IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC92581

WILLIAM DOUGLAS ZWEIG, et al.,
on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents/Cross-Appellants,

vs.

THE METROPOLITAN ST. LOUIS
SEWER DISTRICT,

Defendant-Appellant/Cross-Respondent.

SUBSTITUTE BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, THE AMERICAN PUBLIC WORKS ASSOCIATION AND THE ASSOCIATION OF MISSOURI CLEANWATER AGENCIES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT/CROSS-RESPONDENT THE METROPOLITAN ST. LOUIS SEWER DISTRICT

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STATEMENT OF INTEREST

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA), the American Public Works Association (APWA), and the Association of Missouri Cleanwater Agencies (AMCA) (collectively the "*amici*") submit this brief as *amici curiae* in support of the Metropolitan St. Louis Sewer District (MSD), the Defendant-Appellant/Cross-Respondent in this matter. Collectively, the *amici* represent municipal governments and a large number of city and county public works organizations responsible for the operation, oversight and management of municipal separate storm sewer systems, as well as agencies, companies and professionals involved in ensuring that such systems are designed, funded, operated and maintained in compliance with applicable laws and regulations.

NACWA represents the interests of nearly 300 of the nation's wastewater and stormwater management agencies. NACWA has 6 public utility members in the State of Missouri,[1] including MSD. NACWA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. NACWA was instrumental in lobbying for the recent amendment to Clean Water Act § 313(c) which clarified the understanding of Congress

[1] In addition to MSD, NACWA's members in the State of Missouri include City of Liberty, City of Springfield, Independence Water Pollution Control Department, Kansas City Water Department, and Little Blue Valley Sewer District.

that stormwater user fees based on a reasonable approximation of a property's contribution to pollution in terms of the volume or rate of stormwater discharge or runoff are "reasonable service charges" payable by all federal government facilities.

NAFSMA is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local government. NAFSMA's 100 member agencies serve a combined population of approximately fifty (50) million people. NAFSMA's *Guidance for Municipal Stormwater Funding* (January 2006) was published under a cooperative grant from the U.S. Environmental Protection Agency.

APWA is an organization of 28,500 public works professionals, including city and county Public Works Directors responsible for stormwater management, water and wastewater services, waste collection, and other municipal services, including 534 members in Missouri. APWA members and their agencies are responsible for planning, budgeting, design and management of municipal stormwater programs. APWA is the publisher of *Financing Stormwater Facilities: A Utility Approach* (1991), which discusses the rationale behind the utility approach to financing stormwater management by an estimated 50 communities nationwide.

AMCA is a new (as of 2012) Missouri non-profit, mutual benefit corporation incorporated under the Missouri Nonprofit Corporation Act. AMCA's voluntary membership includes 10 publicly-owned water, sewer, and stormwater utilities across the

state. AMCA's members provide sewer and stormwater service to a significant majority of the state's population. AMCA's goal is to facilitate the reduction and elimination of water pollution through the application of sound science and public policy. As local governments and public utilities, almost all of AMCA's members are subject to unfunded stormwater management mandates from the state and federal governments. These mandates are imposed through strict and demanding permits issued pursuant to the federal Clean Water Act and state water laws. These permits require funding streams in order for the AMCA members to comply. Several AMCA members, including MSD, have stormwater utilities and their rate structures could be impacted by the Court's decision in this case.

In order to meet the increasing costs of stormwater management requirements as mandated in municipal stormwater permits issued by their state and federal environmental agencies, local stormwater authorities throughout the United States have developed appropriate funding mechanisms, including the creation of stormwater utilities and the collection of user fees and service charges. By far the most common approach to establishing an appropriate rate structure for stormwater utilities is the use of impervious surface area to allocate costs based on each property's contribution of runoff to the stormwater management system. The Trial Court in this case held that MSD's Stormwater User Charge is an invalid tax, in part, because the Court erroneously found that there is no direct relationship between the amount of impervious area on a property and the volume of stormwater runoff and the associated stormwater management services provided by MSD. The court clearly erred in reaching this finding and the finding must

be reversed. Unless reversed, this erroneous finding undermines the ability of Missouri communities to fund federally-mandated stormwater control programs. Moreover, the erroneous finding casts doubt on the validity and implementation of similar programs using the approach employed by MSD, at a time when the need for reliable and certain funding mechanisms to support those programs is rapidly increasing. The ruling is at odds with findings in courts in many other states – which have upheld similar municipal stormwater fee programs.

