2022-1581

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CITY OF WILMINGTON, DELAWARE

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in Case No. 1:16-cv-001691, Judge Matthew H. Solomson

BRIEF OF DEFENDANT-APPELLEE, UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for the United States states that no other appeal in or from the proceedings below was previously before this or any other appellate court under the same or similar title. Counsel is not aware of any cases pending in this or any other court that will directly affect or be directly affected by the Court's decision in this appeal.

STATEMENT OF THE ISSUES[1]

1. Whether the trial court correctly concluded that plaintiff-appellant, the City of Wilmington (Wilmington or the City), failed to prove by a preponderance of the evidence that the stormwater charges it assessed the United States Army Corps of Engineers (USACE or the Corps) are "reasonable services charges" under section 1323(c)(1)(A) of the Clean Water Act.

2. Whether the trial court correctly held that Wilmington's optional fee adjustment process, which provides only prospective relief, is not a "local requirement" under section 1323(a) of the Clean Water Act.

3. Whether the trial court correctly held that Wilmington cannot recover interest from the United States on the disputed stormwater charges because the Clean Water Act does not waive sovereign immunity for interest.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

In this case, Wilmington seeks to recover stormwater service charges that it assessed against the USACE in connection with five properties comprising dredge disposal sites (the Properties) that the USACE owns in the City. Wilmington

[1] In light of Federal Circuit Rule 28(b), we include a separate statement of issues, statement of the case, and statement of the facts because plaintiff-appellant's brief does not adequately explain the case.

claims that the stormwater charges at issue are "reasonable service charges" assessed for the "control and abatement of water pollution" pursuant to 33 U.S.C. § 1323(c)(1)(A), and that the United States owes the City $2,577,682.62 in principal and $3,360,441.32 in interest. Wilmington seeks review of the United States Court of Federal Claims' decision to grant the United States' motion for judgment on partial findings following a trial, which concluded following the City's case-in-chief. The Court of Federal Claims found that Wilmington failed to carry its burden to prove that its charges were "reasonable service charges" within the meaning of the statute, and 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. Appx0050.

II. Statement Of Facts

A. The Evolution Of The Clean Water Act

In 1948, Congress passed the Federal Water Pollution Control Act (FWCPA), the predecessor to the Clean Water Act. Pub. L. No. 80-845, 62 Stat. 1155 (1948). The law instructed the Surgeon General, in cooperation with Federal and state agencies, to create comprehensive programs for reducing water pollution. Pub. L. No. 845 62 Stat. 1155, Ch. 758, § 2(a). The FWPCA, however, led to a 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). The statute has been amended several times. For example, pursuant to the Water Quality Improvement Act of 1970, Federal agencies were required to "insure compliance with applicable water quality standards[.]" Act of April 3, 1970, Pub. L. No. 91-224, 84 Stat. 91.

In 1972, the FWPCA was substantially rewritten because Congress determined that water quality standards could not effectively serve "as the major vehicle for pollution control or abatement." *Env't Def. Fund., Inc. v. Costle*, 657 F.2d 275, 279 (D.C. 1981). The Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. § 1251 *et seq.* (1970 ed.)), "placed primary emphasis upon both a point of source discharge permit program and . . . effluent limitations (specified maximum levels of pollution allowed to be discharged by an individual source)." *Costle*, 657 F.2d at 279. Under the new scheme, reducing the level of effluents that flow from point sources was accomplished through the issuance of permits under the National Pollutant Discharge Elimination System (NPDES). *See* 33 U.S.C. § 1342. The CWA prohibited the release of pollutants from point sources except in compliance with an NPDES permit. *See* 33 U.S.C. § 1311.

In 1972, Congress also added Section 313 of the CWA, titled "Federal Facilities Pollution Control" (Federal-Facilities Section), the predecessor to the

provision at issue in this case, which 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 any payment of reasonable service charges." 86 Stat. 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. So, 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.

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. *See* Clean Water Act of 1977, Pub. L. No. 95-217, §§ 60-61, 91 Stat. 1566, 1597-98 (the 1977 Amendments). The 1977 Amendments required 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 or sanction, whether enforced in Federal, State, or local courts or in any other manner.

Id.

Despite the 1977 amendment to the Federal-Facilities Section, the federal government routinely refused to pay stormwater charges upon the ground that such charges were impermissible taxes rather than fees, which violated the Supremacy Clause and did not fall within the waiver of immunity contained in section 1323(a) of the CWA. *See Dekalb Cnty., Georgia v. United States,* 108 Fed Cl. 681, 686, 696 (2013) (holding that the County's stormwater management system is an impermissible tax, rather than a fee because, among other reasons, stormwater charges are used to finance benefits that inure primarily to the general public, and therefore, Congress did not unequivocally waive the federal government's sovereign immunity from state taxation in 1977); *see also City of Cincinnati v. United States*, 39 Fed. Cl. 271 (1997) (granting Government's motion to dismiss because the storm drainage services charges levied against the United State by the

City of Cincinnati constitute impermissible taxation of the federal government), *aff'd on other grounds,* 153 F.3d 1375, 1376 (Fed. Cir. 1998) (holding that Cincinnati failed to establish elements of an implied in fact contract between the City and the United States and dismissing the complaint on that basis, but not reaching the more "difficult" issue of whether the stormwater charge was an impermissible tax); *Oneida Tribe of Indians of Wis. v. Vill. of Hobart, Wis.*, 732 F.3d 837, 842 (7th Cir. 2013) (holding that the stormwater runoff assessment is an impermissible tax rather than a fee, in part, because it "is not a fee for a service provided to a particular landowner").

In part to address this issue, Congress amended the Clean Water Act in 2011 to define "reasonable service charges:"

> (c) Reasonable service charges
>
> (1) In general
>
> For the purpose of this subchapter, 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 quantity 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).

B. Wilmington's Stormwater Ordinance, Wilmington Code § 45-53

Wilmington charges owners of all properties within its corporate boundaries to recover the costs "related to all aspects of storm water management." Wilmington, DE Code (Wilmington Code) §45-53(d) (the Ordinance). The program's goal is "to enhance the surface water quality by reducing the quantity and rate of stormwater runoff and the amount of pollutants discharged into the rivers, which occurs as a consequence of separate stormwater discharges [combined sewer overflows], and wastewater treatment plant discharges." Appx0220.

C. The Properties 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. Appx0041. Only one of the five parcels contains impervious area. Appx0215. The Properties cover more than 270 acres. *Id.* Some portion of

precipitation that falls on the Properties runs off them and ultimately into the Christina and Delaware Rivers. *Id.*

Wilmington's manual provides that stormwater fees should be "proportional to the demand a user places on the system." Appx0226. 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 nearby rivers. *Id.* The system consists of stormwater collection and conveyance system and a wastewater treatment facility. Appx0041-0042. The stormwater collection and conveyance system is comprised of a combined sewer system and municipal separate storm sewer system. Appx0042. In times of heavy rainfall, stormwater runoff can combine with wastewater in amounts too great for the combined sewer system capacity. *Id.* This can cause a combined sewer system overflow event, during which wastewater and stormwater both flow into the rivers, polluting them. *Id.*

Although stormwater from at least one of the Properties flows directly into a nearby river, it does so without using the City's sewer system. Appx0042. As a result, no stormwater from the Properties contribute to combined sewer overflows. Stormwater from the Properties does not enter Wilmington's combined sewer system or its municipal separate storm system. *Id.* The Properties also do not use, or burden, the City's wastewater treatment plant. *Id.* Wilmington does not know

the proportional demand or burden, if any, that the dredge disposal sites place on the rivers. Appx0148 (Williams Tr. 185:13-23, 186:23-25, 187:1-3).

D. Wilmington's Stormwater Charge Formula

Wilmington assesses a stormwater charge on the owner of each parcel of land in Wilmington. Appx0042. Because the City cannot feasibly measure actual stormwater runoff or pollution for each property within its corporate boundaries, Wilmington's stormwater charge formula attempts to approximate runoff or pollution attributable to each property. Appx0043. The City's estimating and charging formula for calculating stormwater varies depending on the type of property. Appx0043.

