Ninth Circuit that "requirements" refers "'simply and solely to substantive' standards, to effluent limitations and standards and schedules of compliance." 426 U.S. at 215 (quoting *California ex rel. State Water Res. Control Board v. EPA*, 511 F.2d 963, 969 (9th Cir. 1975)).[35] Under this definition, Wilmington's appeal process is not a "requirement."

The few district courts that have addressed the issue also read the term "requirements" like this Court reads it. *See In re ACF Basin Water Litigation*, 467 F. Supp. 3d 1323, 1337 (N.D. Ga. 2020) ("The Supreme Court has stated that the requirements that can be enforced against federal agencies under [the Federal-Facilities Section] are limited to objective state standards of control, such as effluent limitations in permits, compliance schedules and other controls on pollution applicable to dischargers." (citing *EPA*, 426 U.S. at 215)); *New York v. United States*, 620 F. Supp. 374, 384 (E.D.N.Y. 1985) (defining Clean Water Act "requirements" as "objective, administratively predetermined effluent standard[s] or limitation[s] or administrative order[s] upon which to measure the prohibitive levels of water pollution"); *Kelley ex rel. Michigan v. United States*, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (defining Clean Water Act "requirements" as state statutes that "provide objective, quantifiable standards subject to uniform application," and holding that statutes making it unlawful to discharge into state waters any substance that may become harmful to public welfare and providing causes of action for that behavior were *not* Clean Water Act "requirements").[36]

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[35] As discussed in Section I.B, *supra*, Congress amended the Clean Water Act in 1977 in response to *EPA v. California*. Nevertheless, Congress did not alter the Court's definition of "requirements" — the amended statute did not, and does not, expressly define "requirements." *See New York v. United States*, 620 F. Supp. 374, 382 (E.D.N.Y. 1985) (explaining that Congress did not expand the definition of substantive requirements in the 1977 Amendments and that "to the degree the Supreme Court's ruling in *EPA v. California* . . . construed the substantive 'requirements' of § 313 to mean effluent limitations, such ruling was unaffected by the 1977 amendments enacted by Congress"). Wilmington's appeal process also would not qualify as a procedural requirement even under the examples in the statute's legislative history; as cited *supra* note 5, a 1977 Senate report listed several examples of "procedural provisions" covered by "requirements," none of which resembles the appeal process: "requirements to obtain operating and construction permits, reporting and monitoring requirements, any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief, and the payment of reasonable service charges." S. Rep. No. 95-370, at 67.

[36] Wilmington did not cite any definition of "requirements," under the Clean Water Act or any other statute, or any case law, suggesting that Wilmington's appeal process applies to the federal government. The government, in contrast, bolsters its argument that the City's appeal process is not a "requirement" under the statute by citing cases that interpret the word "requirements" as used in similar statutes; this Court agrees that none of the definitions of

Additionally, legislative history, though not dispositive, supports the idea that Wilmington's appeal process does not concern the control or abatement of water pollution. As explained above, Congress amended the Clean Water Act in 1977 to address the Supreme Court's decision in *EPA v. California*, 426 U.S. 200 (1976), that the statute as then-written did not require federal agencies to pay for permits. *See supra* Section I.B. Wilmington thus correctly notes that the purpose of the 1977 Amendments, in part, "was to 'unequivocally' subject 'all Federal facilities and activities . . . to all of the provisions of State and local pollution laws.'" Pl. Resp. at 18 (quoting S. Rep. No. 95-370, at 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392). But Wilmington's reliance upon legislative history is misplaced. First, such history cannot supplant the plain meaning of the statute. Second, the Senate Report itself indicates that the 1977 Amendments were intended to subject federal facilities to procedural requirements related to controlling pollution, such as "requirements to obtain operating and construction permits, [and] reporting and monitoring requirements." S. Rep. No. 95-370, at 67. The government thus argues, and this Court agrees, that "a fee adjustment process is not at all similar to those example procedural requirements" cited in the Senate Report. Def. Mot. at 42.