The Missouri Court of Appeals for the Eastern District, through its opinion affirming the ruling of the Trial Court,[2] has failed to adequately consider all facts and law relevant to this issue. The lower court rulings fail to consider the task required of all stormwater utilities in the State of Missouri, including MSD, the regulations associated with accomplishing their tasks, and the manner in which stormwater utilities can fund their operations. Judge Mooney, in his dissent below, cites directly to many of the studies cited by the *amici* in prior pleadings before the appellate court. Judge Mooney's analysis of the issues present in this case is directly on point, and should be adopted by this Court.

The impervious area approach used by MSD is the overwhelming method of billing for stormwater costs and services because studies have established that the impervious area of a property is the single most significant factor impacting the amount of stormwater runoff generated by each parcel. It also provides the most direct

[2] *Zweig v. Metropolitan St. Louis Sewer District*, No. ED 96110 (2012).

correlation to the necessary stormwater management services MSD and the *amici* must provide for that runoff. Further, impervious area is relatively easy to identify and quantify numerically, and is the most common parameter used in stormwater service fee calculations.[3] In short, setting fees based upon impervious area of properties is directly related to the stormwater management services MSD and similarly situated communities must provide. It is also a simple, practical, equitable, and easy to understand approach. The Trial Court's finding, that there is no direct relation between impervious cover and stormwater runoff which MSD has to manage, is clearly erroneous and must be overturned.

The *amici* further believe the lower court rulings are contrary to prevailing national legal precedent as well as to normal utility rate-setting practices throughout the country, and will place Missouri stormwater utilities at significant disadvantage. Accordingly, the *amici* offer this brief to aid the Court in its consideration of this critical case.

[3] *Guidance for Municipal Stormwater Funding* (NAFSMA 2006), 2-36-to 37. *Id.*

ARGUMENT

I. STORMWATER USER FEES BASED ON IMPERVIOUS SURFACE AREA ARE THE INDUSTRY NORM AND ARE DIRECTLY RELATED TO THE COST OF SERVICES PROVIDED BY THE STORMWATER UTILITY

The Trial Court based its decision in part on a finding that there is not a "direct relationship" between the amount of impervious surface area on a property and stormwater runoff or the services provided by MSD. Findings of Fact, Conclusions of Law, Judgment and Decree at 28-30, ¶¶ 110-116 [hereinafter cited as "Decree"]. Based on this finding, the Trial Court held that the third of the five factors to be considered under *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo. 1991) (whether the amount of fee to be paid is affected by the level of goods or services provided to the fee payer) should be resolved in favor of the plaintiff, because "the charge imposed must bear a *direct* relationship to the level of services a 'fee payer' actually receives." Decree at 29, ¶111, quoting *Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217, 221 (Mo. 1993) (emphasis in original).

The Trial Court's finding on this issue, and deferential affirmation by the appellate court, is clearly erroneous. It defies gravity, common sense, and common experience. When rain hits impervious cover (roofs, driveways, patios, parking lots, etc) it by definition does not infiltrate into the ground, which has been made "impervious". gravity takes over and that rainwater runs off the impervious surface. An urban parking lot that is 100 percent paved will see all (or very nearly all) of the rainwater that hits the

property run off. It runs off into the surrounding streets and then must be managed by the local government under federal and state permits. It is a simple hydrologic fact that runoff from a parking lot or other impervious surface will be significantly greater than an undeveloped (forested or grass covered) lot next door.

Communities build storm sewer infrastructure based on this undeniable reality – how much impervious cover is in a particular area translates to how big the storm sewers must be to accommodate the expected runoff. Those storm sewers have to be built and maintained along with a host of other requirements that spring directly from the runoff from land due to impervious cover. Storm sewers are not built in the forest or in areas with vast amounts of undeveloped land – they are built where there is impervious cover.

Federal and state (unfunded) stormwater management requirements include applying for permits, monitoring, reporting, public outreach and education, collecting fees, enforcing federal/state development requirement, implementing pollutant controls where streams are impaired and even limiting the flow that gets to area streams (to prevent stream bank erosion from high flows).