To calculate the stormwater charges for nonresidential properties, including the Properties at issue, the City multiplies the property's total area (gross parcel area) by a "runoff coefficient." *Id.* The runoff coefficient is used to estimate the percentage of a property's surface area that generate water runoff based on the property's physical nature and topography. *Id.* The product of the property's gross parcel area and its runoff coefficient is the property's "impervious area," *i.e.*, a number meant to approximate the surface area from which stormwater runs off the property. *Id.* The impervious area is then divided by an "equivalency stormwater unit" or "ESU," of 789 square feet, which represents the size of the median-single family home in Wilmington. Appx0044. The ESU serves as a common

denominator to help property owners conceptualize the runoff for which their property is responsible. *Id.* The impervious area divided by the ESU produces a property's ESU factor. 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. *Id.*

The City obtains the first factor in the nonresidential formula – a property's gross parcel area – from the New Castle County Department of Land Use. *Id.* The City assigns a runoff coefficient to a property based upon the stormwater class into which the City has categorized a property. *Id.* Wilmington does not visit, or otherwise independently assess properties, but rather places them within a stormwater class based on an occupancy code the County has assigned to a particular property. *Id.* Wilmington defines a stormwater class as "classes of uses defined such that the customers within a class have similar land use characteristics." Appx0467.

Black & Veatch, an engineering firm the City hired to develop its stormwater charge system, 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 (1962 Study). *Id.* At trial, Wilmington'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 runoff coefficients – assumes the same stormwater characteristics as the categories used in Dr. Chow's 1962 study or those used by the City. Appx0045. The City 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. Appx0045.

By contrast, for residential parcels, Wilmington does not use runoff coefficients. Appx0046; Appx0132. Instead, for residential properties, Wilmington calculates impervious area more accurately by using actual data, including Geographic Information System (GIS) mapping and aerial imagery. Appx0046; Appx0133 (Williams Tr. 125:5-13).

Wilmington assesses interest on unpaid stormwater charges: 1% for the first three months of nonpayment of charges, 1.5% for the second three months, 2.5% for the third three months of nonpayment of charges, and 3% for each subsequent month after twelve months of nonpayment of charges. Appx0045.

E. Wilmington's Application Of Its Formula To The Properties

For purposes of calculating stormwater charges, Wilmington assigned the Properties to the "vacant" nonresidential stormwater class, with an assigned runoff

coefficient of .30 (or 30%). Appx0045; Appx2048 (JSUF ¶ 123[2]). The "vacant" class includes properties that "are not similar at all to one another" in terms of "land cover and size." Appx0045; Appx0143 (Williams Tr. 165:20-166:5). The vacant class could encompass marshes or wetlands, wooded areas, regular grass, loose gravel, compacted gravel, cobblestone, concrete and asphalt, and properties with different soils. Appx0143 (Williams Tr. 164:16-25; 165:1-18). Wilmington's fee adjustment manual recognizes that those different land covers are entitled to vastly different runoff coefficients. Appx0475. Wilmington has never analyzed whether the dredge disposal sites actually have a 30 percent impervious area such that they would contribute 30% stormwater runoff, or whether the 30 percent runoff coefficient assigned to the Properties accurately reflects the physical characteristics of the dredge disposal site. Appx0135 (Williams Tr. 135:12-23); Appx0142 (Williams Tr. 163:21-25, 164:1-2). Wilmington has never visited the Properties. Appx0045. 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." Appx00046; Appx2056.

[2] "JSUF" refers to Joint Statement of Undisputed Facts."

F. Wilmington's Appeal System

The City provides a limited appeal process to dispute stormwater charges; nonresidential property owners can file fee adjustment requests with the City if they believe there was an error in the charge calculations. Appx0047. Property owners can appeal: (1) the calculation of the storm water charge; (2) the assigned storm water class; (3) the assigned tier; and (4) the eligibility for a credit. *Id.* The appeal process applies only to future charges; Wilmington's appeal manual makes clear that "[t]here will be no retroactive adjustments for prior billing periods." *Id.;* Appx2047 (JSUF ¶ 112); Appx0475. Also, a property owner must pay all fees before the City will even consider an appeal. Appx0047.

G. The Disputed Stormwater Charges

Because the Corps disputes the reasonableness of the charges, it did not pay the stormwater charges or associated interest that Wilmington assessed on the Properties. Appx0214-0215. The United States did not bring an administrative appeal to dispute the charges. Appx0047. Wilmington claims that the United States owes it $2,577,686.82 in stormwater charges and $3,360,441.32 in interest for the Properties. Appx0045.

III. Course Of Proceedings Below

Wilmington filed suit in the trial court in December 2016 to recover "reasonable service charges" assessed for the "control and abatement of water pollution" pursuant to section 1323 of the Clean Water Act. Appx0038.

The parties cross-moved for judgment on the pleadings. *Id.* Wilmington argued that the Government, by not pursuing the City's administrative appeal process under Wilmington Code, waived any challenges to the reasonableness of Wilmington's charges. *Id.* On March 24, 2018, the trial court denied both parties' motions because: (1) Wilmington's appeal process is permissive, not mandatory; and (2) requiring the Government to exhaust its local administrative remedies would severely prejudice the Government. *Id.; City of Wilmington v. United States* (*Wilmington I)*, 136 Fed. Cl. 628 (2018).

On January 30, 2020, the United States filed a motion *in limine* to exclude the expert testimony of Mr. Hector J. Cyre. Appx0039. The next day, Wilmington filed a motion *in limine* to preclude the Government from asserting certain arguments, exclude the testimony of the Government's expert witness, and exclude several of its fact witnesses. *Id.* The trial court denied both motions. *Id.*; *City of Wilmington v. United States* (*Wilmington II*), 152 Fed. Cl. 373 (2021). In *Wilmington II*, the court once again rejected the City's administrative exhaustion argument that Wilmington had asserted in *Wilmington I*. 152 Fed. Cl. at 379-80.

On April 2, 2021, Wilmington filed a motion for reconsideration of *Wilmington I* and *Wilmington II*. Appx0040. The court denied Wilmington's motion. *Id.*

On April 19, 2021, trial commenced. *Id.* Wilmington presented evidence from one fact witness, Ms. Kelly Williams, the Commissioner of Public Works for the City, and one expert witness, Mr. Hector Cyre. *Id.* On April 21, 2021, following the close of Wilmington's case-in-chief, the trial court suspended trial to permit the Government to file a motion for judgment on partial findings pursuant to Rule 52 of the Rules of the United States Court of Federal Claims. *Id.*

Following briefing, the trial court granted the Government's motion for judgment on partial findings upon the ground that Wilmington failed to carry its burden to prove its charges were "reasonable service charges" within the meaning of the Federal-Facilities Section. Appx0049-0050. Accordingly, the court held that the Government is not liable pursuant to the Clean Water Act to pay Wilmington's service charges as assessed and claimed in this suit. Appx0050.

SUMMARY OF THE ARGUMENT

The Clean Water Act only waives the Federal Government's sovereign immunity with respect to "reasonable service charges," *i.e.*, charges that 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)." 33 U.S.C. § 1323(c)(1). To prove

liability, the Federal-Facilities Section requires evidence involving the physical characteristics of the property – "quantities of pollutants or volume or rate of stormwater discharge" – as a basis for approximating the property's relative contribution to stormwater pollution.

At trial, Wilmington failed to provide *any* evidence concerning the Properties' relative contribution to total stormwater pollution. Wilmington's focus on the general reasonableness of its assessment methodology and its alignment with industry standards proves nothing of consequence: the issue is its application of that methodology to the Properties. Wilmington eschewed its statutory obligation to prove that its fees correlate with the approximate stormwater pollution to which the Properties actually contribute. For example, Wilmington provided no evidence tying the Properties' assigned runoff coefficients to the Properties' physical characteristics. Likewise, the City did not analyze the Properties to determine the volume or content of their stormwater runoff. Moreover, the land-record tax classifications that the City used to assign the Properties into stormwater classes have nothing to do with stormwater runoff and have no connection to the Properties' actual topography. To wit, the City placed the Properties into a "vacant" stormwater class that includes properties that are not similar at all to one another. Ultimately, the City failed to demonstrate that its estimate of the Properties' runoff had any basis in reality; thus, the trial court

correctly concluded that Wilmington had not met its burden to prove that its charges were "reasonable service charges" under the statute.

