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September 29, 2010

Ms. Avis Marie Russell, Esq.
General Counsel
D.C. Water and Sewer Authority
5000 Overlook Avenue, S.W.
Washington, D.C. 20090

Subject: *Use of Appropriated Funds to Pay for the D.C. Water Impervious Surface Area Fee*

Dear Ms. Russell:

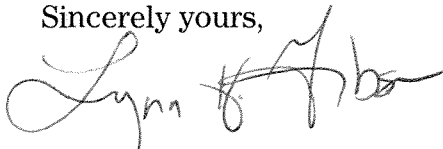
The purpose of this letter is to inform you that we have evaluated the District of Columbia Water and Sewer Authority's (D.C. Water) Impervious Surface Area charge (ISA charge) and, for the reasons detailed in the Enclosure, have determined that GAO's appropriated funds are available to pay the assessment due on October 1, 2010. We have concluded that the ISA charge is a component of the utility rate customers pay for water and sewer services.

In April 2009, D.C. Water transmitted to the Director of the Office of Management and Budget (OMB) D.C. Water's fiscal year 2011 water and sewer services bill for federal customers. Letter from Chief Financial Officer, D.C. Water, to Director, OMB, Apr. 15, 2009 (D.C. Water FY 2011 Bill). The D.C. Water FY 2011 Bill includes ISA charges assessed on District properties based on the amount of impervious surface located on each property. *Id.* Funds collected are used to recover costs of construction projects directed at reducing and controlling combined sewer overflows, which occur during heavy rain events when combined sewage and stormwater from the combined sewer system overwhelm D.C. Water's facilities and untreated sewage is discharged into local waterways.

It is well established that a federal agency may use appropriations to pay a fee, such as a utility rate, for services rendered. Because the purpose of the ISA charge is to cover the costs of capital improvements to D.C. Water's sewer system and treatment facilities, we view the ISA charge as a component of the utility rate a customer must pay to obtain water and sewer services. In evaluating the charge, GAO considered all the facts and circumstances in order to understand the essential nature of the charge. We do not find dispositive that D.C. Water, in billing for these costs, separates the costs of these capital improvements from other costs of operation as separate line items on customer bills.

We have directed the U.S. Department of the Treasury's Financial Management Service that it may use GAO appropriated funds to pay the assessment due on October 1, 2010. If you have any additional questions on this matter, please contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Lynn H. Gibson", with a stylized flourish at the end.

Lynn H. Gibson
Acting General Counsel

Enclosure

cc: David A. Lebryk
Commissioner, Financial Management Service
U.S. Department of the Treasury

ENCLOSURE

ANALYSIS OF D.C. WATER'S IMPERVIOUS SURFACE AREA CHARGE

At issue here is whether GAO's appropriations are available to pay the District of Columbia Water and Sewer Authority's (D.C. Water, formerly WASA) Impervious Surface Area charge. The Supremacy Clause of the U.S. Constitution establishes that the United States and its instrumentalities are immune from taxation by state and local governments. However, appropriations are available to pay charges, such as utility rates, assessed for services rendered.

BACKGROUND

D.C. Water, a public utility and independent municipal corporation created by the Council of the District of Columbia (District), is responsible for the operation and maintenance of water distribution and sewage collection, treatment, and disposal systems within the District. D.C. Code §§ 34-2202.02, 34-2201.01. D.C. Water has full authority to "establish, adjust, levy, collect, and abate charges for services, facilities, or commodities . . . supplied by it," and to "maintain . . . operate, extend, enlarge, . . . construct, and improve the water distribution and sewage collection, treatment, and disposal systems." *Id.* §§ 34-2202.03(11), (14); 34-2202.16. D.C. Water establishes and adjusts retail water and sewer rates to cover its costs of construction, interest on capital, operation and maintenance, necessary replacement of equipment, and the principal and interest on bonds. *Id.* §§ 34-2202.16(b), 1-204.87(b), 34-2202.09(i). D.C. Water has no authority to levy taxes in support of its activities. *See id.* § 34-2202.03 (enumerating D.C. Water's general powers).