Undaunted, Wilmington continues to push its twice-rejected thesis that the government had to comply with the City's appeal process. First, Wilmington again argues that the appeal process qualifies as a statutory "requirement" that the government is obligated to follow. Pl. Resp. at 39. Second, Wilmington asserts that Delaware state law mandates exhaustion. *Id.* at 40. And third, Wilmington contends that the government can pay the bills under protest and then sue for their return. *Id.* at 9. The Court addresses each argument *seriatim*.

First, Wilmington argues that the United States is subject to Wilmington's appeal process because that process is "easily understood as a procedural requirement" and the Clean Water Act subjects the federal government to local "administrative authority." Pl. Resp. at 39 (quoting 33 U.S.C. § 1323(a)).[37] As discussed above, the

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"requirements" in those cases, even if applied to the Clean Water Act, would include Wilmington's appeal process. *See* Def. Mot. at 41–43 (citing *Hancock v. Train*, 426 U.S. 167, 187 (1976) (Clean Air Act); *Fla. Dep't of Env't Regul. v. Silvex Corp.*, 606 F. Supp. 159, 162–63 (M.D. Fla. 1985) (RCRA); *Romero-Barcelo v. Brown*, 643 F.2d 835, 855 (1st Cir. 1981), *rev'd on other grounds sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (Noise Control Act)). In each of the cited cases, the court did not interpret the word "requirements" to include anything analogous to Wilmington's appeal process.

[37] "Each department, agency, or instrumentality . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, *administrative authority*, and process and

statute's language, as well as case law interpreting its language, foreclose this argument.

Second, Wilmington attempts to support its exhaustion argument on state law grounds. Pl. Resp. at 40 ("[T]he United States does not deny that Delaware requires exhaustion from its property owners."). It is irrelevant, though, whether Delaware law requires property owners to exhaust administrative remedies. As noted in *Wilmington I*, "[w]here '*Congress* has not clearly mandated the exhaustion of particular administrative remedies, the exhaustion doctrine is not jurisdictional, but is a matter for the exercise of sound judicial discretion.'" 136 Fed. Cl. 628, 632–33 (emphasis added) (quoting *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000)). In this case, neither Congress nor the Wilmington Code has mandated exhaustion. *See* 33 U.S.C. § 1323; Wilmington Code § 45-53(d)(7).

Mandating exhaustion thus falls to judicial discretion — and sound judicial discretion prevents mandating exhaustion in this case. For the reasons discussed above as well as in *Wilmington I*, Wilmington's appeal process is not reasonable. Section 45-53(d)(7) of the Wilmington Code applies only prospectively and does not allow adjustments of prior billing cycles. JSUF ¶ 112; Tr. 71:1–5, 102:23–103:4; JX 40 at WILM0012020. And before Wilmington even considers adjusting a property's stormwater charges, the property owner must pay all outstanding charges. Tr. 103:5–15. Thus, as Judge Williams noted in *Wilmington I*, pursuing Wilmington's appeal process could require the United States to pay unreasonable charges — something the language of Section 1323(c) expressly precludes. 136 Fed. Cl. at 633; 33 U.S.C. § 1323(c).

Third, Wilmington posits that property owners should pay charges "under protest" and then "bring[] an action against the city to recover [them] back." Pl. Resp. at 9 (first quoting *Murphy v. City of Wilmington*, 11 Del. 108, 138 (1880); and then citing *Mr. Kleen, LLC v. New Castle Cnty. Dep't of Special Servs.*, 2014 WL 4243562 (Del. Sup. Ct. Aug. 19, 2014)). Even if Delaware law provides for such an option — something the Court accepts only for the sake of argument here — this does not help Wilmington's case because it means that property owners who have been charged unreasonable sums have recourse, if at all, only as a plaintiff claiming a refund and not through Wilmington's appeal process. Indeed, even according to the City, the government's only remedy here with respect to past fee assessments is to pay the charges and then sue for a refund. Such an approach ignores the terms of the Clean Water Act which require the federal government only to pay charges where the statute commands it. Wilmington cannot use its appellate process to force the government to pay and sue for