The degree to which Wilmington's position is entirely untethered to the money-mandating requirements of the statute is illustrated by the City's admission that it would not label as unreasonable any gap, not 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 estimate. Under the Wilmington Code, as a precondition to filing an appeal, the Government would have to pay its assessed fee – whether reasonable or not – and then if the appeal is successful, the City would adjust only *future* charges. The Federal-Facilities Section, which only permits that the Federal government pay "reasonable service charges," forbids such a result. More fundamentally, Wilmington's permissive fee adjustment process is not a "requirement" under section 1323(a) of the Clean Water Act, and therefore, the trial court correctly held that the statute does not mandate the Government to exhaust the City's limited appeal process.

Finally, the trial court correctly concluded that, because the Clean Water Act does not waive sovereign immunity for interest, Wilmington is not entitled to recover interest on the disputed stormwater charges. The Federal-Facilities Section waives sovereign immunity for "reasonable service charges," yet, conspicuously,

does not waive sovereign immunity for interest, which is not mentioned in the Section.

ARGUMENT

I. Standard Of Review

This Court reviews the factual findings of the United States Court of Federal Claims for clear error. *Systems Fuels, Inc. v. United States*, 666 F.3d 1306, 1310 (Fed. Cir. 2012); *Bannum, Inc. v. United States*, 404 F.3d 1346, 1353-54 (Fed. Cir. 2005) ("[T]his court reviews such findings for clear error, consistent with RCFC 52[.]"); *see also Southern Travel Club, Inc. v. Carnival Air Lines*, 986 F.2d 125, 128 (5th Cir. 1993) ("We review district court judgments on partial findings pursuant to Rule 52(c) for clear error."). A finding may be held clearly erroneous when . . . the appellate court is left with a definite and firm conviction that a mistake has been committed." *In re Mark. Indus.*, 751 F.2d 1219, 1222-23 (Fed. Cir. 1984). This Court reviews the trial court's legal conclusions without deference. *See Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1272 (Fed. Cir. 2008); *Rego v. ARC Water Treatment Co. of Pennsylvania*, 181 F.3d 396, 400 (3d Cir. 1999) ("[I]n a Rule 52(c) case, a court of appeals reviews a district court's . . . conclusions of law *de novo*.").

II. The Trial Correctly Determined That Wilmington Failed To Prove That Its Stormwater Charges Were "Reasonable Service Charges" Under The Clean Water Act

Where a plaintiff seeks compensation from the Government based upon a provision of the Constitution, a statute, or regulation, the Court of Federal Claims possesses jurisdiction where the plaintiff demonstrates that its claim is based on a substantive law that "can be fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 219 (1983). Although we do not dispute that the Clean Water Act's Federal-Facilities Section is a money-mandating statute, for the reasons set forth below, Wilmington cannot recover under that statute. The trial court correctly held that the City's stormwater methodology as applied to the Properties did not meet the money-mandating requirements of the statute. Specifically, Wilmington failed to prove that its charges were "reasonable service charges" within the meaning of the statute. Accordingly, the trial court appropriately concluded that the Clean Water Act did not waive sovereign immunity, and the Government is not liable for, the stormwater charges at issue.

A. Wilmington Failed To Demonstrate That Its Charges Were Based On "Some Fair Approximation Of The Proportionate Contribution Of The Property Or Facility To Stormwater Pollution"

Under the Federal-Facilities Section, the Government is liable only for charges that are based upon the property or facility's proportionate contribution to stormwater pollution in terms of the "*property or facility's pollutant quantities or runoff volume.*" 33 U.S.C. § 1323(c)(1)(A) (emphasis added). In other words, the estimation of a property's relative (*i.e.*, proportionate) contribution to stormwater pollution must be based upon the amount of pollutant quantities or runoff volume emanating from that property. *Id.*; *see also* Cong. Rec. 111th Cong., 2d Sess. Vol. 156 at H8979 (2010) (the purpose of the Federal-Facilities section is to ensure "that the Federal Government is responsible for stormwater pollution runoff originating or emanating from its property."). The trial court correctly stated that 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. Appx0056.

Wilmington failed to prove that its charges were "reasonable" under the statute because its case-in-chief was devoid of any evidence that the runoff coefficient that it applied to the Properties – which assumed 30% impervious area – is a "fair approximation" of the Properties' runoff volume. The trial court's

finding that Wilmington provided no evidence linking the runoff coefficient assigned to the Properties to "the reality of the Properties' physical characteristics (in terms of runoff or pollution generation") is not clearly erroneous and is fatal to Wilmington's claim. Appx0052.

The City assigns runoff coefficient to Properties based upon the stormwater class into which the City has categorized a property and stormwater classes are based on an occupancy code the County has assigned to a particular property for local tax purposes. Appx0044. However, as the trial court found, "[t]he County land-record tax classifications have nothing to do with stormwater water runoff . . . . 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." Appx0051. The City's runoff coefficients are based upon the 1962 Chow Study; however, as the trial court found, Wilmington's system merely *assumes* that the County's tax records reflect land categories whose definitions mirror those described in Dr. Chow's Study. Appx0051. 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. Appx0045. The City failed to offer any testimony substantiating its assumption

that the local tax-based occupancy codes, including the vacant class at issue, correlate to a property's actual topography and runoff characteristics. Appx0051.

Moreover, by assigning the Properties to the vacant stormwater class – with an assigned .30 runoff coefficient – Wilmington is assuming that the Properties contribute volumes of runoff similar to all other properties within that class and that 30 percent of all stormwater runs off the Properties. Appx0133 (Williams Tr. 126:15-22; 127:2-7); Appx0135 (Williams Tr. 134:16-20, 135:9-18). Indeed, Wilmington argues that the .30 runoff coefficient is "a value empirical research established fairly approximates runoff from properties *with similar land cover* when multiplied by their respective gross areas." Applnt. Br. at 37 (emphasis added). However, as the trial court found, Wilmington failed to prove that the actual characteristics of properties within a particular tax-record category is relatively small. Appx0052. Indeed, the City's expert, Mr. Cyre, conceded that he had not performed any analysis of the properties within the vacant stormwater class and that, in the absence of any such analysis, he could not conclude the properties in the vacant class have similar land use characteristics. Appx0052-0053. The City never actually analyzed whether the Properties contribute at or around 30 percent stormwater runoff or whether the Properties actually contribute volumes of runoff similar to other properties within the vacant class. Appx0135 (Williams Tr. 135:19-23); Appx0142 (Williams Tr. 162:14-25, 163:1-5). In fact,

the City does not know what land covers or property characteristics actually exist on the Properties. Appx0052.

In the end, the trial court concluded that "Wilmington fail[ed] to demonstrate that all the properties within particular class should be assigned the same coefficient" and that "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." Appx0053. That finding is not clearly erroneous. Because Wilmington did not provide testimony or other evidence substantiating the degree of similarity within an occupancy code or tying the coefficients to the reality of the Properties' physical characteristics, Wilmington failed to prove its charges are "based on some fair approximation of the proportionate contribution of the property . . . to stormwater pollution[.]" 33 US.C. § 1323(c)(1); Appx0053.

Wilmington argues that the county's characterization of the Properties as vacant must be presumed correct, citing a nineteenth century case that presumes "that a man acting in a public office has been rightly appointed" and "that entries found in public books have been made by the proper officer." Applnt. Br. at 53 (citing *Bank of U.S. v. Dandridge*, 25 U.S. 64, 69-70 (1827)). We do not dispute that the land-tax records reflecting the assignment of the Properties to the "vacant" category were "made by the proper officer"; the problem is the City's failure to

offer any testimony or evidence to prove that the County's tax records properly characterize the Properties for purposes of calculating stormwater charges. Appx0051. Indeed, the trial court found that the County's land-record tax classifications have nothing to do with stormwater runoff. Appx0051. Not surprisingly, Wilmington does not identify any caselaw indicating that the court must presume that the City's placement of the Properties into a vacant stormwater class is accurate. Instead, the City, as the plaintiff, had the burden to demonstrate by a preponderance of the evidence that its charges were "reasonable service charges" within the meaning of the statute, which it failed to do. Appx0051, Appx0059. *See Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) (the burden of persuasion never shifts).

