

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

CITY OF CINCINNATI, 801 Plum Street Room 214 Cincinnati, Ohio 45202,	:	CASE NO. C-1-03-731
	:	(Judge Weber)
Plaintiff	:	
v.	:	
UNITED STATES OF AMERICA	:	AMENDED COMPLAINT
and	:	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES :	:	
Defendants.	:	

**c/o The Honorable, John Ashcroft
Attorney General
The United States of America
Tenth & Constitution Avenues, N.W.
Room 4400
Washington, D.C. 20530,**

SERVE ALSO:

**G. Gregory Lockhart , United States Attorney
220 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202**

Now comes the Plaintiff and for its complaint against Defendants hereby states:

PARTIES

1. Plaintiff City of Cincinnati (hereinafter "the City") is a home-rule municipal corporation established under the Constitution of the State of Ohio.

2. Upon information and belief, Defendant Secretary of the Department of Health and Human Services and Defendant United States of America (hereinafter "the Defendants") are in charge of the United States of America National Institute of Occupational Safety and Health (hereinafter "NIOSH"), a division of the Health and Human Services Agency of the United States of America.

3. Upon information and belief, the Defendants own several premises located in Cincinnati, Ohio that use the services of the City's Stormwater Management Utility.

JURISDICTION AND VENUE

4. Proper venue for this action is the Southern District, Ohio, Western Division. The City and the Defendants both exist within the district.

5. This Court has jurisdiction under 28 U.S.C. §1331, Article III, Section 2, United States Constitution, and 28 U.S.C. §2201, the Declaratory Judgment Act.

FACTUAL ALLEGATIONS

6. Article XIX, Section 7, of the City of Cincinnati Administrative Code, requires the City's division of stormwater management utility to "charge a storm drainage service charge based on individual contribution of runoff to the system, benefits enjoyed and service received."

7. In 1985, the City of Cincinnati ordained a Stormwater Management Code to implement a comprehensive drainage code consistent with the effective use, operation, management, maintenance, and improvement of a stormwater management system.

8. The City's Stormwater Management Code provides that its purpose is to:

[P]rovide for effective management and financing of a stormwater system within the city; to provide mechanism for mitigating the damaging effects of uncontrolled and unplanned stormwater runoff; to improve the public health, safety and welfare by providing for the safe and efficient capture and conveyance of stormwater runoff and the correction of stormwater problems; to authorize the establishment and implementation of a master plan for storm drainage, including design, coordination construction,

management, operation, maintenance, inspection and enforcement; to establish reasonable storm drainage service charges based on each property's contribution of stormwater runoff to the system and use and benefit of services and facilities; and to encourage and facilitate urban water resources management techniques, including detention of stormwater runoff, minimization of the need to construct storm sewers, and the enhancement of the environment.

C.M.C. Section 720 (emphasis added).

9. The City's Stormwater Management Code further provides that:

[A] storm drainage service charge shall be made on each lot or parcel in the city. Each property's contribution to runoff shall be the primary consideration in setting the service charge.

C.M.C. Section 720.

10. The Stormwater Management Code provides that the storm drainage service charge reflect the user's individual characteristics. The service charge is a user fee and must be paid by the property owner benefiting from the stormwater utility services. The service charges are based on contribution to runoff generated from each lot or parcel. The charges reflect the area of each property and its intensity of development factor. Equivalent runoff units are derived from the area of each property and its intensity of development factor. The equivalent runoff unit multiplied by the monthly charge per equivalent runoff unit calculates the monthly service charge for that property. The amount of runoff generated by each property dictates the size of the drainage system required and influences the frequency of routine and remedial maintenance needed. The NIOSH properties are classified in the institutional category with an intensity of development factor of 0.40. The exhibit attached to this amended complaint describes the calculation of the service charges for the NIOSH properties.

11. Article XVIII, Section 4, of the Ohio Constitution empowers a home-rule municipality to own and operate a public utility.

12. Article XVIII, Section 3, of the Ohio Constitution empowers a home-rule

municipality to exercise its full power of local self-government and its police powers.

