Appeal No. ED96110 (consolidated
with Nos. ED96165 and ED96393)

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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

Respondents/Cross-Appellants,

vs.

THE METROPOLITAN ST. LOUIS
SEWER DISTRICT,

Appellant/Cross-Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AND THE AMERICAN PUBLIC WORKS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF 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), and the American Public Works Association (APWA) (collectively the "*amici*") submit this brief as *amici curiae* in support of the Metropolitan St. Louis Sewer District (MSD), the 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 5 public utility members in the State of Missouri, 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 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, 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.

In order to implement the expanding requirements of the stormwater management programs required in municipal stormwater permits issued by their state and federal environmental agencies, local stormwater authorities throughout the United States have devised 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 such 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 it found that there is no relationship between the amount of impervious area on a property and the volume of stormwater runoff or the stormwater management services provided by MSD. This ruling calls into question the validity and implementation of similar programs established throughout the country 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 *amici* believe this ruling is contrary to prevailing legal opinion as well as to normal utility rate-setting practices throughout the country. Accordingly, the *amici* offer this brief to aid the Court in its consideration of this issue.

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 runs counter to the fundamental rate-setting approach used by the vast majority of stormwater utilities throughout the country. In most instances, stormwater service fees are designed to reflect the impacts that each property has on stormwater service demands and thus the cost of providing facilities and operational and support activities. Such costs are primarily a function of peak stormwater runoff rate, total volume of discharge, and pollutant contributions. Empirical studies have demonstrated that impervious surface area on a property is the single most significant factor influencing all of these impacts. Impervious area is also relatively easy to identify and quantify numerically and is the most common parameter used in stormwater service fee calculations.[1]

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. Impervious area rate methodology reflects a philosophy of allocating costs based on each property's contribution of runoff to the system. The approach is generally 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

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[1] *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.

discharges themselves. There is a "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 technically validate the equity of an impervious area rate methodology for stormwater management user fees.[2] The coefficient of runoff value in hydrologic engineering tables

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[2] 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.

closely 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 1970's and 1980's and subsequent research showed that impervious area is the most dominant factor in pollutant loadings conveyed by stormwater runoff.[3]

More recently, based on the findings and recommendation in a 2009 study by the National Research Council on *Urban Stormwater Management in the United States*, U.S. 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 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

[3] *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).

addition, the increase in impervious land cover results in the increase of the pollutant load discharged from storm sewers.[4]

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.[5] 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, further a majority of those utilities use "impervious area" alone as the basis for calculating their fees.[6]

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

The question whether a municipal stormwater service charge is a valid user "fee" or an impermissible "tax" has been litigated in a number of jurisdictions around the country. The majority of recent cases favor the position that stormwater service charges

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[4] 74 Fed. Reg. 68617, 68620 (December 29, 2009).

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

[6] *2010 Stormwater Utility Survey* (Black & Veatch 2010), at 6-8. Available at www.bv.com/stormwatersurvey.

are a fee, including decisions from cases arising in Kentucky, Colorado, Florida, Washington, Tennessee, South Carolina, Georgia and Illinois.

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.

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 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.

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. 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.

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.[7]

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:

> (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--

[7] 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.

(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 reverse the decision below and uphold the District'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

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

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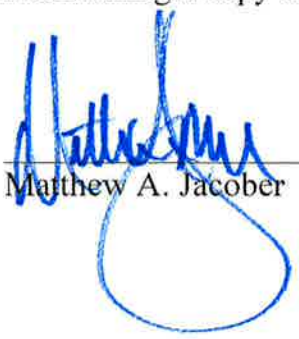

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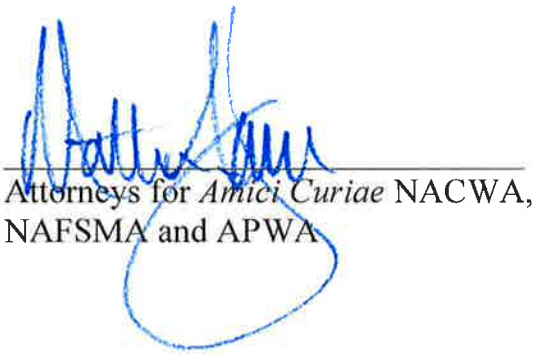

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