Wilmington argues that because it normalizes each property's estimated impervious area by converting to runoff units and assesses charges per runoff unit, the stormwater charge is proportionate to that property's runoff. Applnt. Br. at 37. That is incorrect. At trial, Wilmington established only that the stormwater charge is based upon an *assumed* value – the runoff coefficient. Appx0053. Wilmington's own technical memorandum confirms that, because the runoff coefficient is an assumed value "it is likely that in some situations, the resulting measure of imperviousness may differ from the actual imperviousness that exists in a specific property" and in some circumstances, "may be significantly lower than

that determined using the runoff coefficient approach." Appx0229. Because Wilmington "fail[ed] to demonstrate that all the properties within a particular class should be assigned the same coefficient" and that the coefficient assigned to the Properties accurately reflects the "reality of the Properties' physical characteristics," Wilmington did not prove that its stormwater charges were proportionate to the Properties' runoff. Appx0053.

Similarly, Wilmington argues that, 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 storm water pollution. Applnt. Br. at 37. The problem with Wilmington's formulation is that a property's runoff units is derived from its assigned runoff coefficient and gross parcel area. Appx0044. However, at trial, Wilmington made no attempt to demonstrate that the Properties' assigned runoff coefficient corresponds to their actual amount of impervious area. Appx0053. Indeed, Wilmington's expert, Mr. Cyre, "was unable to explain to what extent the City's impervious area estimate correlated with the Properties' actual impervious area." Appx0053. Thus, Wilmington merely established that the amount that it charged USACE contributes to the overall costs of the city's stormwater

management, not that the charges reflect a fair approximation of the Properties' proportionate contribution to stormwater pollution.

Wilmington argues that, 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 that the Wilmington Ordinance "is clearly unreasonable and arbitrary." Applnt. Br. at 40. Wilmington's argument fails because Delaware law is inapplicable here. It is the Clean Water Act, not Wilmington's ordinance, that waived sovereign immunity for "reasonable service charges," 33 U.S.C. § 1323(c)(1)(A) and is the money-mandating statute that governs the outcome of this lawsuit. *See United States v. Testan*, 424 U.S. 392, 402 (1976). Moreover, "[w]here, a federal right is concerned," this Court is "not bound by the characterization given" to Wilmington's charges by Wilmington or Delaware state courts. *See Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930).

Finally, Wilmington incorrectly assumes that under Delaware law it no longer has the burden of showing that its charges comply with section 1323(c) of the Clean Water Act. To the contrary, it is "elementary" that Wilmington, as the plaintiff, has the burden of persuasion on the issue of whether the charges are "reasonable charges" under the CWA. *See Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1360 (Fed Cir. 2009), *on reh'g in part*, 638 F.3d 781 (Fed.

Cir. 2011) (finding that plaintiff has the burden of persuasion); *Tech Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1326 (Fed. Cir. 2008) (same). The burden of persuasion never shifts to the defendant. *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) (citing 9 J. Wigmore, Evidence § 2489 (3d ed. 1940) (the burden of persuasion "never shifts"). The trial court correctly held that Wilmington "failed to produce evidence demonstrating proportionality, and, thus, failed to meet its burden to prove facts necessary to show that it is entitled do the claimed fees." Appx0060.

Wilmington argues that the "court objected to the Ordinance's use of different means [of] estimating runoff contributions because Wilmington is allegedly treating residential properties better than it treats the Properties (non-residential properties) and thereby discriminates against the Federal Government." Applnt. Br. at 41. Wilmington suggests that the trial court's remarks are groundless because the parties have stipulated that the stormwater charges at issue are not discriminatory under 33 U.S.C. § 1323(c)(1)(a). *Id.* Wilmington, however, misunderstands the court's point. The trial court did not conclude that Wilmington's charges were discriminatory under the statute; to the contrary, the court recognized that Wilmington "does not differentiate between Federal and private properties when levying stormwater charges." Appx0046. The trial court did, however, observe that, unlike

Wilmington's methodology for calculating impervious area for residential properties – which is based on actual data gleaned from aerial imagery – the City's methodology for non-residential properties does not rely upon such data. *Id.* In other words, the trial court observed that there were general limitations to the accuracy of Wilmington's methodology for calculating stormwater charges for non-residential properties and that it is noteworthy that the City did not change its methodology following the Clean Water Act's 2011 amendments that updated the statute to define the term "reasonable service charges." Appx0046-47.

B. Wilmington's Arguments That The Court Imposed Extra-Statutory Requirements Are Meritless

Wilmington argues that, in denying its claim, the trial court imposed requirements not found in the Federal-Facilities Section. Applnt. Br. at 56. Specifically, Wilmington cites the court's statement that it is "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 program.'" Appx0059. Likewise, the trial court found that Wilmington failed to identify *any* measurable costs the Properties impose on the City's stormwater management system. *Id.* Wilmington posits that the court's examination of whether the Properties imposed any costs or burdens on

Wilmington stormwater management system falls outside the ambit of the Federal-Facilities Section. Wilmington's argument is meritless.

There is a relationship between the extent to which a property contributes to stormwater pollution and the burden that property imposes on the City's stormwater management system. As Wilmington's technical memorandum states "the primary goal of the stormwater management system is to enhance surface water quality by reducing the quantity and rate of stormwater runoff and the amount of pollutants discharged into the rivers[.]" Appx0220. The pollutants and runoff that emanate from properties impose costs on the City's stormwater system that the City seeks to recover through stormwater fees. Appx0226 ("[T]o assess stormwater fees in proportion to the demands placed on the stormwater system, it is imperative to treat properties with similar parcel characteristics in a consistent manner.").

So, the City's own memorandum draws a link between the amount of runoff and pollutants from a property and the costs born by the stormwater management system to reduce stormwater pollution. Thus, one way Wilmington could have established the Properties' "proportionate contribution" to stormwater pollution would have been to provide evidence of the burden that the Properties impose on the City's stormwater management system, which is related to the amount of runoff and pollutants that emanate from the Properties. For that reason, the trial

court did not err in finding that Wilmington failed to demonstrate that "the Properties impose any burdens on, or contribute any pollution to, Wilmington's stormwater management system." Appx0059.

Wilmington argues that the Federal-Facilities Section does not refer to a property's actual physical characteristics or require accuracy regarding Wilmington's runoff estimate of runoff. Applnt. Br. at 57. Wilmington's claim is flatly refuted by the plain language of the statute, which expressly identifies the physical characteristics of the property – "quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property" – that describe a property's "proportionate contribution to stormwater pollution." 33 U.S.C. § 1323(c)(1)(A).

And the statute requires that charges be based upon "some fair approximation" of a property's relative contribution to stormwater pollution, which means that the City's "estimates must be based on facts anchored in reality." Appx0054. In fact, Wilmington's notion that the Federal-Facilities Section does not require any degree of accuracy regarding estimates of runoff cannot be squared with the "fair approximation" requirement. This Court has held that a party charged with proving a fair approximation of damages "has the burden of proving them with 'reasonable certainty.'" *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 833 (Fed. Cir. 2010) (quoting *Nat'l Australia Bank v.*

United States, 452 F.3d 1321, 1327 (Fed. Cir. 2006)). "As the phrase itself suggests, reasonable certainty requires more than a guess, but less than absolute exactness or mathematical precision." *Id.* Thus, reasonable certainty, as the statutory standard, is a far cry from Wilmington's position that section 1323 does not require accuracy in the estimation of stormwater runoff. Indeed, the extremeness of Wilmington's position is illustrated best by its admission 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.[3] Appx0057. Ultimately, the trial court correctly determined that "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).

