



DEPARTMENT OF THE NAVY
COMMANDER, NAVY INSTALLATIONS COMMAND
716 SICARD STREET, SE, SUITE 1000
WASHINGTON NAVY YARD, DC 20374-5140

CNICINST 5090.5
N00
24 Feb 2016

CNIC INSTRUCTION 5090.5

From: Commander, Navy Installations Command

Subj: REQUIREMENTS FOR PAYMENT OF STORMWATER MANAGEMENT CHARGES

Ref: (a) Public Law 111-378
(b) DoD DGC (E&I) memo, Stormwater Charges and the Waiver of Sovereign Immunity Under the Clean Water Act, of 11 Apr 11
(c) USDOJ OLC opinion of 25 Feb 11
(d) ADUSD (I&E) memo, DoD Legal Guidance on Stormwater Charges Under Clean Water Act, of 20 Apr 11
(e) OPNAVINST M-5090.1

Encl: (1) Process for Payment or Non-Payment of Stormwater Charges
(2) Chief of Naval Operations (N45) ltr 5090 Ser N4552E/12U158065 of 9 Apr 12
(3) Stormwater Fee Template

1. Purpose. To provide a unified, enterprise-wide process for assessing the payment or non-payment of stormwater management charges issued in the United States in accordance with references (a) through (e).

2. Background

a. In January 2011, Congress passed "an Act to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution." Reference (a), which revised section 313 of the Clean Water Act (CWA), 33 U.S.C. §1323 (2006), clarifies that reasonable service charges payable by federal agencies include certain stormwater assessments. The amendment to section 313(c) was two-fold: (1) language was added to section 313(c)(1) explaining what constitutes a reasonable, and therefore payable, service charge related to stormwater runoff; and (2) language was added in section 313(c)(2) that the Department of Justice Office of Legal Counsel has interpreted that no stormwater service charge should be

denied based on the lack of specific appropriations act language. Such charges should be paid, as they have been in the past, using appropriations otherwise available to the department, such as operation and maintenance funds; however, the amendment is not retroactively effective. This amendment only applies prospectively to charges with an assessment date (not the payment due date) after the date of enactment, 4 January 2011.

b. To determine whether a stormwater charge is a reasonable service charge and therefore payable, the Department of Defense Office of General Counsel, in accordance with reference (b), provides seven criteria that "may, in any particular case, expand or contract what qualifies as a reasonable service charge for purposes of stormwater runoff." The Commander, Navy Installations Command (CNIC) process for determining payment or non-payment of stormwater charges is detailed in enclosure (1), to include the seven criteria to determine if a stormwater service charge is reasonable.

3. Policy. In accordance with references (a) through (e), enclosures (1) through (3) are provided as guidance in processing stormwater charges as allowed by reference (a).

4. Responsibilities

a. In accordance with the process detailed in enclosure (1):

(1) The Region General Counsel or their designee is responsible for ensuring that stormwater charges are reviewed, negotiated, and analyzed to determine whether the charges are reasonable.

(2) Region Engineer (N4) is responsible for providing technical expertise to support the Region Counsel or their designee in their review, negotiation, and analysis of stormwater charges.

(3) CNIC Headquarters Environmental Counsel, or their designee, is responsible for tracking stormwater legal analyses.

(4) CNIC Environmental (N45) is responsible for tracking and reporting stormwater charges.

(5) Installation Commanding Officers (COs) are responsible for ensuring stormwater charges are forwarded to Region Counsel.

5. Action

a. CNIC (N4) shall distribute this instruction to CNIC Regional Engineers for implementation and sustainment of this policy.

b. CNIC HQ Environmental Counsel shall distribute this instruction to Region Counsels and provide support in its implementation.

c. Region Counsels shall distribute this instruction to Installation COs within their regions.

d. CNIC (N45) shall distribute this instruction to Region Environmental Divisions and provide support in its implementation.

e. CNIC (N8) shall implement the requirements of this instruction to ensure timely payment is administered upon receipt of documented legal determination and all associated funding documents.

6. Records Management. Records created as a result of this instruction, regardless of media and format, shall be managed in accordance with SECNAV M-5210.1 of January 2012.



D. R. SMITH
Vice Admiral, U.S. Navy

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PROCESS FOR PAYMENT OR NON-PAYMENT OF STORMWATER SERVICE CHARGES

1. Stormwater Service Charge Payment Process

a. The process for determining payment or non-payment of stormwater service charges (stormwater charges) consists of four phases:

(1) Receipt of stormwater charges to include initial notifications;

(2) Review of stormwater charges to include information gathering;

(3) Negotiation over stormwater charges; and,

(4) Determination of payment or non-payment.

b. Receipt of Stormwater Charges

(1) Immediately upon receipt, Installation Commanding Officers shall ensure that stormwater charges, bills, or demands for payments are immediately forwarded to Region Counsel. Note that bills or demands for payment are received various ways, including through Installation Public Works, Environmental, Real Estate, or Command Front Offices. It should be widely communicated to all involved parties that Region Counsel should receive copies of all bills or demands for payment received.

