

IN THE SUPREME COURT OF MISSOURI

WILLIAM DOUGLAS ZWEIG, <i>et al.</i> ,)	
on behalf of themselves and all others)	
similarly situated,)	
)	
Plaintiffs-Respondents/Cross-Appellants,)	Circuit Court No. 08SL-CC03051
)	Court of Appeals No. ED96110
)	(Consolidated with Nos. ED96165
)	and ED96393)
v.)	Supreme Court No. SC92581
)	
THE METROPOLITAN ST. LOUIS)	Court of Appeals, Eastern District
SEWER DISTRICT,)	Circuit Court for St. Louis County
)	
Defendant-Appellant/Cross-Respondent.)	

SUGGESTIONS IN SUPPORT OF METROPOLITAN ST. LOUIS
SEWER DISTRICT'S APPLICATION FOR TRANSFER

The National Association of Clean Water Agencies (NACWA) submits its Suggestions in Support as *amicus curiae* of the Metropolitan St. Louis Sewer District (MSD) pursuant to Supreme Court Rule 84.05(f). NACWA represents the interests of nearly 300 of the nation's wastewater and stormwater management agencies, with five public utility members in the State of Missouri, including MSD. This case presents a matter of general interest and importance for both Missouri and the entire country. NACWA is appreciative for the Court's acceptance of its Suggestions in Support and encourages the Court to grant MSD's pending Application for Transfer.

I. This Case is One of General Interest and Importance

As a result of increased governmental regulations relating to stormwater management programs, agencies, like MSD, are facing substantial costs associated with legislatively mandated improvements to existing sewer systems. Those improvements

come at a considerable cost – which agencies must pass along. The nationwide trend is to use the impervious surface standard as a basis for determining each property owner's share of the costs.

Indeed, per recent amendments to the Clean Water Act, §313(c), all federally owned properties are required to pay stormwater fees based on the impervious surface standard. Other courts around the country that have examined this issue have found impervious surface charges to be valid fees for service and not taxes. This case allows Missouri to adopt this national trend.

The Appellate Court's ruling on this issue runs counter to the fundamental rate-setting approach used by the vast majority of stormwater utilities. 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, 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 Simply stated, the impervious surface area billing approach is simple, appropriate and equitable. It is not an indiscriminate tax, but is a fee.

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>.

A. Congress Amended the Clean Water Act in 2011 To Require the Federal Government to Pay Stormwater User Charges.

Since 1977, Section 313(a) of the Clean Water Act (33 U.S.C. 1323(a)) has provided 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.” Congress amended the Clean Water Act at the beginning of 2011 with significant input from NACWA to make it clear that the type of stormwater user fees at issue here were included within the definition of “reasonable service charges” that all federal facilities are obligated to pay.

The “Stormwater User Charge” adopted by MSD is precisely the type of “reasonable service charge” defined by Congress in § 313(c) of the Clean Water Act. Stormwater user fees based on impervious area provide the type of “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 § 313(c) of the Act.

II. Calculating User Charges Based on Impervious Area is the Industry Standard

A. Impervious-Based Charges are Supported by Science and Engineering.

NACWA will more fully set forth in its *amicus curiae* brief the calculation of user charges on the impervious area of property that has become the industry standard. The

science supports this viewpoint as careful research has shown that the single largest factor contributing to stormwater runoff is the amount of impervious area on property. Should the Court grant MSD's Application for Transfer, NACWA will more fully outline the relevant science. However, at its simplest, the science shows impervious area is so important because it has a direct and known impact on how much runoff a property produces during a wet weather event.

B. Stormwater Rate Structures Based Solely on Impervious Area Are Equitable.

These rate structures are fair, practical and easy to understand. 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 discharges themselves. There is a rational 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. The use of impervious surface for stormwater billing provides a similar approach to determine in the most fair and equitable fashion how much a ratepayer should be charged for its use of the

stormwater management system and related programmatic costs. For this reason, stormwater utilities all across the nation have shifted to impervious surface-based billing.

III. Other States Have Upheld Impervious-Based Charges as Fees, Not Taxes

Courts nationwide have already held that stormwater service charges are fees, including decisions from cases arising in Kentucky, Colorado, Florida, Washington, Tennessee, South Carolina, Georgia, Illinois and Ohio. NACWA will more completely address the national trend in relation to these matters, in its *amicus* brief if this Court grants MSD's Application for Transfer. However, the State of Missouri with the underlying decisions is at risk of becoming an outlier in this area of vital public services. This Court is uniquely positioned to address these issues and should take this step by granting the Application for Transfer filed by MSD.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on this 1st day of June, 2012, through the electronic filing system and regular mail on:

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