Wilmington argues that typical assessments of the reasonableness of charges assessed by one government on another do not involve a property's actual

[3] Wilmington's statement that the trial court, "assumes, without evidence, that acquiring more data would reveal a 'monumental difference between actual and correct charges" is simply not true; the court made no such assumption. Rather, the trial court accurately described the implications of the City's position that, in the absence of an appeal, it would not label any gap, no matter how large, as unreasonable. Appx0057 at note 22.

characteristics or require the accuracy of estimates. Applnt. Br. at 57. Specifically, Wilmington cites *Massachusetts v. United States*, 435 U.S. 444 (1978), for the proposition that fees do not "represent retrospectively a close approximation of actual, historical benefits." Applnt. Br. at 58. *Massachusetts* is inapposite. That case involved the constitutional question of "whether [a] 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." *Massachusetts*, 435 U.S. at 446. In holding that the tax did not violate the implied immunity of state government from Federal taxation, the Supreme Court held that one of the relevant factors is whether the Federal charges "are based on a fair approximation of use of the system." 435 U.S. at 466-67. Wilmington fails to explain how the constitutional principles controlling what taxes or fees the Federal Government may impose on states is relevant to the interpretation of the Federal-Facilities Section. Unlike in *Massachusetts*, this litigation involves a statute 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). The trial court's conclusion that "Wilmington's charging methodology is entirely untethered to the Properties' proportionate contribution to stormwater pollution" is not clearly erroneous.

Wilmington argues that the Government conceded the infeasibility of requiring Wilmington to assess properties' actual stormwater pollution. Applnt. Br. at 59. Actually, the Government stipulated that it would be infeasible for Wilmington to measure the actual stormwater pollution, discharge, or runoff that occurs from each and every parcel in its corporate boundaries. Appx 2032. We do not contend that such an exercise is necessary under the CWA. Rather, the Federal-Facilities Section requires that the City's runoff result in charges that are a fair approximation of the Properties' proportionate contribution to stormwater pollution. 33 U.S.C. § 1323(c)(1)(A). As the trial court soundly held, "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." Appx0067.

Wilmington argues that the "court's demand for a 'tape measure' assessment of the Properties would require a revision to the Ordinance to assess the Properties separately" and Congress could not have intended that result. Applnt. Br. at 61. It is not clear why the evidence gap that doomed Wilmington's case before the trial court would necessarily require the City to amend its Ordinance. The court found that "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." Appx0071. The trial court did not take issue with the City's charging methodology – *i.e.*, the use of runoff efficient to estimate impervious area and stormwater discharge – as set forth in the Ordinance, rather the issue was the application of that methodology to the Properties.[4] Wilmington simply made no attempt to tie its estimate to the reality of the Properties' physical characteristics and has not identified any provision within its Ordinance that prohibited it from doing so. In any event, if there was a conflict between Delaware law and the Federal-Facilities Section on this point, which the City has not established, Delaware Law, and the Ordinance would have to yield to the Clean Water Act. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("[S]tate law is pre-empted to the extent that it actually conflicts with federal law."); *Amgen, Inc. v. Sandoz, Inc.*, 877 F.3d 1315, 1326 (Fed. Cir. 2017) ("[S]tate laws are also preempted when they conflict with federal law.").

[4] The fact that the trial court did not take issue with the City's general methodology demonstrates that the concerns expressed in the amicus brief of the National Association of Clean Water Agencies are unfounded. Upholding the trial court's decision would not prevent stormwater management agencies from collecting stormwater service fees from the Federal government; rather, the decision confirms that such fees must meet the money-mandating requirements of the Federal Facilities Section. The amicus brief fails to demonstrate any error in the trial court's interpretation of that Section, and instead, focuses on policy concerns that should be directed to Congress, and not the judiciary.

Wilmington argues that so long as the Ordinance applied stormwater charges in a nondiscriminatory manner across Federal and privately-owned property, the trial court's concerns about excess, *i.e.*, disproportionate charges are groundless. Applnt. Br. at 60. Wilmington's argument is meritless as it equates "proportionate" with "nondiscriminatory"; however, section 1323(c) separately requires stormwater charges be nondiscriminatory. Wilmington's interpretation renders the word "proportionate" superfluous, and therefore, must be rejected. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretative canons" is that a statute or regulation "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]").

C. Wilmington's Attempt To Prove The General Reasonableness Of Its Service Charge Methodology Is Insufficient For Recovery

The entire focus of Wilmington's case-in-chief was on proving the general reasonableness and fairness of its methodology for assessing stormwater charges. Appx0057. Specifically, Wilmington attributes great significance to the fact that its use of runoff coefficients to estimate impervious area and stormwater pollution is consistent with industry standards. Appx0058. That is beside the point. The Federal-Facilities Section does not define "reasonable services charges" in terms of the *methodology* that is used to estimate runoff or stormwater pollution. *See* 33 U.S.C. § 1323(c)(1)(A). Rather, liability turns on the *application*

of the methodology to a property for purposes of estimating that property's relative contribution to stormwater pollution. *Id.* To that end, the statute requires that charges be based upon "some fair approximation" of the property's "proportionate contribution . . . to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff)." *Id.*

Wilmington's broad reading of the statute – in which the general reasonableness of its methodology is dispositive – ignores the statutory command that the "fair approximation" of the property's relative contribution to stormwater pollution be expressed in terms of "quantities of pollutants, or volume or rate of stormwater discharge or runoff." *Id.; Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004) ("'Congress expresses its intent through the language it chooses and . . . the choice of words in a statute is therefore deliberate and reflective") (quoting *INS v Cardoza-Foseca*, 480 U.S. 421, 433 n.12 (1987)). And the cases that Wilmington cites, Applnt. Br. at 50, in support of the relevance of industry standards are inapposite, as they do not involve the specific statutory language found in the Federal-Facilities Section, which requires that charges be based upon specific physical characteristics of the property. *Compare In re Permian Basin Area Rates Cases*, 390 U.S. 747, 754-755 (1968) (involving determination of maximum just and reasonable rates under the Natural Gas Act, 15 U.S.C. § 717d(a)), *and Sancom, Inc. v. Qwest Commc'ns*

Corp., 683 F. Supp. 2d 1043, 1052, D.S.D. 2010)(citing caselaw holding that whether power company's ratemaking methods are used elsewhere in the industry is relevant under Nebraska law, Neb. Rev. Stat. § 70-655), *with* 33 U.S.C. § 1323 (c)(1)(A).

Because "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[,]" Wilmington cannot recover on its claim. Appx0056. Indeed, the City's expert, Mr. Cyre, admitted that the City's use of runoff coefficients 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." Apppx59. As the trial court correctly recognized, that admission "fundamentally undermine[s] Wilmington's case." Appx0059. At bottom, the trial court correctly determined that industry standard testimony was not relevant to the statutory requirements. Appx61.

In support of its argument that its charge methodology is generally reasonable, Wilmington relies upon a January 2008 brochure authored by the Environmental Protection Agency (EPA), titled "Funding Stormwater Programs," in which the EPA states that Wilmington's use of runoff coefficients and "total

property area" obtained from County records allowed it to "recover costs related to stormwater management on a fair and equitable basis." Applnt. Br. at 49 (quoting Appx1081-1082). Wilmington claims that this EPA statement constitutes "the United States evidentiary admission regarding the reasonableness of Wilmington's stormwater charge methodology and, by extension, its charges on the Properties." Applnt. Br. at 49. It is not. The trial court correctly determined that the EPA brochure is irrelevant to the issue of whether the charges at issue are "reasonable charges" under section 1323(c)(1) because the 2008 brochure was published well before the 2011 Clean Water Act Amendments. Appx0061. The EPA 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. *Id.* Thus, the EPA's statement that the City's methodology was "fair and equitable" is not an admission that the stormwater charges at issue are based on a fair approximation of the Properties' proportionate contribution to stormwater pollution. Likewise, the EPA's statement about general reasonableness of the City's use of runoff coefficients is not relevant to the dispositive issue of whether the City's application of a .30 coefficient to the Properties reasonably reflects the Properties' actual physical characteristics.

