No. 22-1581

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CITY OF WILMINGTON, DELAWARE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in Case No. 1:16-cv-01691-MHS, Judge Matthew H. Solomson

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF THE BRIEF OF PETITIONER-APPELLANT CITY OF WILMINGTON, DELAWARE

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May 31, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number No. 22-1581

Short Case Caption City of Wilmington, Delaware v. United States

Filing Party/Entity National Association of Clean Water Agencies

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 05/31/2022

Signature: /s/Amanda Waters

Name: Amanda Waters

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
National Association of Clean Water Agencies		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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STATEMENT OF IDENTITY AND INTEREST AND SOURCE OF AUTHORITY TO FILE

The National Association of Clean Water Agencies (NACWA) is a nonprofit trade association representing the interests of publicly owned stormwater and wastewater utilities across the United States. NACWA's members include 350 municipal clean water agencies, including the City of Wilmington, that own, operate, and manage stormwater sewer systems, publicly owned treatment works, wastewater sewer systems, and all aspects of wastewater collection, treatment, and discharge.

Stormwater management fees provide critical support for the work done by NACWA's members to protect public health and the environment. NACWA played a key role in advocating for the adoption of 33 U.S.C. §1323(c) (Clean Water Act Section 313(c)) in response to longstanding federal resistance to paying such local government fees despite benefiting from the effective stormwater management programs of local agencies. It is imperative that this court uphold the ability of stormwater utilities across the country to assess and collect payment from federal agencies for these services.

NACWA's members are public agencies funded by local residents, property owners, and businesses, whose dollars are dedicated to protecting water quality in the communities they serve. They are stewards of public health, the environment, and public funds. NACWA's members make substantial investments in construction, operation, and maintenance of major infrastructure projects, which are designed to have the greatest environmental benefits without financially overburdening local communities.

The costs of managing stormwater discharges from impervious surfaces has been a major concern for NACWA members for many years. Local stormwater utilities throughout the United States have devised appropriate funding mechanisms, including the collection of user fees and service charges, to implement the requirements of the stormwater management programs required in municipal stormwater permits issued by state and federal environmental regulators. By far the most common approach taken by such utilities to establish appropriate rate structures is the use of impervious surface area to allocate costs based on a fair approximation of each property's contribution of runoff to the stormwater management system. Such a methodology was employed by the City of

Wilmington in the present case. *See* Wilmington City Code § 45-53; Appx2030 (JSUF ¶5); Appx0244; Wilmington Charter § 1-101; Del. Code Ann. tit. 7, § 4005(c); Del. Code Ann. tit. 22, § 802.

These fee programs are commonly called Impervious Area Charge Programs (IACs), and local governments rely on them to cover the costs of meeting increasingly stringent Clean Water Act requirements. These costs will only increase, as stormwater remains a leading cause of water quality impairment and a focus of increased federal regulatory requirements by the U.S. Environmental Protection Agency (EPA) and many states.

Prior to enactment of Clean Water Act Section 313(c), NACWA members faced intense resistance from federal entities claiming that such charges constituted an impermissible tax rather than a "fee for service" and were therefore barred by the principle of sovereign immunity.

The number of federal government facilities nationwide refusing to pay municipal stormwater charges continued to increase as more utilities

shifted towards the use of IACs for stormwater billing.[1] As a result, local communities were left footing the bill for critical public health and environmental services being provided to the federal government. Accordingly, NACWA worked directly with Congress in 2010 to clarify the responsibility of federal agencies to pay reasonable stormwater service charges, including past, present, and future amounts, through an amendment to the Clean Water Act. These efforts lead to the enactment of Clean Water Act Section 313(c) in early 2011.

In the present case, a decision by this Court upholding the lower court's narrow interpretation of "reasonable service charges" may serve to embolden federal facilities to once again attempt to avoid payment of local stormwater fees to the detriment of public utilities, residents and businesses in communities across the country. The Court should avoid such an outcome and instead uphold municipal stormwater fee structures in a manner consistent with the text and legislative history of Clean Water Act Section 313(c).

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[1] *Available at* https://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101505997.html (last visited May 31, 2022).

NACWA submits this brief pursuant to Fed. R. App. P. 29(a) based on its members' compelling interest in ensuring that public clean water agencies can continue to collect reasonable stormwater fees from federal facilities served by their stormwater management programs.

The undersigned counsel for NACWA has authored this Amicus Brief and NACWA (and no other person or entity) has funded the preparation and submission of this Amicus Brief.

ARGUMENT

A. A Ruling in Favor of the United States Could Negatively Impact Stormwater Utilities Nationwide

Municipal Separate Storm Sewer Systems (MS4s) are regulated by EPA and states under the Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) program, which sets limits on the amount and kind of pollutants that can be discharged from their pipes. MS4s differ from other regulated dischargers, however, in that their flows are not conveyed to a treatment plant or discharged from a single pipe at the end of a process. Instead, MS4s convey stormwater generated from precipitation events through diffuse networks of pipes and other conveyances that may or may not be interconnected and may serve only a portion of a community or jurisdiction. This stormwater,

which picks up pollutants from a variety of sources, is ultimately discharged to surface waters pursuant to an NPDES permit.