(2) Immediately upon receipt, Region Counsel shall make a record of the receipt of the stormwater bill. CNIC HQ Environmental Counsel, in coordination with CNIC Environmental (CNIC N45), will track the status of stormwater bills and provide updates upon request to the Office of the Chief of Naval Operations, Energy and Environmental Readiness Division (OPNAV N45).

(3) Upon receipt of the bill, the Region Counsel shall send a letter to the billing entity to acknowledge receipt and advise that the bill is being assessed to determine if payment is appropriate.

c. Review Phase. The Review Phase involves a detailed and collaborative analysis of the stormwater bill by both the legal

and environmental technical staff. During the Review Phase, legal and environmental technical staff shall:

(1) Led by Region Counsel, determine, based on the current business structure, who should be involved in the Review Phase. Collaboration may include Naval Facilities (NAVFAC), Facilities Engineering Command (FEC) technical and legal staff, installation technical personnel, and/or technical and legal staff from the Regional Environmental Coordinator (REC) offices.

(2) Analyze each stormwater bill in accordance with this instruction and, on a case-by-case basis, understand that the criteria may apply differently from one stormwater bill as compared to another. Enclosure (2), the Chief of Naval Operations (N45) Policy Letter on Payment of Reasonable Stormwater Service Charges of April 2012, offers answers to frequently asked questions (FAQs) to aid in analysis and help ensure consistency across the Navy. Enclosure (2) also includes a template for responding to the billing entity regarding demands for payment and for requesting information needed to conduct the review. This template may be tailored to collect the specific information needed after a review has been completed and prior to negotiation with the entity that has presented the bill for payment. Section 2-1.6 of reference (e) offers policy on fee versus tax determinations.

(3) Evaluate the wording of state law or local ordinance which provides the authority to assess stormwater management fees, considering the following questions:

(a) What is the purpose of the state law or ordinance?

(b) Are there exemptions for federal facilities?

(c) Does the federal facility property discharge to the locality Municipal Separate Storm Sewer Systems (MS4)?

(d) Is the property storm sewer discharge regulated by its own industrial stormwater or MS4 permit?

(e) Are there exemptions for property that has its own collection and discharge system?

(f) Are federal facilities assessed in the same manner as non-federal facilities under the law or ordinance? [See 1.b(8)(c)]

(4) Review the stormwater bill and pertinent installation information to examine the following questions:

(a) Are all the properties included in the bill Navy-owned properties?

(b) Is the property properly categorized (e.g., industrial or agricultural areas)?

(c) What is the basis for the fee (e.g., impervious surface area, percentage of water bill, etc.)?

(d) Which Navy-owned properties receive stormwater from an off-site property?

(e) If the fee is based on impervious surface area, what are the assumptions or algorithms used to estimate impervious surface area?

(f) If the fee is based on impervious surface area, can the amount of impervious surface area on the Navy-owned property be validated with current installation maps and/or Geographic Information System data?

(g) Have there been changes in the amount of impervious surface area on the Navy-owned property?

(h) What are the local fee rates or codes used to assess the Navy fee?

(i) Does the current bill include previous charges, late charges, or interest charges? Reference (c) clarifies that the fee cannot be retroactive and any previous charges included on the bill received after 4 January 2011 should not be considered for payment. Navy will not pay interest charges on fees. Late charges that are assessed need to be examined on a case-by-case basis. If the Navy was engaged in negotiations with the billing entity for the period of time that late charges are assessed, then it may be unreasonable to pay such charges under those circumstances. If, however, the late fees are assessed because the bill was not promptly acted upon, or the

Navy failed to enter negotiations and a bill was "lost" within the system, then the issue must be elevated to the CNIC Environmental Counsel or their designee to evaluate if it is reasonable to pay a late fee for that time frame.

(5) Review stormwater permit requirements:

(a) Review property maps to identify which storm drains and acres of impervious area drain to the locality's storm sewers.

(b) For each property, have any Best Management Practices (BMPs) been implemented that would reduce runoff from impervious areas discharging stormwater to a locality's storm sewers?

(c) Identify the location, type, and drainage area of each BMP.

(d) Does the property have all or a portion of its stormwater discharge authorized under an installation National Pollutant Discharge Elimination System (NPDES) industrial stormwater or MS4 permit?

(6) Explore means of reducing current and future service charges to the extent practicable.

(a) Are there state or local processes to receive credits or rate reductions?

(b) Does any property receive specific benefits from the locality that is associated with payment of the stormwater fee? What are those benefits?