Wilmington argues that the trial court rejected its entire case-in-chief by mistakenly believing that to prove its case, the City must make a heightened

showing of direct evidence of the Properties' proportionate contributions to pollution without resorting to circumstantial evidence. Applnt. Br. at 51. Wilmington maintains that if the circumstantial evidence showed that stormwater charges on vacant properties "are generally reasonable" and based on an approximation of the proportional contribution of all of the properties to stormwater pollution, then the court should infer that the charges at issue are reasonable. *Id.* Wilmington conspicuously avoids describing what circumstantial evidence concerning the vacant class should lead the court to infer that the charges are reasonable. To the extent Wilmington is referring to the "general reasonableness" of its methodology (Applnt. Br. at 51), that evidence falls short of satisfying the statutory requirement that the charges be based on a "fair approximation" of the proportionate contribution of the property to stormwater pollution, in "terms of quantities of pollutants, or volume of runoff." 33 U.S.C. § 1323(c)(1)(A). The trial court did not require Wilmington to make a "heightened showing," but rather, required Wilmington to show that there was a "demonstrable connection" between the vacant class and the actual runoff characteristics of the properties with that class. Appx0051. The problem was not the trial court prioritizing direct evidence over circumstantial evidence, but rather Wilmington's utter failure to provide *any* evidence tying the runoff coefficients to the reality of the Properties' physical characteristics. Appx0053.

Wilmington's criticism of the trial court for purportedly rendering findings of fact based "on conjecture and mere possibilities of inaccuracies," Applnt. Br. at 52, misreads the court's decision, which outlines the numerous ways in which Wilmington failed to establish as fact the Properties' proportionate contribution to stormwater pollution. Thus, for instance, the trial court's finding that the "City did not prove that the Properties' estimated runoff, and thus the stormwater charges" were remotely accurate" (Appx0059; Applnt. Br. at 53) is not an example of the court engaging in rank speculation, but rather the court describing how Wilmington failed to meet its burden of proof.

D. The Trial Court Properly Applied A *De Novo* Standard Of Review

Wilmington argues that the trial court improperly assessed issues under the *de novo* standard of review and confused the difference between burden of proof and the scope of review. Applnt. Br. at 43. Wilmington is mistaken. The trial court properly applied the correct standard of review – *de novo* – to issues of law and made factual findings on a clean slate. *See Genentech v. Immunex Rhode Island Corp.*, 964 F.3d 1109, 1111 (Fed. Cir. 2020) (questions of law are reviewed *de novo*); *Int'l Paper Co. v. United States*, 36 Fed. Cl. 313, 322 (1996) ("This is a trial *de novo*, in which plaintiff is expected to produce evidence supporting a refund, "not a quasi-appellate review of an administrative determination.") (quoting *Hearst Corp. v. United States*, 28 Fed. Cl. 202, 230 (1993)). And the

court properly applied the correct burden of proof – preponderance of the evidence – to the issue of whether Wilmington established that its stormwater charges were "reasonable charges" under 33 U.S.C. § 1323(c)(1)(A).

In ruling on Wilmington's motion for reconsideration of the court's denial of the parties' motions for judgment on the pleadings, the trial court explained that "[t]his is a case of whether you're entitled to compensation under a money-mandating statute. And your burden is to prevail on the preponderance of the evidence." Appx0028. The court also explained that "[t]he question about what the statute means is de novo . . . [a]nd as far as I understand, there is no administrative process here from the agency or regulation that I'm deferring to about what the statute means." *Id.* The court also stated that "I'm making factual findings on a clean slate. . . . [D]e novo review means that I am making factual findings without deference to the agency." Appx0030. The court's statements demonstrate that it understood well the difference between the applicable standard of review and the applicable burden of proof that Wilmington must meet to prevail on its claim. Indeed, the court, throughout its decision, made clear that Wilmington failed to meet its burden of proof. *See* Appx0051 ("[T]he City failed to meet its burden of proof . . . and, thus, has not properly tailored its stormwater charge program to the Federal-Facility Section's requirements."); Appx0060 ("In the end, Wilmington . . . 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"); Appx0062 ("Wilmington, as the plaintiff in this action, bears the burden of proof and cannot shift that burden to the government.").

Wilmington claims that the court improperly applied *de novo* review to deem irrelevant the 2008 EPA publication, which stated that the City's methodology was "fair and equitable." Applnt. Br. at 46. Wilmington asserts that, because *de novo* review does not apply, the 2008 publication should have been deemed a "contemporaneous evidentiary admission" that creates a rebuttable presumption that Wilmington's approach was fair and equitable. Applnt. Br. at 47. In this suit involving whether Wilmington may recover its claimed fees under a money-mandating statute, the City's claims are reviewed *de novo* without deference to any prior factual determinations by the agency. *Bishop Hill Energy, LLC v. United States*, 143 Fed. Cl. 540, 543 (2019), *aff'd sub nom. California Ridge Wind Energy LLC v. United States*, 959 F.3d 1345 (Fed. Cir. 2020) ("Congress did not intend a different standard of review based on Section 1603's provision of direct reimbursement in lieu of tax credits . . . . Accordingly, the court reviews plaintiff's claims *de novo*."). The trial court appropriately considered the 2008 publication "on a clean slate" without deference to the agency and deemed the publication to be irrelevant. Appx0030; Appx0061; *Cf. Shnie v. United States*, 151 Fed. Cl. 1, 10 (2020) ("In tax refund suits, factual issues are tried *de novo* in

this court, with no weight given to subsidiary factual findings made by the Service in its internal administrative proceedings."). Wilmington fails to offer any basis upon which the court should have applied any standard of review other than *de novo* to the EPA's statements in its 2008 publication. Indeed, prior to trial, the court asked Wilmington's counsel "are you arguing for some other standard of review" aside from *de novo*, and counsel's response was "No." Appx0030. Moreover, as we demonstrated above, the trial court correctly concluded that the 2008 EPA publication was irrelevant to the issue of whether the stormwater charges at issue comply with the later-enacted 2011 Clean Water Act Amendments that define "reasonable service charges." 33 U.S.C. § 1323(c)(1)(A); Appx0061.

Wilmington also argues that because "the only relevant day in a de novo trial is its first," the trial court improperly failed to consider the decade from 2011 to 2021 in which the United States could have appealed some or all disputed charges pursuant to the City's fee adjustment process. Applnt. Br. at 44. Wilmington's argument is meritless for at least two reasons. First, Wilmington's misdescribes *de novo* review. As the trial court explained to the parties, d*e novo* reviews means that, as a legal matter, the court will not afford deference to prior factual determinations; instead, the court will make factual findings on a clean slate. Appx0029-Appx0030. The relevance of the agency's opportunity to appeal the disputed charges between 2011 and 2021, as an evidentiary matter, is a separate

question from whether the court reviews those facts from a clean slate, without deference to prior factual determinations. And once again, Wilmington fails to explain upon what basis the court would apply any standard of review other than *de novo* to these facts. *See Doty v. United States*, 24 Cl. Ct. 615, 624 (1991) (finding that in cases, such as breach of contract, that do not involve the review of administrative actions, "this court . . . conducts proceedings to determine de novo the facts and circumstances to which the relevant law must be applied."). At bottom, the trial court correctly made factual findings on a clean slate, *de novo*, as there is no basis for the court to apply a more deferential review of the facts in this case involving a money-mandating statute.

III. The Trial Court Correctly Held That The City's Fee Adjustment Process Does Not Qualify As A "Local Requirement" For Purposes Of 33 U.S.C. § 1323(a)

Throughout this litigation, Wilmington has repeatedly claimed that the United States cannot challenge the stormwater charges at issue because the USACE did not participate in Wilmington's local fee adjustment process, and the trial court has consistently rejected that argument. Appx0071; *Wilmington I*, 136 Fed. Cl. at 631-33 (rejecting Wilmington's argument that the Federal-Facilities Section compels the Government to file an administrative appeal and the exhaustion doctrine prevents the Government from raising in litigation any arguments it could have raised in that 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 continued to assert that its charges must be presumed reasonable because the Government did not file a fee adjustment application. Appx0071. For the reasons set forth below, the trial court correctly held that Wilmington's permissive 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 – is not a "local requirement" to which the Government must adhere pursuant to 33 U.S.C. § 1323(a). Appx0071. And the trial court did not err in finding that sound judicial discretion prevents mandating exhaustion in this case, where Wilmington's appellate process could require the United States to pay unreasonable charges prior to contesting those charges, in violation of the 33 U.S.C. § 1323(c). Appx0075.