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sanctions *respecting the control and abatement of water pollution*[.]" 33 U.S.C. § 1323(a) (emphasis added).

a refund as if the federal government itself were a plaintiff-claimant in this Court (or any other). Again, Section 1323(c) does not allow the government to pay unreasonable charges that do not comply with the statute, and nothing in the Federal-Facilities Section requires the government to pay first and seek a refund later. *See Nat'l Fed'n of Ind. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. --, 2022 WL 120952, at *7 (Jan. 13, 2022) (Gorsuch, J., concurring) ("Congress does not usually 'hide elephants in mouseholes'" (quoting *Whitman v. Am. Trucking Ass'ns.*, Inc., 531 U.S. 457, 468 (2001))).

Finally, *even if* this Court were to interpret the fee-adjustment process as generally mandatory, the government would not be required to exhaust it here. Wilmington concedes that the fee-adjustment process cannot provide the government's requested relief — retroactive adjustment of past charges. JX 40 at WILM0012020 ("There will be no retroactive adjustments for prior billing periods."); Tr. 191:15–25. And exhaustion is not mandatory when an agency cannot grant the requested relief. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 146–48 (1992) (describing a situation in which a federal agency "lack[s] authority to grant the type of relief requested" as a "set[] of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion"), *cited in Fredericks v. United States*, 125 Fed. Cl. 404, 411–12 (2016).

Further, the government would be forced to pay all outstanding charges before beginning the fee-adjustment process — even unreasonable charges that by law may not be imposed in the first place on the federal government. JX 40 at WILM0012021 ("All storm water charges that are outstanding at the time of the application must be paid in full prior to the city commencing the technical review."); Tr. 103:5–15, 194:5–195:5. The government therefore has no remedy under Wilmington's appeal process to dispute past unreasonable charges without paying them first, something forbidden by Section 1323, as the Court explained above.

Wilmington contends that *United States v. Testan*, 424 U.S. 392 (1976), "derail[s]" this point. Pl. Resp. at 40–41.[38] The legislative scheme at issue in *Testan* and that at

[38] The entirety of Wilmington's argument, which is difficult to track, is as follows:

> The United States' first argument [that the appeal process is inadequate because it would not grant retroactive adjustment of past charges] is derailed by *United States v. Testan*. There, the Supreme Court explained that because the respondents "have an administrative avenue for prospective relief available to them under the elaborate and structured provisions of the Classification

issue here, however, are as different as proverbial apples and oranges, and *Testan*'s holding does not support Wilmington's arguments. At issue in *Testan* was a federal scheme governing federal employee pay and via which Congress circumscribed the remedies available to federal employees for incorrect payments. 424 U.S. at 403–04 ("The situation, as we see it, is not that Congress has left the respondents remediless, as they assert, for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification."). In this case, in contrast, Wilmington is seeking damages which must qualify under the Clean Water Act's limited waiver of sovereign immunity. Am. Compl. ¶ 3 ("The United States . . . continues to deny[] its obligation under the Clean Water Act, 33 U.S.C. § 1323(a), to pay Wilmington reasonable service charges for stormwater management assessed against its properties located in Wilmington").

Here, accordingly, the question is whether the Clean Water Act mandates the government to pay Wilmington's invoices. Wilmington's contention that the government could have challenged the charges in the City's appeal process is spurious, as the government notes, Def. Mot. at 44, because such a challenge would not affect charges already assessed which may have violated the Clean Water Act. If Congress had circumscribed the government's remedies in Federal-Facilities Section cases — by, say, declaring all invoices assessed under that section presumptively proper and subject only to challenge via municipal appeal processes — this would be a different case. In the absence of such limiting language, however, the government is permitted to defend against the City's charges on the grounds that the charges do not comply with the Clean Water Act.