(c) Are credits available for stormwater management costs borne by the Navy due to off-site stormwater conveyed onto Navy property?

(d) Are credits or rate reductions available based on stormwater mitigations or management measures already in place on Navy installations, such as rainwater harvesting, retention infiltration strategies, and low impact development?

(7) Evaluate "reasonableness" and the discriminatory nature. The Region Counsel shall consider the stormwater cases

in the jurisdiction in which a stormwater fee is assessed regarding the reasonableness and the discriminatory nature of the bills. Use existing case law to assist with obtaining fact based evidence. Examples include:

(a) Morningstar, et seq. v. Bush, et al., 2011 Arkansas 350; 2011 Arkansas Legal Electronic Research System (LEXIS) 440 (September 2011). (Discusses authority granted in ordinance.)

(b) Fred Nackard Land Company, et al. v. City of Flagstaff, 2010 Arizona Court of Appeals Unpublished LEXIS 1604 (September 2010). (Discusses purpose of charging fees.)

(c) City of Gainesville v. State of Florida, et al., 863 So.2d 138; 2003 Florida LEXIS 1473 (September 2003). (Discusses propriety of fee structure.)

(d) City of Gainesville v. State of Florida, Department of Transportation, 778 So.2d 519; 2001 Florida Court of Appeals LEXIS 2377 (March 2001). (Discusses propriety of fee structure, fair application of assessments.)

(8) Evaluate data collected against the seven criteria in reference (c), which are included below. To be payable, a stormwater service charge must satisfy all of the following criteria:

(a) Relate to the control and abatement of water pollution;

(b) Be reasonable;

(c) Be non-discriminatory;

(d) Be based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution;

(e) Be measured in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility;

(f) Be 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); and

(g) May include 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.

d. Negotiation Phase

(1) The Region Counsel or their designee shall lead negotiations with the billing entity.

(2) After the initial "Review Phase" has been completed, the Region Counsel or their designee should send a letter to the billing entity detailing issues/concerns found during the review process and additional data or information may be requested. If applicable, the issue of discrimination shall be raised and additional information may also be requested in order to fully assess the discriminatory nature of the stormwater bill.

(3) Region Counsel shall ensure all key players involved in the "Review Phase" are part of the "Negotiation Phase".

(4) Consider negotiating a payment timeline that allows adequate time to program for the costs.

e. Determination of Payment or Non-payment. "Payment" is defined as payment of the originally billed amount, in its entirety, with no amount in dispute. "Non-Payment" is defined as the entire originally billed amount, which is determined to be unreasonable and therefore not payable, or any portion of the bill that is determined to be unreasonable. This includes bills that have been negotiated down to the reasonable fair share or any portion that remains in dispute even after negotiation.

(1) Payment. If after review and negotiation, the Region Counsel determines that stormwater service charges have been assessed appropriately, and are reasonable, then:

(a) Region Counsel will document the analysis and assessment of reasonableness in a draft legal opinion and provide copies of the opinion and corresponding bill to CNIC HQ Environmental Counsel. The legal memorandum or assessment

supporting the decision of payment shall demonstrate how the seven criteria in enclosure (1) section b(8) have been evaluated.

(b) After receiving feedback from CNIC HQ Environmental Counsel, Region Counsel will document the analysis and assessment of reasonableness in a final legal opinion and provide copies of the opinion and corresponding bill to CNIC Environmental Counsel, the Region, and CNIC N45.

(c) Upon receipt, CNIC N45 will use this documented analysis to determine if a payment should be issued. The CNIC Comptroller may not authorize payment without a documented legal opinion that the fee is a reasonable service charge.

(d) CNIC N45 will centrally manage payment of any new stormwater fees and program for payment through the Navy's Environmental Portal, Environmental Program Requirements Web (EPR Web), under Guidebook Number 08980 (Wastewater and Stormwater Fee). The legal memorandum or assessment supporting the decision to pay, and updated information contained in enclosure (3), shall be attached to the Environmental Program Requirements (EPR) Project. Once an initial bill is paid, each Region will plan and program for the recurring bills via EPR Web.

(2) Non-Payment. If the Region Counsel determines that a stormwater service charge is not payable, the Region Counsel shall provide a legal opinion addressing the reason(s) for determining that the bill is not payable, along with the bill itself and any supporting correspondence from the billing entity, to CNIC HQ Environmental Counsel and CNIC N45. CNIC HQ Environmental Counsel and CNIC N45 are responsible for notifying OPNAV and Deputy Assistant Secretary of the Navy (Environmental) (DASN Environmental), in accordance with reference (d), of intent not to pay a stormwater bill prior to communication of the determination to the state or local government/billing entity. Once OPNAV and ADUSD (I&E), through DASN Environmental, have been notified, the Region Counsel may communicate the determination to the billing entity. In accordance with reference (d), no stormwater charge may be denied based on lack of specific appropriation act language.