13. Since 1985, Defendants have been billed \$112,951.94 in reasonable charges for the use of the City's stormwater system at property in the City owned by the Defendants.

14. To date, Defendants have refused to pay the reasonable stormwater utility charges billed by the City.

15. The Defendants currently owe the City \$112,951.94 for nonpayment of the billed stormwater management utility charges.

16. Section 720-51 C.M.C. provides that all service charge revenues received by the stormwater management utility shall be used exclusively for purposes of the utility. The service charge revenues are not for general funds of the City. The funding allows the City to administer a comprehensive stormwater management program that addresses stormwater drainage control and ensures a fully integrated approach to resolving existing drainage problems and meeting future needs. The system reduces the environmental impacts of stormwater on the receiving waters to which the drainage systems initially discharge.

17. The Comptroller General has determined that local user charges for sewer services are payable by the United States.

18. 33 U.S.C.A. §1323, Clean Water Act, waives sovereign immunity and provides that each agency of the federal government shall be subject to, and comply with, all 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.A. 1323 applies notwithstanding any immunity of the federal agency under any law or rule of law.

19. The City's stormwater management utility has continuously controlled and abated water pollution since its inception and will continue to do so pursuant to a National Pollutant

Discharge Elimination System permit to be issued to Hamilton County by the Ohio Environmental Protection Agency on behalf of the United States Environmental Protection Agency.

20. The United States Environmental Protection Agency requires that Hamilton County obtain a National Pollutant Discharge Elimination System permit for the SMU. The permit will require that the SMU continue to have a comprehensive stormwater quality management plan that reduces the discharge of pollutants from the storm system to the maximum extent practicable and eliminates non-stormwater discharges into the storm sewer system. Hamilton County's application for the NPDES permit is pending. The SMU will even further reduce adverse impacts to water quality and aquatic habitat by instituting controls on the still unregulated sources of stormwater discharges that have the greatest likelihood of causing continued environmental degradation. The City's stormwater management utility's pollution prevention efforts have included and will continue to include reducing non-point source pollutants by application of quality standards to development and redevelopment within the City. The City also has incorporated water quality standards and considerations into the design and construction management of capital improvement program projects.

21. Service charges, or user fees, are payments given in return for a government-provided benefit. The Defendants' liability for the stormwater management utility fees arise from their use of the City provided stormwater management service.

22. The Office of the General Counsel of the United States Department of Health and Human Services conceded that a "municipality may be compensated on a quantum meruit basis for the fair and reasonable value of services actually received by the United States." Attached communication from Office of the General Counsel. The lawyer for HHS advised the City to "pursue such a claim pursuant to 31 U.S.C. § 3701 et. seq." *Id.* Nevertheless, the Defendants

have refused to pay the City its reasonable charges for providing stormwater management utility services to the Defendants. Equitable principles, as conceded by the United States itself, justify the relief requested by the City.

23. The Defendants have used the services of the City's stormwater management utility and the Defendants have benefited from and been unjustly enriched by those services. The SMU, furthermore, has responded to the following specific service requests from NIOSH: repaired a caved-in road in front of the NIOSH building at a cost to the SMU of \$77,895; provided ditch cleaning and lining at a cost to the SMU of \$1,031; provided ditch cleaning and lining at a cost to the SMU of \$3,670. These amounts have not yet been billed to, or paid by, the defendants.

CLAIM FOR RELIEF

WHEREFORE, the City prays for the following relief:

Judgment in its favor based on the obligation of the United States under the Cincinnati Municipal Code, as authorized by the Clean Water Act, in the amount of \$112,951.94, plus interest, costs and attorney fees, a declaration that the Defendants must pay the City's stormwater management utility user fee in the future, and all other relief this Court deems appropriate.

Respectfully submitted,

JULIA L. MCNEIL (0043535)
City Solicitor

RICHARD GANULIN (0025642C)
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3329
(513) 352-1515 FAX
richard.ganulin@cincinnati-oh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Complaint has been served electronically using the CM/ECF system that will send notification of such filing to all parties of record this 10th day of May, 2004.

/s/ RICHARD GANULIN
RICHARD GANULIN

MSD-595-RG/(gec)