VI. THE UNITED STATES DOES NOT OWE INTEREST TO WILMINGTON

Wilmington claims the government owes the City interest accrued over the past decade due to the government's refusal to pay Wilmington's outstanding stormwater charges. Compl. at 10 (requesting $1,185,929.24 in interest). By the time of trial, Wilmington had assessed the government over $3.3 million in interest. Am. Compl. at 14 (requesting $3,360,441,32 in interest). In *Wilmington I*, the government moved for

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> Act . . . ," they "are not entirely without remedy. They are without the remedies in the Court of Claims of retroactive classification . . . to which they assert they are entitled. Additional remedies of this kind are for the Congress to provide and not for the courts to construct." *United States v. Testan*, 424 U.S. 392, 403–04 (1976).

Pl. Resp. at 40–41.

partial judgment on the pleadings as to the interest issue, arguing that Wilmington could not recover interest as a matter of law because Section 1323 does not explicitly waive sovereign immunity to recover interest. 136 Fed. Cl. at 630. The Court declined to resolve the interest question at that time because it "raise[d] a thorny issue of first impression in this Court." *Id.* at 634.

The Court today holds that Wilmington cannot claim interest from the government for the unpaid Clean Water Act charges even if the government were liable to Wilmington for the principal charges it assessed.

This Court can only award interest "under a contract or an Act of Congress expressly providing for payment thereof." 28 U.S.C. § 2516(a). The Supreme Court also has articulated a general "no-interest rule": "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). In *Shaw*, the Court held that a litigant who was entitled under statute[39] to a reasonable attorney's fee and costs after winning an employment suit against the federal government was not entitled to interest on the attorney's fee because the statute did not separately waive sovereign immunity for interest. *Id.* at 311, 323. The Court noted that this no-interest rule had been recognized "[f]or well over a century." *Id.* at 316. The Court further rejected plaintiff's contention that the statute waived sovereign immunity from interest "by equating the United States' liability to that of a private party." *Id.* at 319. Importantly, the Court noted that neither the statute nor legislative history references interest; such "congressional silence d[id] not permit [the Court] to read the provision as the requisite waiver of the Government's immunity with respect to interest." *Id*.

The Federal Circuit has repeatedly expanded upon the no-interest rule, noting, for example, that "the waiver for sovereign immunity for interest must be distinct from a general waiver of immunity for the cause of action resulting in the damages award against the United States." *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1126–27 (Fed. Cir. 2004). Such waivers, the Federal Circuit held, "'must be unequivocally expressed,' or a court must infer that Congress did not intend to create a waiver." *Id.* at 1127 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). In *Marathon Oil*, the Federal Circuit held that oil companies who successfully sued the United States for a breach of contract were not entitled to post-judgment interest because the statute under which they sued did not contain a separate, unambiguous sovereign immunity waiver

[39] The statute at interest in *Shaw* made the government "liable 'the same as a private person' for 'costs,' including 'a reasonable attorney's fee.'" 478 U.S. at 317–18 (quoting 42 U.S.C. § 2000e–5(k)).

for interest. 374 F.3d at 1125. The statute at issue "require[d] the government to pay post-judgment interest on 'all final judgments against the United States in the United States Court of Appeals for the Federal Circuit," *id.* at 1126 (quoting 28 U.S.C. § 1961(c)(2)), but "trigger[ed] a chain of cross[-]references that link[ed] four distinct statutory provisions," *id.* at 1128. Because the interaction between the cross-referenced statutes was "subject to plausible readings under which Congress has not waived sovereign immunity for post-judgment interest," the Federal Circuit concluded that "Congress has not unequivocally excluded the narrower reading of the relevant statutes" and held that plaintiffs could not recover interest. *Id.* at 1132. The Federal Circuit continues to invoke and apply the no-interest rule.[40]

Shaw, *Marathon Oil*, and 28 U.S.C. § 2516(a) all mandate that the government is only liable for interest when the law at issue contains an express waiver of sovereign immunity for interest. Nowhere in the Federal-Facilities Section is there such a waiver. Thus, the government would not be liable for interest even if Wilmington's charges qualified as "reasonable service charges" under the statute.