Permits for discharges from MS4s must "prohibit non-stormwater discharges into the storm sewers" and "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA] or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3). This is a unique standard under the Clean Water Act that applies only to MS4s.

The need to replace and repair aging infrastructure, increased regulatory requirements imposed on MS4 communities through the NPDES program, and pressure from citizen activist groups for increasingly sophisticated stormwater management practices continue to raise the costs of stormwater management. Given these compounding factors, the ability to adequately, fairly, and equitably fund stormwater management programs is critical.

Nor are these the only challenges communities face. Changing weather patterns and the intensification of weather events can make

stormwater management a moving target. Likewise, difficulties in forecasting population and development changes when implementing a program and sizing infrastructure can also increase the costs of stormwater management. These and many other factors must be taken into consideration when adopting a stormwater funding mechanism.

NACWA's members and the communities they serve already frequently face funding shortfalls for their existing obligations. Rates for municipal stormwater services have increased substantially since the mid-1980s at a rate that outpaces both inflation and the costs of other essential household services. R. Raucher *et al.*, *Developing a New Framework for Household Affordability and Financial Capability Assessment in the Water Sector*, 1-3-1-4 (2019).[2] And yet, these rising rates are still not enough to meet increasing regulatory requirements, update aging infrastructure, and respond to climate change. *Id.* at 1–4.[3]

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[2] *Available at* https://www.nacwa.org/docs/default-source/resources---public/developing-new-framework-for-affordability-report-(final).pdf?sfvrsn=dc1f361_2 (last visited May 31, 2022).

[3] Estimates place the needed investment to replace aging water infrastructure and respond to climate change anywhere from more than $36 billion by 2050 to $1 trillion over the next 25 years. *Id.*

Stormwater utilities face an uphill battle to obtain the funding and ratepayer buy-in necessary to efficiently and equitably implement their programs.

A 2018 survey of stormwater utilities found that less than half of respondents reported that their funding was sufficient to meet their obligations, with nine percent indicating they lacked funding to address urgent needs. Black & Veatch Management Consulting, LLC, *2018 Stormwater Utility Survey* (2018) at 24.

The ability of stormwater utilities to collect reasonable stormwater fees from federal facilities is critical to address the increasing costs of Clean Water Act compliance and the provision of essential public health and environmental services to local communities. The imposition of impractical requirements on municipalities before they can assess and obtain such fees would negatively impact local water quality and human health initiatives across the country.

B. Impervious Surface Area Approaches Meet the Statutory Requirements of Section 313(c)

The City of Wilmington's stormwater fee methodology utilizes impervious service area to approximate runoff or pollution attributable to each property. Impervious surface areas include hard-surfaced,

manmade areas that do not readily absorb or retain water, such as roofs and paved areas. The amount of impervious surface area on a property is therefore directly related to the amount of runoff likely to flow from that property.

Wilmington's methodology, specifically, includes a multifactor formula whereby the total area of a property is multiplied by a runoff coefficient to determine the amount of impervious area. Wilmington determines the total area of the property from county land records, which is the common practice. As the lower court acknowledged, Wilmington was only required to show a "fair approximation" of the proportionate contribution of the property to stormwater pollution in accordance with the Clean Water Act, 33 U.S.C. § 1323(c)(1)(A). Indeed, the lower court expressly held that it "takes no issue with Wilmington's general approach – i.e., the use of property categories and runoff coefficients." See *City of Wilmington v. U.S.*,157 Fed. Cl. 705 (2022).

The use of impervious surface area in the determination of appropriate stormwater fees is critical to NACWA's members. Stormwater utilities do not have the resources to separately and with 100% accuracy assess the exact amount of stormwater flowing from every

individual parcel of land within a service area and provide individually calculated fees for thousands of properties based on multiple sources of data. Nor does the Clean Water Act require this. Instead, utilities use stormwater property classification methods, appeals processes, and stormwater credits to, in accordance with the requirements of Section 313, calculate fair approximations of the proportionate contribution of each property or facility to stormwater pollution in terms of quantities of pollutants or volume or rate of stormwater discharge or runoff. Congress recognized this as an appropriate way to calculate stormwater fees when it adopted Clean Water Act Section 313(c). The Court should uphold the lower court's finding that Wilmington's general approach comports with the requirements of the Clean Water Act.