Section 1323, which is titled "Federal Facilities *pollution control*," instructs agencies to comply with "local requirements . . . *respecting the control and abatement of water pollution.*" 33 U.S.C. § 1323(a) (emphasis added). As the trial court correctly found, Wilmington's optional appeal process is not a "requirement" under the Federal-Facilities Section. Apppx0005; Appx0052. Wilmington's insistence that its appeal process is required under the Clean Water Act cannot be

squared with the fact that the Wilmington Code does not require a property owner to pursue an administrative appeal. Appx0005.

Moreover, the trial court correctly held that Wilmington's appeal process does not govern, does not involve, and thus, is not "respecting the control or abatement of water pollution." 33 U.S.C. § 1323(a). Appx0072. The United States is not required to participate in Wilmington's local fee adjustment process unless Congress has unequivocally waived the Government's sovereign immunity regarding that process. *Lana v. Pena*, 518 U.S. 187, 192 (1996) (finding that a waiver of sovereign immunity must be unequivocally expressed in statutory text). Congress has not unequivocally done so here. The plain language of section 1323(a) defeats Wilmington's argument that its appeal process is "respecting the control or abatement of water pollution." 33 U.S.C. § 1323(a). The plain meaning of "abatement" means "the act or process of reducing . . . something."[5] "Control" means "to exercise restraining or directing influence over," "to have power over," or "to reduce the incidence or severity of especially to innocuous levels."[6] A municipality's fee adjustment process does not concern "an act or process of reducing" or controlling water pollution. Rather, the Wilmington Code describes

[5] Merriam-Webster, Abatement, *available* at htttps://www.merriam-webster.com/dictionary/abatement.

[6] Merriam-Webster, Control, *available* at htttps://www.merriam-webster.com/dictionary/control

the appeal process as one property owners can undertake to dispute the amount of their charges. Appx0072. The trial court correctly found that "[a]ppealing a charge, self-evidently, has nothing to do with the 'control and abatement of water pollution.'" Appx0072.

Wilmington contends that its appeal process incentivizes lower stormwater pollution through lower stormwater charges. Applnt. Br. at 66. That argument, however, does not explain how Wilmington's fee adjustment process controls water pollution; or specifically, how the prospect of a lower charge leads to a reduction in pollution. At best, a successful appeal might result in the City revising a property owner's charge and the property's assigned runoff coefficient so that the estimated impervious area – which was presumably overstated – reflects the actual impervious area. That scenario does not describe a reduction in pollution, but rather an adjustment of stormwater charges to better reflect the actual physical characteristics of the property. As the trial court stated, Wilmington's argument "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." Appx0072.

The Supreme Court in *EPA v. California*, 426 U.S. 200 (1976), defined "requirements" under section 1323 in a way that excludes Wilmington's appeal process. In that case, the Supreme Court stated that section 1323(a) encompasses

only objective requirements, such as "effluent limitations and standards and schedules of compliance." 425 U.S. at 215 (quoting *California ex rel. State Water Res. Control Board v. EPA*, 511 F.2d 963, 969 (9th Cir. 1975)). Wilmington's appeal process is not encompassed within that definition. Other courts, likewise, have interpreted "requirements" under section 1323 as "objective, administratively predetermined effluent standard[s] or limitation[s] or administrative orders upon which to measure the prohibitive levels of water pollution." *New York v. United States*, 620 F. Supp. 374, 384 (E.D.N.Y. 1985); *In re ACF Basin Water Litigation*, 467 F. Supp. 3d 1323, 1337 (N.D. Ga. 2020) ("The Supreme Court has stated that the requirements 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."); *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.").

Other courts have interpreted "requirements" in similar statutes in ways that would exclude Wilmington's appeal process. *See Hancock v. Train*, 426 U.S. 167, 187 (1976) (interpreting similar language under the Clean Air Act as applying to "emission standards and compliance schedules[,] those requirements when met

work the actual reduction of air pollutant discharge[.]"); *Fla Dep't of Env'tl Regul. v. Silvex Corp.*, 606 F. Supp. 159, 162-63 (M.D. Fla. 1985) (interpreting the Resource Conservation and Recovery Act, which requires all Federal entities to comply with "local requirements both substantive and procedural . . . respecting the control and abatement of solid waste or hazardous waste disposal," as encompassing "ascertainable standards that a federal agency dealing with hazardous waste would have to meet."); *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) (interpreting similar language under the Noise Control Act requiring Federal properties to comply with "state requirements," which refers to "relatively precise standards capable of uniform application.").

Wilmington argues that Congress' amendment to the Clean Water Act in 1977 in response to *EPA v. California* demonstrates that Wilmington's appeal process is a "requirement" under the Federal-Facilities Section. Applnt. Br. at 65. That amendment clarified that section 1323(a) applies to "any requirements whether substantive or procedural (including any recordkeeping reporting requirements, any requirement respecting permits and any other requirements, whatsoever)." 33 U.S.C. § 1323(a). The 1977 amendments to section 1323(a) did not alter the Supreme Court's definition of "requirements" in *EPA v. California*. Rather, the amendments simply clarified that, where Federal agencies

must comply with objective state pollution standards, they must also comply with associated procedural requirements. To that end, the 1977 Senate report indicates that the 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, as *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392. Wilmington's appeal process does not resemble any of these procedural requirements, which concern objective state pollution standards.

Nonetheless, Wilmington argues that, because the United States must comply with the state's procedural requirement to obtain a permit, it must also comply with the City's appeal process. Applnt. Br. at 66. To the contrary, unlike the state's mandatory permitting process, which is a procedural requirement related to controlling pollution, the City's optional fee adjustment process concerns the potential reduction of property owners' stormwater charges. Because Wilmington's appeal process does not concern the control or abatement of water pollution, that process is not a "local requirement" under section 1323(a).

Wilmington relies upon *Ohio v. U.S. Army Corps of Engineers*, 259 F. Supp. 3d. 732 (E. D. Ohio 2017), for the proposition that section 1323(a) compels federal agencies to exhaust administrative remedies. Applnt. Br. at 67. That case is easily distinguishable. *Ohio* involved an administrative appeal that concerned the

abatement of pollution, specifically the amount of dredging by the USACE that would impact water quality standards. 259 F. Supp. 3d at 741. That administrative appeal is far removed from Wilmington's fee adjustment appeal, which does not involve the control or abatement of pollution.

In the City's letter to this Court pursuant to Federal Rule of Appellate Procedure 28(j), Wilmington claims that the Supreme Court's recent decision in *United States v. Washington*, 142 S. Ct. 1976 (2022), supports its position that the City's fee adjustment process is a "local requirement" under section 1323(a). *See* Letter to the Clerk of Court, U.S. Court of Appeals for the Federal Circuit dated June 22, 2022, ECF No. 23. It does not. In *Washington*, the Supreme Court stated that Congress has authorized regulation that would otherwise violate the Federal Government's intergovernmental immunity "only when and to the extent there is a clear congressional mandate." 142 S. Ct. at 1984 (quoting *Hancock v. Train*, 426 U.S. 167, 179 (1976)). The Court held that Congress did not clearly and unambiguously authorize a State to enact a discriminatory law that facially singles out the Federal Government for unfavorable treatment, and therefore, Washington's workers' compensation law, which makes it easier for Federal contract workers to establish their entitlement to workers' compensation as compared to the general state workers' compensation regime, violates the Supremacy Clause. *Id.* Similarly, here, the Federal-Facilities Section does not

"clearly and unambiguously" require the USACE to utilize the City's fee adjustment process prior to challenging those charges in this litigation because Wilmington's appeal process is not "respecting the control or abatement of water pollution" 33 U.S.C. § 1323(a); *see California*, 426 U.S. at 211 ("Federal installations are subject state regulation only when and to the extent that congressional authorization is clear and unambiguous.").

The trial court correctly held that, because the Federal-Facilities Section does not mandate exhaustion of Wilmington's fee adjustment process, mandating exhaustion falls to judicial discretion, and sound judicial discretion prevents mandating exhaustion in this case. Appx0075; *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaustion, sound judicial discretion governs."). The trial concluded that exhaustion does not apply here because Wilmington's appeal process is unreasonable; specifically, under Wilmington Code, fee adjustments apply only prospectively and does not allow adjustments for prior billing cycles. *Id.* And before Wilmington even considers adjusting stormwater charges, the property owner must pay all outstanding invoices, which means that the City's appeal process could require the United States to pay unreasonable charges – something section 1323(c) expressly precludes. Appx0075. And, thus, even if the court were to interpret the fee adjustment process as mandatory – which it is not – the Government would not be

required to exhaust it here because the City's appeal process cannot grant the Corps' requested relief. *Id.*; *McCarthy*, 503 U.S. at 147 (providing that an administrative remedy may be inadequate where the agency lacks authority to grant the type of relief requested).