It comes as no surprise given these realities that the finding in this case of no direct relationship between impervious cover and stormwater costs/services runs counter to the fundamental rate-setting approach used by the vast majority of stormwater utilities throughout the country. Those utilities have all sought to establish the most directly related and equitable fee approach they can. Like MSD, they settled on impervious cover. Empirical studies have confirmed what is known from common observation - that impervious surface area on a property has the greatest direct relationship to the amount of

runoff and the costs imposed on the storm sewer system to manage that runoff. Impervious area is also relatively easy to identify and quantify numerically and, accordingly, is the most common parameter used in stormwater service fee calculations.[4] Most importantly, impervious surface provides the most direct correlation between the natural amount of runoff from a property in its undeveloped state and the total amount of runoff after development occurs. Impervious surface by its very nature creates increased stormwater runoff over and above the natural runoff from a property. It is this increased runoff created by development – which can also be thought of as the difference or the "delta" between natural runoff and total runoff – that triggers federally and state-mandated municipal stormwater infrastructure, management systems and service requirements such as those to be provided by MSD in this case.

Stormwater rate structures based solely on impervious area have been widely used. They are simple, the concept is easily understood by the general public, and it is generally perceived as equitable. As discussed above, impervious area rate methodology reflects a philosophy of charging customers based on each property's contribution of runoff which must be managed by the storm sewer system. The approach is consistent with local service fee rate practices for wastewater services, wherein fees are customarily based on the amount of water consumed by each residential, commercial or industrial user, rather than through metering of the wastewater discharges themselves. There is a

[4] *Guidance for Municipal Stormwater Funding* (NAFSMA 2006), 2-36 to 37. Available at: http://www.nafsma.org ; and at: http://cfpub.epa.gov/npdes/stormwater/munic.cfm .

"direct relationship" between water consumption and wastewater generation, even though the exact volume and strength of the effluent will vary from one customer to another. Most wastewater utilities nationwide do not rely on separate metering of the wastewater generated by each household, but instead use metered water consumption to provide an approximate measure of the amount of wastewater generated.

By way of contrast, the sewer charge struck down in *Beatty* was an unmetered, flat fee for sewer service that remained the same no matter how much waste a residential customer sent into the system. The plaintiffs in *Beatty* argued that the sewer charge bore "no relation" to the amount of services provided by MSD, while MSD argued that the charge reflected the "estimated, average use" for each residential customer. The Missouri Supreme Court's holding that there must be a "direct relationship" to the level of services provided does not mean that there must be a "perfect" or "exact" relationship with the cost to treat each gallon of water, rather that there must be a direct relationship with the varying number of gallons generated by different households.

Numerous technical studies, references, and citations in engineering literature validate the equity of an impervious area rate methodology for stormwater management user fees.[5] The coefficient of runoff value in hydrologic engineering tables closely

[5] A comprehensive bibliography compiled by the Center of Urban Policy and the Environment at the School of Public and Environmental Affairs at Indiana University is available at: http://stormwaterfinance.urbancenter.iupui.edu/home.htm. While the majority opinion dismissed these authorities because they were not before the Trial

approximates the percentage of impervious coverage. Empirical evidence gathered in the field by monitoring changes in runoff before and after development verifies that impervious coverage is the key factor influencing peak stormwater runoff. Data gathered during the National Urban Runoff Program (NURP) in the 1970s and 1980s and subsequent research showed that impervious area is the most dominant factor in pollutant loadings conveyed by stormwater runoff.[6]

More recently, based on the findings and recommendations in a 2009 study by the National Research Council on *Urban Stormwater Management in the United States*, the U.S. Environmental Protection Agency ("EPA") has commenced a formal rulemaking process to strengthen its stormwater regulations by including a comprehensive new program to reduce stormwater discharges from new development and redevelopment. The basic assumption behind this program is that an increase in impervious land cover has a direct relationship with increased stormwater discharges:

> This increase in impervious land cover reduces or eliminates the natural infiltration of precipitation, which greatly increases the volume of

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Court, the same information was nevertheless admitted into evidence before the Trial Court in the form of, for example, a comprehensive treatise on stormwater management authored by plaintiffs' expert Thomas Debo. See Thomas N. Debo & Andrew J. Reese, *Municipal Stormwater Management*, at 117-125 (2d ed. 2003) (Trial Ex. WW).

[6] *See* discussion in the preamble to U.S. EPA's final "Phase II" stormwater regulations, in 64 Fed. Reg. 68722, 68725-26 (December 8, 1999).