Water and sewer rates levied by D.C. Water "shall only be a source of revenue for the maintenance of the District's supply of water and sewage systems, and shall constitute a fund exclusively to defray any cost of the Authority." *Id.* § 34-2202.16(b). The District of Columbia sewer system is comprised of combined and separate sewer systems. District of Columbia Water and Sewer Authority, *WASA's Recommended Combined Sewer System Long-Term Control Plan*, Executive Summary, ES-1, July 2002, available at www.dewater.com/workzones/projects/longtermcontrolplan.cfm (last visited Sept. 28, 2010) (Control Plan Executive Summary). The Combined Sewer System (combined system), serving the central one-third of the District, carries both sewage and stormwater runoff in a single pipe. *Id.* The mixture is conveyed to Blue Plains Advanced Wastewater Treatment Plant (Blue Plains) where the wastewater is treated and discharged into the Potomac River. *Id.* The GAO Building is located in the combined system area.

The Municipal Separate Storm Sewer System (separate sewer system) is comprised of individual pipes for sewage and stormwater, and serves the outer two-thirds of the District. *Id.* at ES-8, ES-1. In the separate sewer system, only sewage is conveyed to Blue Plains for treatment before being discharged, while stormwater is discharged untreated directly into local waterways. Meeting with General Counsel, District of

Columbia Department of the Environment, and Managing Associate General Counsel, GAO, and others, May 5, 2010. While the District owns the water authority's assets, D.C. Water possesses and maintains all District water and sewer pipes. D.C. Code §§ 34-2202.07(e), 34-2202.03(14).

In April 2008, D.C. Water notified the U.S. Office of Management and Budget (OMB) of a newly implemented impervious area billing program (IAB),¹ informing OMB that Impervious Surface Area charges (ISA charges) would be assessed against federal customers for the first time in October 2010.² Letter from Chief Financial Officer, D.C. Water, to Director, OMB, Apr. 15, 2009 (OMB Letter). Under the program, D.C. Water reduced the sewer service rate and added a "special charge for properties that include surfaces water can't penetrate," known as impervious surface areas. D.C. Water, *Impervious Area Charge* (IAC Fact Sheet), *available at* www.dcwasa.com/customer-care/iab.cfm (last visited Sept. 28, 2010). Funds collected under the IAB program are used to "recover the costs of the . . . Combined Sewer Overflow Long-Term Control Plan." *Id.*

D.C. Water instituted its IAB program, and its ISA charge, following a 2005 Consent Decree. OMB Letter. In March 2005, the federal district court for the District of Columbia approved a Consent Decree between the U.S. Environmental Protection Agency (EPA), the Anacostia Watershed Society, and D.C. Water, outlining a combined sewer overflow Long-Term Control Plan for D.C. Water. Consent Decree for *Anacostia Watershed Society v. D.C. Water and Sewer Authority* and *United States v. D.C. Water and Sewer Authority and the District of Columbia*, Consolidated Civil Action No. 1:CV00183TFH (D.D.C. Mar. 25, 2005) (Consent Decree). D.C. Water's obligations under the Consent Decree "have the objective of achieving full compliance with the Clean Water Act, all applicable Federal and local regulations,

¹ The Water and Sewer Authority Equitable Ratemaking Amendment Act of 2008 prescribed a new methodology for determining sanitary sewer service charges based on both consumption and amount of impervious surface area. D.C. Law No.17-370, § 2, Mar. 25, 2009, *codified at* D.C. Code § 34-2107. The resulting impervious area charge is based on a flat fee Equivalent Residential Unit (ERU). D.C. Mun. Regs. title 21, § 4101.1(b).

² Approximately every April 15, D.C. Water submits to OMB an estimated bill for all government-owned properties in the District due for payment two fiscal years in the future. All residential and commercial D.C. Water customers have been paying the ISA charge since May 2009. However, federal facilities will pay their first assessment of the charge in fiscal year 2011, which begins October 1, 2010. Meeting with General Counsel, D.C. Water, and Managing Associate General Counsel, GAO, and others, May 14, 2010 (D.C. Water Meeting); Meeting with General Counsel, Financial Management Service, U.S. Department of Treasury, and Managing Associate General Counsel, GAO, and others, June 3, 2010.

and the terms and conditions of WASA's [National Pollution Discharge Elimination System or NPDES³] Permit, and to meet the objectives of U.S. EPA's April 19, 1994 [Combined Sewer Outflow] policy." Consent Decree, at 7.