Despite the patent inadequacy of Wilmington's prospective-only fee adjustment process, Wilmington maintains that its appeal process is adequate because, if the Corps had filed a successful appeal during the 73 days between January 4 and March 8, 2011, when Congress amended section 1323 and when the City assessed the first disputed stormwater charge, a successful appeal would have lowered *all* disputed charges. Applnt. Br. at 45; 68. It is not clear, under this hypothetical, why the Corps would seek an appeal prior to receiving the first disputed charge. More fundamentally, under the Wilmington Code, the appeal process is limited to future charges – a fact that Wilmington has repeatedly admitted throughout this litigation. Appx0047 (quoting Joint Statement of Undisputed Facts ¶ 112, which states: "Wilmington's appeal process only applies prospectively"); Appx0025 (Tr. 16:17-25) (trial court questioned Wilmington's counsel concerning whether a successful appeal of an invoice for January through March 2011 would apply only prospectively to future charges; counsel responded: "That is correct."). Thus, it is simply not true that a hypothetical March 8, 2011 appeal of the first disputed charge could have lowered *all* of the disputed

charges. Because under Wilmington Code, "there will be no retroactive adjustments of prior billing periods," Appx047, the United States is not required to exhaust the City's limited appeal process.

Finally, Wilmington argues that by entering judgment against Wilmington based in part on the United States' affirmative defense regarding the inadequacy of the City's appeal process under the exhaustion doctrine, the court exceeded RCFC 52(c)'s grant of authority to enter judgment against a party on an issue in which the party bears the burden of proof. Applnt. Br. at 70. Wilmington's argument fails in the first instance because the trial court's judgment is based on its holding that the City's fee adjustment process is not a "local requirement" under the Federal-Facilities Section, and therefore, the Clean Water Act does require the United States to file an administrative appeal prior to challenging the charges in this litigation. Appx 0071. That holding does not involve the United States' affirmative defense. And the trial court's finding, in the alternative, that the United States was not required to exhaust an unreasonable appeal process was not necessary to its holding.

But even so, Wilmington's argument fails because it misreads RCFC 52(c). The plain text of RCFC 52(c) provides that "[i]f 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 the party on a claim *or defense* that, under the

controlling law, can be maintained of defeated only with a favorable finding on that issue. RCFC 52(c) (emphasis added). Thus, in light of the trial court finding against Wilmington regarding the adequacy of the City's appeal process after considering the City's case-in-chief, RCFC 52(c) permits the court to enter judgment against Wilmington on the United States' affirmative defense, which could only have been defeated if the court had decided that factual issue in the City's favor. The court, in that instance, may enter judgment pursuant to RCFC 52(c) without waiting for the United States' case-in-chief. *See Pal v. New York Univ.*, 583 F. App'x 7, 10 (2d Cir. 2014) (rejecting plaintiff's argument that a court may grant judgment pursuant to Fed. R. Civ. P. 52(c) on an affirmative defense only after the defense has presented its case); *id* ("Because court was satisfied that [the defendant's] cross-examination of [plaintiff's] witnesses established the factual basis for the affirmative defense . . . the court was entitled to enter judgment pursuant to Rule 52(c) without waiting for [the defendant's] case-in-chief."). Thus, Wilmington's argument that the trial court exceeded its authority under RCFC 52(c) is meritless.

IV. The Trial Court Correctly Held That The United States Does Not Owe Interest To Wilmington

As we demonstrated above, the Court should affirm the trial court's holding that Wilmington failed to establish its entitlement to any portion of the principal stormwater fees it sought. The trial court also correctly held that, because the

Clean Water Act lacks an express waiver of sovereign immunity for a plaintiff to claim interest, Wilmington cannot recover interest from the United States in this case even if it were entitled to the principal charges. Appx0081.

"As sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986), *superseded by statute on unrelated grounds*. Relatedly, "[i]nterest on a claim against the United States shall be allowed . . . only under a contract or act of Congress expressly providing for payment thereof." 28 U.S.C. § 2516(a). The "no-interest" rule requires "consent to liability for interest on a damage award to be 'affirmatively and separately contemplated by Congress.'" *Marathon Oil v. United States*, 374 F.3d 1123, 1126-27 (Fed. Cir. 2004) (quoting *Shaw*, 478 US. At 315). "Thus, the waiver for sovereign immunity must be distinct from a general waiver of immunity for the cause of action resulting in the damages award against the United States." *Id. Shaw, Marathon Oil*, and 28 U.S.C. § 2516(a) collectively mandate that the Government is only liable for interest when the law at issue contains an express waiver of sovereign immunity for interest. *See also 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.").

The Federal-Facilities Section does not contain an express waiver of sovereign immunity from interest. Rather, the statute provides for payment of

"reasonable service charges," 33 U.S.C. § 1323(c), which encompasses charges for *services* – not charges for "the time value of money and loss of use of amounts not paid when they are due." *Am. Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 684 (2007). There is simply no distinct waiver of sovereign immunity for interest anywhere in the Clean Water Act.

Nonetheless, Wilmington contends that the following sentence in section 1323(a) waives sovereign immunity for interest: "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). It does not. That provision simply indicates that Federal instrumentalities cannot use "any immunity" to escape liability under section 1323. Section 1323, however, does not provide for the payment of interest, nor may a right to interest be implied from the phrase "under any law or rule of law." *Pena*, 518 U.S. at 192 ("A waiver of the Federal Government's sovereign must be unequivocally expressed in statutory text, and will not be implied."). Indeed, as the trial court observes, section 1323 makes clear, in defining the charges for which sovereign immunity is waived, that interest is not available. Appx0080.

Courts have repeatedly rejected arguments similar to Wilmington's interest-by-implication argument. For instance, in *Smith v. Principi*, 281 F.3d 1384, 1387 (Fed. Cir. 2002), the Federal Circuit held that a Federal statute permitting the

secretary to "provide such relief . . . as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys" did not waive sovereign immunity for the purpose of collecting interest. This Court reasoned that the statute did not mention interest and "that deficiency" controlled the question of whether interest was allowed. *Smith*, 281 F.3d at 1387. Likewise, the Supreme Court held that Title VII's provisions making the United States liable "the same as a private person" for costs and attorney fees did not waive sovereign immunity for interest. *Library of Congress v. Shaw*, 478 U.S. 310, 314-15 (1986), *superseded on other grounds by Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994).

Wilmington argues that Congress can waive United States' immunity from interest without writing the word "interest" in the statute. Applnt. Br. at 73. However, neither of the cases that Wilmington relies upon for that proposition even involve interest, and therefore, do not address the issue of whether a Federal statute unequivocally waived sovereign immunity for interest. *See United States v. S. Coast Air Quality Mgmt. Dist.*, 748 F. Supp. 732, 738 (C.D. Cal. 1990) (holding that the Clean Air Act waives sovereign immunity with respect to Federal facilities obligation to pay certain fees imposed pursuant to the South Coast Air Quality Management District's rules and regulations); *F.A.A. v. Cooper,* 566 U.S. 284, 290-91 (2012) (holding that the civil remedy provision of the Privacy Act does not

unequivocally authorize an award of damages for mental or emotional distress, therefore, the Act does not waive the Federal Government's sovereign immunity for such harms). At bottom, because the Federal-Facilities Section does not contain an express waiver of sovereign immunity for interest, the trial court correctly concluded that Wilmington cannot recover interest from the United States in this case.

CONCLUSION

For the reasons stated above, we respectfully request that this Court affirm the trial court's judgment.

Respectfully submitted,

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August 31, 2022

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 31st day of August, 2022, a copy of the foregoing BRIEF OF DEFENDANT-APPELLEE, UNITED STATES was filed electronically.

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FOR THE FEDERAL CIRCUIT

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