> stormwater discharges. This increased volume of stormwater discharges results in the scouring of rivers and streams; degrading the physical integrity of aquatic habitats, stream function and overall water quality. In addition, the increase in impervious land cover results in the increase of the pollutant load discharged from storm sewers.[7]

Theoretically, to reflect runoff precisely, other rate factors such as total area, percentage of impervious area, soil type, slope and other factors might be considered. As a practical matter, however, the calculations necessary to incorporate all relevant factors are not warranted economically and the data to perform such calculations are not readily available. Consequently, impervious area is the only factor that is usually used.[8] In the 2010 edition of the annual *Stormwater Utility Survey* compiled by the international consulting firm Black & Veatch, based on a survey of 70 utilities in 20 states, 80% of the respondents derive their revenues from stormwater user fees, and majority of those utilities use "impervious area" alone as the basis for calculating their fees.[9]

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[7] 74 Fed. Reg. 68617, 68620 (December 29, 2009).

[8] *Financing Stormwater Facilities: A Utility Approach* (APWA 1991) at 13. Available at: http://stormwaterfinance.urbancenter.iupui.edu/PDFs/APWAmanual.pdf .

[9] *2010 Stormwater Utility Survey* (Black & Veatch 2010), at 6-8. Available at http://204.118.135.81/Downloads/Resources/Brochures/rsrc_EMS_2010StormwaterUtilitySurvey.pdf.

Judge Mooney, in his dissenting opinion from the appellate court decision below, clearly understood the direct relationship between impervious surface and the setting of cost/service-based stormwater fees. He accurately identified impervious surface as the single most important factor in influencing stormwater runoff, and correctly observed that MSD's charge at issue in this case was equitable, consistent with national industry norms, and founded on sound engineering principals. *Amici* urge this Court to embrace Judge Mooney's dissent and overturn the Trial Court's clearly erroneous finding. There is a direct relationship between the amount of impervious cover on a property and the runoff from that property.

Furthermore, a decision by this Court endorsing Judge Mooney's analysis will not only bring Missouri in line with the relevant engineering science and allow for a more equitable stormwater fee structure, but will insure Missouri stormwater utilities are able to provide Missourians with adequate municipal separate storm sewer systems and stormwater services. Unless overturned, the lower court decisions will severely hinder the ability of Missouri communities to equitably impose fees for essential – and federally mandated – public stormwater infrastructure and services. Such basic utility service is not only necessary to meet both federal and state environmental regulations, but is also important for the continued growth of Missouri.

II. MUNICIPAL STORMWATER FEES HAVE BEEN UPHELD BY THE MAJORITY OF STATE COURTS AS LEGITIMATE SERVICE CHARGES RATHER THAN TAXES

Fees identical or similar to MSD's have been determined to be just that – fees and not taxes – in a number of jurisdictions around the country under review standards similar to Missouri's Hancock Amendment analysis. Recent cases holding that stormwater service charges are a fee include decisions from state courts in Kentucky, Colorado, Florida, Washington, Tennessee, South Carolina, Georgia and Illinois. The erroneous finding in this case has misled the lower courts to find a tax where numerous other courts have correctly identified similar or identical charges as a fee.

Notably, this issue has been an area of unsettled law necessitating, as in this case, a number of state Supreme Court decisions. However, the majority trend is for the state appellate courts to find charges like MSD's to be a fee and not a tax. This Court should overturn the erroneous finding below and follow the majority "fee" trend as well.

In *Long Run Baptist Ass'n v. Louisville MSD*, 775 S.W.2d 520 (Ky. App. 1989), the Plaintiffs challenged the constitutionality of a stormwater service charge that was based on an "Equivalent Surface Unit" approach (1 ESU for all residential parcels; 1 ESU per 2500 sq. ft. for commercial and industrial parcels). The Kentucky court of appeals found that the service charge was not a "tax" and was reasonable and uniform in its application. As with MSD's stormwater charge, the charge upheld by the Kentucky court in this case was directly correlated to the amount of impervious surface on a particular property parcel.