In response, Wilmington argues that the following sentence in Section 1323(a) waives sovereign immunity for interest regardless of the no-interest rule: "This subsection shall apply *notwithstanding any immunity* of such agencies, officers, agents, or employees *under any law or rule of law*." Pl. Resp. at 43 (quoting 33 U.S.C. § 1323(a)). Wilmington claims that this sentence waives the no-interest rule because "there is no plausible way to interpret 'notwithstanding any immunity . . . under any law or rule of law' to exclude interest." Pl. Resp. at 44 (quoting 33 U.S.C. § 1323(a)).

The Court disagrees. The sentence to which Wilmington points certainly indicates that federal instrumentalities cannot use "any immunity" to escape the provisions of Section 1323. But no provision provides for interest. Section 1323 does

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[40] *See, e.g.*, *Shell Oil Co. v. United States*, 7 F.4th 1165, 1174 n.3 (Fed. Cir. 2021) (reiterating that interest cannot be recovered in a suit against the United States without an express waiver); *Clay v. McDonough*, 2021 WL 4538675, at *2 (Fed. Cir. Oct. 5, 2021) (per curiam) (rejecting plaintiff's claim that he is entitled to interest because "'interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest' . . . and [plaintiff] has not identified any such waiver" (quoting *Shaw*, 478 U.S. at 311)); *Athey v. United States*, 908 F.3d 696, 708–09 (Fed. Cir. 2018) (affirming Court of Federal Claims' denial of interest on Lump Sum Pay Act and Back Pay Act pursuant to the no-interest rule); *Bitzer v. Shinseki*, 429 F. App'x 984, 986 (Fed. Cir. 2011) ("Moreover, *Smith* [*v. Principi*, 281 F.3d 1384 (Fed. Cir. 2002)] . . . unequivocally rejected the argument that no matter how compelling the equities or public policy argument in favor of awarding interest, the Department [of Veterans Affairs] is without authority to do so in the absence of express statutory language").

not mention interest, so the general waiver of immunity language is of no help to Wilmington. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." (citations omitted)). In short, the "subsection" may "apply" notwithstanding any assertion of immunity, but nothing in that subsection provides for the payment of interest.

The Federal Circuit has held that statutory language far more helpful to a plaintiff than that of the Clean Water Act does not permit the recovery of interest. In *Smith v. Principi*, 281 F.3d 1384 (Fed. Cir. 2002), upon which the government relies, *see* Def. Reply at 16, the Federal Circuit addressed a statute that provided that the government could "provide such relief on account of such error as the Secretary determines *equitable*, including the payment of moneys to any person whom the Secretary determines is *equitably* entitled to such moneys." *Smith*, 281 F.3d at 1387 (quoting 38 U.S.C. § 503). The Federal Circuit concluded that such language did not waive sovereign immunity for the purposes of collecting interest. *Id.* at 1387. Section 1323 contains no language regarding interest that would make it more helpful to Wilmington than the language at issue in *Smith* was helpful to the plaintiff in that case. Indeed, if anything, Section 1323 makes clear, in defining the charges for which sovereign immunity *is* waived, that interest is *not* available. Accordingly, *Smith* all but precludes interpreting Section 1323 as waiving sovereign immunity for interest.

Wilmington's other arguments similarly fail to overcome the no-interest rule. The government correctly observes that "[t]he plain language of 'service charges' encompasses charges for *service* — not charges for 'the time value of money and loss of use of amounts not paid when they are due.'" Def. Mot. at 47 (quoting *Am. Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 684 (2007)). In response, Wilmington argues that "Congress statutorily defin[ed] . . . 'reasonable service charge' in Section 1323(c)(1) to include a qualifying 'fee, charge, or assessment' even if 'denominated a tax,' which supplants any alternative 'typical' meanings." Pl. Resp. at 43 (citing *Van Buren v. United States*, 593 U.S. --, 141 S. Ct. 1648, 1657 (2021)). This argument fails. Even if "service charge" were defined broadly, as Wilmington urges, the statute nowhere mentions interest — and the "fee, charge, or assessment" language Wilmington points to is plainly not a waiver of immunity for a plaintiff to collect interest on any amounts owed. *See, e.g.*, *Shaw*, 478 U.S. at 314.