The purpose of the Long-Term Control Plan (Control Plan) is to reduce the number of combined sewer overflows so that D.C. Water can meet EPA-established water quality standards. D.C. Water Permit, at 40; Control Plan Executive Summary, at ES-1. Combined sewer overflows are excess flows of combined sewage and stormwater from the combined sewer system that result in the discharge of untreated sewage directly into local waterways when D.C. Water's facilities are overwhelmed because of stormwater runoff during heavy rain events. *Id.* Projects include rehabilitation of pumping stations and construction of interceptor and storage tunnels. D.C. Water Permit, at 40; Control Plan Executive Summary, at ES-7-8. The GAO Building is connected to, and discharges wastewater and stormwater runoff into, the combined system. Consequently, the stormwater runoff from GAO's impervious surface areas combines with wastewater from the GAO Building, which is treated at Blue Plains before release into local waterways.

Control Plan projects, like all D.C. Water capital projects, are incorporated into D.C. Water's overall Capital Improvement Program, which is a program undertaken to "significantly enhance D.C. Water's water and sewer facilities infrastructure." D.C. Water, *Capital Improvement Program, available at* www.dcwater.com/about/cip/default.cfm (last visited Sept. 28, 2010). According to D.C. Water officials, D.C. Water's capital costs related to Control Plan implementation, including costs of Control Plan projects, are built into D.C. Water's rate structure. D.C. Water Meeting.

Prior to the implementation of the ISA charge, D.C. Water's sanitary sewer service rate was based on a customer's consumption of water. D.C. Water Meeting. The D.C. Water Board of Directors determined that migration to an impervious surface area

³ The NPDES program established by the Clean Water Act controls water pollution by regulating discharges of pollutants by point sources into the navigable waters of the United States, including rivers, lakes, and streams. EPA, *National Pollutant Discharge Elimination System, available at* <http://cfpub.epa.gov/npdes/> (last visited Sept. 28, 2010) (NPDES Fact Sheet); *see* 33 U.S.C. § 1342 (describing the NPDES permit system). Under the program, EPA issues and enforces permits regulating pollution from specific entities such as industrial or municipal facilities if they discharge directly into local waterways. NPDES Fact Sheet. The NPDES permit issued to D.C. Water applies to D.C. Water's Blue Plains treatment plant, through which all waste water (sewage) from the combined and separate sanitary sewer systems flows. D.C. Water Meeting. The terms of the Consent Decree are incorporated in the NPDES permit that EPA issued to D.C. Water. NPDES Permit No. D.C. 0021199, Aug. 31, 2010 (D.C. Water Permit) (reissuing permit until Sept. 20, 2015).

charge, and expanding it to include “impervious only properties,”⁴ was a more equitable way to recover Control Plan capital costs because it would allow D.C. Water to assess charges based on “a property’s contribution to rainwater” runoff. IAC Fact Sheet. In this way D.C. Water could bill those land owners not receiving water or sewer services but who nevertheless contribute to the problematic combined sewer overflows. D.C. Water Meeting.

DISCUSSION

The Supremacy Clause of the U.S. Constitution establishes that the United States and its instrumentalities are immune from direct taxation by state and local governments. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436–37 (1819). However, a state or political subdivision may charge for services rendered or conveniences provided, and such charge is not considered a tax. B-250935, Oct. 12, 1993 (a federal agency may pay sewer service charges so long as they reflect the fair and reasonable value of services received by the United States). The computation of such charges must bear a relationship to the service rendered. 49 Comp. Gen. 72, 76 (1969).

As noted earlier, D.C. Water possesses authority to set rates sufficient to cover costs of construction, among other things. It is a basic principle of ratemaking that a public utility may set user rates based on the actual cost of providing its service, including in its rate base the costs of operation, maintenance, and capital improvements. *See, e.g., Washington Metropolitan Area Transit Authority v. Public Service Comm’n of the District of Columbia*, 486 A.2d 682 (D.C. 1982) (finding that the public service commission’s decision to allow inclusion of costs associated with construction of plant improvement in utility’s rate base was not arbitrary or unreasonable).⁵ D.C. Water’s ratemaking policy provides that D.C. Water will set rates based on the actual cost to deliver service, including an annual forecast of its capital budget. *See* D.C. Water Board of Directors Resolution No. 97-124 (Dec. 4, 1997), *available at* www.dcwater.com/investor_relations/financial_policies.cfm (last visited Sept. 28, 2010).