In *City of Littleton v. State*, 855 P.2d 448 (Colo. 1993), the City sought to collect unpaid stormwater management fees from state-owned school properties. The Colorado Supreme Court found the charge was not a tax or special assessment, but a service fee reasonably designed to meet the overall costs of the service provided. The court also found that the portion of the fee used to construct and maintain the drainage system was essential to provision of the services. Similarly, in *Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986), the Colorado Supreme Court denied a class action challenge to the City of Denver's ordinance assessing fees and service charges for the city's storm drainage facilities. The court found that the ordinance was rationally related to a legitimate state purpose of financing the maintenance and construction of new storm sewers, and that it established a valid service charge rather than an unconstitutional tax because the funds raised by the fee were not used for general revenue purposes but were segregated and used solely to pay for the costs of the "operation, repair, maintenance, improvement, renewal, replacement and reconstruction of storm drainage facilities."

In *Smith v. Spokane County*, 948 P.2d 1301 (Wash. App. 1997), the state court of appeals found that a fee charged for funding certain "Aquifer Protection Areas" was not an unconstitutional tax and would be upheld if it was reasonable and designed to cover only the costs of the program. In reaching this decision, the court relied upon an earlier Washington Supreme Court decision, in *Teter v. Clark County*, 704 P.2d 1171 (Wash. 1985), which held that charges for a county storm and surface water utility – based on amount of impervious surface, similar to MSD's program – was not a tax but a valid regulatory fee.

In *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927 (E.D. Tenn. 1998), city taxpayers challenged the validity of a local stormwater ordinance on various state and federal constitutional grounds. The Federal District Court found the ordinance imposed a fee, not a tax, because the charges were based on use of the stormwater system, and applying a portion of fees to construct or expand facilities as well as to defray cost of operating the system was explicitly authorized by state statute. Notably, the fee upheld in this case was calculated based on the amount of impervious surface owned by a ratepayer and the resulting amount of additional stormwater runoff, comparable to the fee structure put in place by MSD.

In *South Carolina v. City of Charleston*, 513 S.E.2d 97 (S.C. 1999), the State of South Carolina brought a declaratory judgment action to determine whether the city was authorized to impose stormwater fees on state facilities pursuant to a state statute, S.C. Code Ann. § 48-14-10, which authorized local governments to establish a "stormwater utility" and to fund it either through a fee or a tax assessment. The City of Charleston created its utility by local ordinance, and opted to fund it through a fee. The state argued that although denominated a fee, the charge involved was really a tax. The state supreme court found that the plain language of the statute allowed local governments to fund the utility through either a fee or an assessment, and that the city had chosen to use a fee, which could properly be imposed on State property.

In *McCleod v. Columbia County*, 599 S.E. 2d 152 (Ga. 2004), the county imposed a stormwater fee based on the impervious area of developed property, very similar to MSD's contested charge. Property owners challenged the fee as an invalid tax. Noting

that a charge is generally not a tax if it provides compensation for services rendered, the Georgia Supreme Court held in a unanimous decision that the fee was "not arbitrary and bears a reasonable relationship to the benefits received by the individual developed properties in the treatment and control of stormwater runoff."

In *Church of Peace v. City of Rock Island*, 2005 Ill. App. LEXIS 448 (2005), an Illinois appeals court found that the stormwater fee levied by the City of Rock Island is not a tax and that churches are not exempt from payment of the fee. The court found that, under Illinois law, a tax may be distinguished from a fee by observing that a tax is a charge having no relation to the service rendered and is assessed to provide general revenue rather than compensation. A fee, on the other hand, is proportional to a service or benefit rendered. Using this analysis, the court found the stormwater service charge was clearly a fee, because there was a direct and proportional relationship between imperviousness and stormwater runoff, thus creating a rational relationship between the amount of the fee and the contribution of a parcel to the use of the stormwater system. The charge upheld in this case was similar in many respects to the charge instituted by MSD, especially the use of impervious surface as the key component in fee calculation.

Most recently, in *Northeast Ohio Regional Sewer District v. Bath Township, Ohio, et al.*, Case No. 714945, the Cuyahoga County, Ohio Court of Common Pleas in February 2012 denied Defendants' Motion for Permanent Injunction in which Defendants sought to preclude the Northeast Ohio Regional Sewer District from levying a proposed stormwater management fee. In making its determination, the Ohio Court analyzed many of the same factors MSD and *amici* are advancing herein. Ultimately, the Court determined that

the fee charged by Northeast Ohio Regional Sewer District was valid, as it was supported by the impervious surface calculation. It was therefore not an arbitrary and capricious method of fee compensation.[10]

As with all public utilities, stormwater sewers and services require considerable resources to maintain. This is particularly true for stormwater systems given the vast network of underground pipes and conveyance systems that must be installed and maintained. Nationwide, impervious surface has rapidly become the most accepted method of fee calculation. This trend is due to the direct and indisputable relationship imperviousness bears to the costs imposed on the storm water utilities and the fee for their services provided. This Court must overturn the erroneous finding below, which will then lead to the inescapable determination that MSD's storm water charge is a fee and not a tax. Such a decision by this Court will bring Missouri in line with other states that have examined this question and insure the long-term viability of stormwater systems in Missouri.