Wilmington also takes a stab at a negative implication argument, noting that Section 1323(a) does not explicitly bar recovery of interest like the Federal Tort Claims Act does. Pl. Resp. at 44–45; *see also* 28 U.S.C. § 2674 ("The United States shall be liable

. . . in the same manner and to the same extent as a private individual . . . but shall not be liable for interest prior to judgment . . . .").

Wilmington apparently fails to grasp that the no-interest rule means exactly that. A statute must explicitly authorize interest for a plaintiff to collect it; statutes do not need to explicitly preclude interest because that is the default setting. As the government correctly responds, "[t]he question is not whether Congress prohibited interest under the [Clean Water Act], but whether Congress *expressly and affirmatively allowed it*." Def. Rep. at 17 (emphasis added) (first citing *Marathon Oil*, 374 F.3d at 1126; then citing *Shaw*, 478 U.S. at 314).[41]

Finally, Wilmington argues that a Supreme Court case from 1921, *Missouri Pacific Railroad Company v. Ault,* is "more instructive" than the no-interest rule reinforced by *Shaw*. Pl. Resp. at 46 (citing *Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554 (1921)). This argument fails to overcome the no-interest rule. First, *Missouri Pacific Railroad Company* was decided over a century ago; to the extent the case conflicts with either *Shaw* or 28 U.S.C. § 2516(a), the latter case and statute are controlling.[42]

This Court reaffirms that absent an express statutory waiver of sovereign immunity for a plaintiff to charge or claim interest, a party cannot succeed on a claim of interest against the federal government. *Blueport Co., LLP v. United States*, 71 Fed. Cl. 768, 780 (2006) (explaining that plaintiff's "'waiver-through-statutory construction' arguments" demonstrated that the statutory language at issue was "*at best* ambiguous [and thus] not enough to constitute a waiver of sovereign immunity" (citing *Lane*, 518 U.S. at 195)). Because the Clean Water Act lacks such a waiver of sovereign immunity, Wilmington cannot recover interest from the United States in this case even if it were entitled to the principal charges.

VII. CONCLUSION

The bottom line is that the statute at issue, Wilmington's litigation strategy, and the evidence presented at trial collectively tie the Court's hands. Section 1323 requires that stormwater charges assessed against federal properties be based upon their proportional contribution to stormwater pollution. At trial, however, Wilmington

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[41] Contrary to Wilmington's contention, this Court did not previously "acknowledge[]" that the Clean Water Act lacks a "prohibit[ion] of interest." Pl. Resp. at 45 (citing *Wilmington I*, 136 Fed. Cl. at 635).

[42] Additionally, *Shaw* does not cite or address *Missouri Pacific*, which indicates that the Court did not recognize *Missouri Pacific* to be a case about interest claims against the government.

failed to provide any evidence linking its charges at issue to the Properties' contribution to Wilmington's stormwater pollution.

For the above reasons, Wilmington has failed to prove that the charges it assessed the government qualified as "reasonable service charges" pursuant to the Federal-Facilities Section and, accordingly, the government's RCFC 52(c) motion for judgment on partial findings is **GRANTED**. The Clerk is directed to enter judgment for defendant, the United States.

IT IS SO ORDERED.

s/ Matthew H. Solomson
Matthew H. Solomson
Judge

In the United States Court of Federal Claims

No. 16-1691 C
Filed: January 27, 2022

CITY OF WILMINGTON, DELAWARE, a municipal corporation of the State of Delaware

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed January 26, 2022, granting defendant's RCFC 52(c) motion for judgment on partial findings,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 22-1581

Short Case Caption: City of Wilmington, Delaware v. US

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Date: 05/26/2022

Signature: /s/Paul T. Nyffeler

Name: Paul T. Nyffeler