The ISA charge is designed specifically to cover costs associated with the Control Plan, which is composed of construction projects such as the building of underground storage tunnels and the rehabilitation of aging pumping stations. Consequently, we view the ISA charge as a part of the rate for obtaining water and sewer services. From GAO’s perspective, it makes no difference if the charge for

⁴ “Impervious only properties” are defined as “properties that do not currently have metered water/sewer service (*e.g.*, parking lots) and require the creation of new accounts.” 21 D.C. Mun. Regs. § 4101.5 (2010).

⁵ *See also* 14 Fletcher, *Cyclopedia of the Law of Corporations* §§ 6677–6680 (Aug. 2010); McQuillan, *The Law of Municipal Corporations* §§ 31.30.15, 35.55–35.69 (May 2010); Corpus Juris 2d. *Public Utilities* §§ 40, 49 (May 2010).

these capital improvements is set out separately from D.C. Water's other costs of operation or is included in an overall rate. As a customer availing itself of D.C. Water's water and sewer services, GAO may pay a reasonable share of the costs of operating and maintaining the system.

In this case, the cost of these capital improvements is necessitated by stormwater runoff collected by the combined sewer system, which overburdens the Blue Plains treatment facility during heavy rain events, resulting in the discharge of untreated sewage. D.C. Water's method for calculating the charge represents a reasonable approximation of GAO's fair share of the capital costs and a fair approximation of the sewer services provided to GAO. We do not object, therefore, to the use of GAO's appropriations to pay the ISA charge.

We do not find dispositive the fact that D.C. Water has segregated these costs for separate billing and assesses the ISA charge against each property in the District, including those who do not otherwise obtain water and sewer services. While an assessment against all property owners is one of the indicia of a tax, that, by itself, does not transform the charge into a tax. In the course of evaluating the ISA charge, we consider all the facts and circumstances in order to understand the essential nature of the charge. *See United States v. City of Columbia, Missouri*, 914 F.2d 151, 154 (8th Cir. 1990).

Because the ISA charge represents a part of the fee GAO pays to obtain water and sewer services from D.C. Water, it is different from the District of Columbia's Stormwater Fee (stormwater fee). In our letter today to the District Attorney General, B-320795, we conclude that the stormwater fee charged to GAO is a tax because the District does not provide any service to GAO in exchange for payment. Although the fee is included in D.C. Water bills, the fee is not part of D.C. Water's utility rate nor does D.C. Water retain the proceeds. Instead, the stormwater fee is credited to the District of Columbia Department of the Environment (DDOE) to pay for activities such as enhanced street cleaning, retrofitting catch basins, expanding tree canopy, installation of rain gardens, and educating the public on collection and disposal of pet waste and environmentally friendly fertilizing and landscaping techniques. District of Columbia Upgraded Stormwater Management Plan 5-1 to 5-39 (as updated on February 19, 2009). The purpose of the District's stormwater fee is not to cover the costs of providing a service to customers, or to cover the costs of a regulatory program, but to raise revenue to defray the costs of the District of Columbia's compliance with its Municipal Separate Storm Sewer System Permit.

CONCLUSION

It is well established that an agency may use appropriations to pay a fee, such as a utility rate, for services rendered. D.C. Water's ISA charge is a component of the utility rate a customer must pay to obtain water and sewer services. D.C. Water calculates the charge to cover the costs of certain capital improvements to its sewer system and sewer treatment facilities, a necessary cost of providing its sewer services.

In evaluating the charge, GAO considers all the facts and circumstances in order to understand the essential nature of the charge. It is not dispositive that D.C. Water, in billing for these costs, separates the costs of these capital improvements from its other costs of operation. The purpose of the ISA charge is to cover the costs of capital improvements to D.C. Water's sewer system and treatment facilities, costs that are properly recoverable through a rate for utility services, and the charge represents a fair approximation of water and sewer services provided to GAO. Accordingly, GAO may use its appropriations to pay the charge.