[10] Most importantly, the court in this case acknowledged the direct relationship between impervious surface and stormwater runoff. Furthermore, the court understood that an impervious surface billing approach is not aimed at measuring total runoff from each property, but instead is intended to measure the increased flow due to development. It is because of these increased flows from development that municipal stormwater management systems and services are necessary.

III. RECENT AMENDMENTS TO THE FEDERAL CLEAN WATER ACT REFLECT THE INTENT OF CONGRESS THAT USER FEES BASED ON AN APPROXIMATION OF THE VOLUME OR RATE OF STORMWATER RUNOFF FROM A PROPERTY ARE REASONABLE SERVICE CHARGES

Section 313(a) of the Clean Water Act (33 U.S.C. 1323(a)) has provided since 1977 that all federal departments and agencies with jurisdiction over any property or facility, or engaged in any activity that may result in the discharge or runoff of pollutants, shall be subject to and comply with all state and local requirements respecting the control and abatement of water pollution, "including the payment of reasonable service charges." Notwithstanding this provision, prior to the end of 2010 a number of federal facilities around the country had refused to pay local stormwater utility fees based on the argument that such fees were actually "taxes" for which the federal government had not waived its sovereign immunity.[11]

In response to this controversy, Congress amended the Clean Water Act at the beginning of 2011 to make it absolutely clear that the type of stormwater user fees involved in this Appeal were included within the definition of "reasonable service charges" that all federal facilities are obligated to pay. This clarification was accomplished by adding the following definition to § 313(c) of the Act:

[11] A number of different federal agencies had refused to pay such fees at facilities located in, *inter alia*, Washington, Ohio and the District of Columbia.

(c) REASONABLE SERVICE CHARGES

(1) IN GENERAL—

For the purposes of this chapter, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is--

(A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and

(B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

Pub. L. No. 111-378, 124 Stat. 4128 (Jan. 4, 2011).

The "Stormwater User Charge" enacted by MSD, based on a rate of $0.14 per every 100 square feet of impervious surface area and calculated to provide the revenue necessary to provide sufficient funds to adequately operate the stormwater system, is precisely the type of "reasonable service charge" defined by Congress in CWA § 313(c).

The court below held that MSD's user charge was a "tax," in part, because there is not a "direct relationship" between impervious area and runoff. However, as explained in Section I, above, stormwater user fees based on impervious area are the industry norm precisely because they provide the "fair approximation" of the proportionate contribution of a property to stormwater pollution (in terms of the volume or rate of stormwater discharge or runoff from the property) to which Congress refers in CWA § 313(c).

Furthermore, the revenues generated by the charge are used to pay or reimburse MSD for the costs associated with its stormwater management program, "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" as contemplated in CWA § 313(c). As stated in the Trial Court's decision, MSD's Stormwater User Charge "funds MSD's maintenance and operation of its stormwater system, and also funds MSD's compliance with applicable regulations and provision of education to District property owners regarding the mandates of the Clean Water Act." Decree at 31, ¶ 119. Contrary to the Trial Court's opinion, therefore, MSD's Stormwater User Charge should be regarded as a reasonable service charge rather than a tax.

CONCLUSION

For each of the foregoing reasons, the *amici* urge this Court to (1) overturn as clearly erroneous the finding below that there is no direct relationship between impervious cover and the level of stormwater services that must be provided by MSD and

(2) uphold MSD's Stormwater User Charge as a valid and constitutional user charge for the stormwater management services rendered to properties within the District.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the requirements of Rule 55.03; the limitations set forth in Rule 84.06, in that it contains 4694 words and was produced using Microsoft Word Software.

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The undersigned hereby certifies that a true and correct copy of the foregoing was provided to all attorneys of record via electronic mail and the Missouri Supreme Court Electronic Filing System this 19th day of December, 2012:

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