C. A Narrow Interpretation of the Clean Water Act's Mandate that Federal Agencies Pay "Reasonable Service Fees" for Stormwater Pollution Abatement is Contrary to Congressional Intent

Congress' intent to broadly waive federal facility sovereign immunity for both substantive and procedural water quality requirements has been consistent since its enactment of the Federal

Water Pollution Control Act of 1972.[4] Indeed, after the Supreme Court determined that the waiver of sovereign immunity contained in the text of Section 313(a) did not extend to state permitting requirements, Congress corrected this holding in the Clean Water Act Amendments of 1977 and made it "unequivocally clear" that federal facilities were subject to "all the provisions of state and local water pollution laws."[5]

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[4] S. Rep. No. 92-414, 92nd Cong., 1st Sess. 77 (1972) ("The Federal Government cannot expect private industry to abate pollution if the Federal government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens."); H.R. Rep. No. 92-911, 92nd Cong., 1st Sess. 118 (1972) ("The Committee, after hearing of numerous examples of flagrant violation of pollution controls is determined that the Federal facilities shall be a model for the Nation and that unless exempted by the President, they shall be required to meet all requirements as if they were private citizens…") adopted in the conference report 92-1236 (92nd Cong. at 135).

[5] The Supreme Court in *EPA v Cal. EPA. Ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976), interpreted the Federal Water Pollution Control Act of 1972 as not subjecting federal facilities to state permitting requirements to abate water pollution. In 1977 Congress amended the Act clarifying the broad scope of the sovereign immunity waiver. S. Rep. 95-370, 95th Cong. 1st Sess., states that "The Act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the congress in passing the 1972 FWPCA amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent" (citing *EPA v. California ex rel. State Water Res. Control Bd.*).

However, as municipalities began to enact and enforce stormwater ordinances such as IACs to cover the increasingly stringent costs of stormwater controls, federal facilities switched tactics and claimed immunity from paying such charges by asserting that they were impermissible taxes, not "reasonable service charges." By 2010, it had become clear that Congress again needed to intervene to address the federal government's refusal to pay its fair share of the tremendous costs of stormwater management being placed on the shoulders of local governments.

In introducing S. 3481, Senator Ben Cardin stated that: "I continue to have grave concerns about the failure of the federal government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties. At stake is a fundamental issue of equity; polluters should be financially responsible for the pollution that they cause. That must include the federal government. When enacted, my legislation will remove all ambiguity

about the responsibility of the federal government to pay these normal and customary storm water fees."[6]

Following the enactment of S. 3481, which clarified that "reasonable service charges" in Clean Water Act Section 313(a) includes municipal stormwater charges such as IACs, the U.S. Department of Justice's Office of Legal Counsel (OLC) affirmed Senator Cardin's intent. OLC issued an opinion for the EPA's General Counsel finding that S. 3481, codified as section 313(c) of the CWA, does not impose a specific appropriations requirement for the payment of storm water assessments. 35 Op. O.L.C. 1 (2011).[7]

That opinion cited "Senator Cardin's consistent, public and unambiguous articulation of the intended purpose and effect of the Stormwater amendment" as confirming the view "that Congress intended the Stormwater amendment to facilitate the payment of stormwater

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[6] Sen. Cardin Press Release statement of June 11, 2010, available at http://cardin.senate.gov/newsroom/press/release/cardin-bill-would-require-feds-to-pay-their-fair-share-to-clean-uplocal-pollution.

[7] Caroline D. Krass, Principal Deputy Assistant Attorney General, *Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act* (February 25, 2011); available at https://www.justice.gov/olc/opinions-volume (last visited May 31, 2022).

assessments by the federal government." *Id.* at 14-15. In so doing, the OLC cited *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 66 (1964) ("it is the sponsors that we look to when the meaning of the statutory words is in doubt") (among other cases), concluding that "there is no indication in the legislative record that the understanding of the stormwater amendment offered by Senator Cardin and others was not shared universally in Congress." *Id.* at 14.

The legislative history of Clean Water Act Section 313 makes abundantly clear that Congress intended the federal government to pay its fair share for the local stormwater services from which it benefits. Adoption of an improperly narrow definition of "reasonable service charges" that would allow the U.S. Army Corps of Engineers to avoid paying Wilmington years of stormwater management fees for its enormous disposal areas would be diametrically opposed to that longstanding intent and could hinder the ability of clean water utilities to control and abate stormwater pollution and protect water quality nationwide.

CONCLUSION

For the foregoing reasons, NACWA requests that the Court hold that the outstanding stormwater fees at issue are reasonable service charges properly payable by the United States in accordance with Congress' waiver of sovereign immunity under the Clean Water Act, 33 U.S.C. § 1323(a).

Dated: May 31, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2022, I caused to be electronically filed the foregoing using the CM/ECF system, which will send notification of such filing by operation of the Court's electronic systems. Parties may access this filing via that Court's electronic system.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: No. 22-1581

Short Case Caption: City of Wilmington, Delaware v. United States

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Name: Amanda Waters