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**Ken Kirk**

April 30, 2010

The Honorable Eric H. Holder, Jr.  
Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Attorney General:

I write to you on behalf of the National Association of Clean Water Agencies (NACWA) in reference to the recent decision by the Government Accountability Office (GAO) and the General Services Administration (GSA) that federal facilities in the District of Columbia are exempt from paying impervious area charges to the District of Columbia Water and Sewer Authority (DCWASA) related to stormwater runoff. NACWA advocates on behalf of publicly owned wastewater treatment and stormwater agencies. DCWASA is a longstanding member of NACWA. We believe the refusal of the federal government to pay DCWASA's stormwater fee for a critically important local environmental service is not only legally unjustified but also significantly undercuts the Obama Administration's own public commitment to improve water quality within the Chesapeake Bay watershed and nationally.

It is our understanding that the Department of Justice (DOJ) is currently reviewing the preliminary determination of the GAO and GSA that DCWASA's stormwater charge constitutes a tax and not a fee for service, thus exempting the federal government from any payment obligation. We believe this interpretation is legally incorrect and socially unjustifiable. NACWA has long taken the position that stormwater charges by local stormwater or wastewater utilities are a clear fee for service from a public utility, no different than fees for water or sewer service, and do not constitute a tax. This position is supported by Section 313 of the federal Clean Water Act (33 U.S.C. §1323) which clearly states that the federal government is obligated to pay reasonable fees to local governments related to runoff control and pollution abatement. Furthermore, under the test laid out by the U.S. Supreme Court in *Massachusetts v. U.S.* (435 U.S. 444 (1978)) for determining when a charge to a government is a fee or a tax, the DCWASA charge clearly qualifies as a fee because it does not unfairly discriminate against the federal government (all

owners of impervious surface in the District serviced by DCWASA must pay), is based on fair approximation of use of the system (charge is based on amount of impervious surface contributing stormwater to DCWASA's system), and is structured to produce revenue that will not exceed the cost of the service (charge is designed to cover DCWASA's cost of reducing water pollution from stormwater).

The federal government's refusal to pay these environmental fees is also in direct conflict with President Obama's stated commitment to preserve the Chesapeake Bay as a national environmental treasure as outlined in Executive Order 13508. In fact, the stormwater fees at issue are being used specifically to help fund DCWASA's multi-billion dollar efforts under a federally mandated consent decree to reduce its sewer overflows from excess stormwater and improve water quality in local water bodies and the Chesapeake Bay. It is hypocritical for the federal government to impose such an unfunded mandate on the District of Columbia and then at the same time, as the largest land owner in the District, refuse to pay its fair share of the cost necessary to address this critical environmental issue within the Chesapeake Bay watershed. This is particularly true given the very stringent new stormwater permit proposed for the District of Columbia last week by the Environmental Protection Agency that will impose significant new costs on the city and its residents.

Like water and sewer services, municipal governments are required to provide stormwater management as a basic public health and environmental service. Federal agencies pay for water and sewer services, and stormwater services should be treated no differently. In the absence of the federal government's commitment to pay its share of these important local costs, the economic burden to address stormwater issues falls even more squarely on the shoulders of local ratepayers at a time when many communities and households are facing unprecedented economic pressures.

NACWA strongly urges the Department of Justice to find that the stormwater charge issued by DCWASA is a fee and not a tax, and further direct all federal facilities within the District of Columbia to pay the appropriate fee as billed by DCWASA. Furthermore, we encourage DOJ to extend its directive nationwide, instructing all federal facilities across the nation to pay appropriate stormwater fees charged by local stormwater utilities. The refusal of federal government agencies to pay local stormwater fees is an issue that has frustrated utilities in many parts of the country for years. NACWA believes the current discussion on the DCWASA fee presents a valuable opportunity for the federal government to make clear on a nationwide basis, once and for all, that it is legally obligated to pay local stormwater fees.

Reducing water quality impairments from urban stormwater is one of the greatest and most expensive environmental challenges facing municipalities today. At a time of increasing federal regulatory and enforcement requirements for cities to address these stormwater issues, coupled with the worst economic downturn since the Great Depression, it is imperative that the federal government commit to paying its share of this important environmental cost, both in our nation's capital and across the country.

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If you have any questions or would like to discuss this issue further, please do not hesitate to contact me or Nathan Gardner-Andrews, NACWA's Counsel, at 202/833-2672 or [ngardner-andrews@nacwa.org](mailto:ngardner-andrews@nacwa.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'K Kirk'.

Ken Kirk,

Executive Director

Cc: Lisa Jackson, Administrator, U.S. Environmental Protection Agency  
Nancy Sutley, Chair, Council on Environmental Quality  
Bob Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency  
Ignacia S. Moreno, Assistant Attorney General, Department of Justice  
John A. DiCicco, Assistant Attorney General, Department of Justice  
John C. Cruden, Deputy Assistant Attorney General, Department of Justice  
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Susan A. Poling, Managing Associate General Counsel, General Services Administration  
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