2. Recordkeeping

24 Feb 2016

a. A copy of the stormwater bill, correspondence with the billing entity/entities, final legal opinions, and other supporting documentation shall be documented and records maintained by the Region Counsel.

b. A copy of the correspondence with the billing entities, stormwater bill, and final legal opinion shall be provided to the CNIC Water Program Manager (CNIC N45) and CNIC HQ Environmental Counsel.

3. Reporting. At a minimum, the Region will submit updates of the Review and Negotiation progress for each stormwater bill to CNIC (N45) on a quarterly basis using enclosure (3). The region environmental technical representative will present progress reports during the quarterly Stormwater Media Field Team Subcommittee meetings. All updates will be maintained in enclosure (3) for record keeping.

4. Funding

a. In the Program Objective Memorandum (POM) process, where Navy leadership considers requirements for the Future Year's Defense Program, the Chief of Naval Operations (OPNAV N4), the assessment and resource sponsor, will ensure that the Special Interest Code (SIC) for Environmental Compliance (EC) will be used to pay reasonable stormwater charges. It should be noted that since FY14 the SIC EC has been utilized for all stormwater fees or demands for payment based on impervious area. Stormwater fees based on water usage and billed as part of the commodity will continue to be paid by the Navy Working Capital Fund or Utilities SIC. Regardless of the method of payment all bills must adhere to this Instruction and follow the appropriate Review and Negotiation phases.

b. For emerging requirements that arise during the Budget Years, Region Commands and CNIC have to identify funding within their existing budget and pay the reasonable stormwater charges or negotiate with the billing entity a timeframe for payment that provides the time necessary to program for the requirement.

5. CNIC Points of Contact

a. CNIC HQ Senior Environmental Counsel is Ms. Margaret Howard, CNIC (N00L), at (202)433-9814 and margaret.howard@navy.mil.

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b. CNIC Water Program Manager is Ms. Patricia Greek, CNIC (N452), at (202)433-4962 and patricia.greek@navy.mil.

**CHIEF OF NAVAL OPERATIONS (N45) POLICY LETTER, PAYMENT OF
REASONABLE STORMWATER SERVICE CHARGES**



DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
2000 NAVY PENTAGON
WASHINGTON, DC 20360-2000

W REPLY REFER TO

5090
Ser N452E/12U158065
09 April 2012

From: Deputy Director, Energy and Environmental Readiness Division
(N45)
To: Distribution

Subj: PAYMENT OF REASONABLE STORMWATER SERVICE CHARGES

Ref: (a) Public Law 111-378
(b) Department of Justice, Office of Legal Counsel Opinion
of 25 Feb 11
(c) Assistant Deputy Undersecretary of Defense
(Installations & Environment) Memorandum of 20 Apr 11
(d) DoD Unified Facilities Criteria "Low Impact Development"
(UFC 3-210-10) of 15 Nov 10
(e) OPNAVINST 5090.1C, 30 October 2007

Encl: (1) Stormwater Service Charge Information Request
Template
(2) Frequently Asked Questions

1. This letter establishes Navy policy regarding payment of reasonable service charges arising under the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) for stormwater runoff on Navy facilities. Reference (a) amended Section 313(c) of the Clean Water Act to provide that "reasonable service charges" applicable to federal entities for water pollution include any reasonable nondiscriminatory fee, charge, or assessment that is: (1) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution; and (2) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a system that manages a combination of stormwater and sanitary waste). The stormwater management costs that may be reimbursed include the full range of costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge. Any such reasonable fee, charge or assessment must be paid regardless of whether it is denominated a tax.

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Subj: PAYMENT OF REASONABLE STORMWATER SERVICE CHARGES

2. Reference (b) provides the opinion of the Department of Justice that payment of appropriate stormwater assessments by Federal entities may be made from general, "lump-sum" appropriations and do not require specific appropriations language.

3. In April 2011, the Assistant Deputy Undersecretary of Defense (Installations & Environment) (ADUSD (I & E)) issued reference (c), providing guidance for DoD Components' review of stormwater charges to determine if they are "reasonable service charges" and thus payable by DoD facilities. Analysis of stormwater charges is highly fact-specific, and must be conducted on a case-by-case basis using seven criteria. To be payable by a DoD facility, a stormwater service charge must:

- a. relate to the control and abatement of water pollution;
- b. be reasonable;
- c. be nondiscriminatory;
- d. be based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution;
- e. be measured in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility;
- f. be 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); and
- g. may include 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.

A stormwater fee, charge, or assessment found to be reasonable under these criteria is payable even if it denominated a tax. Note that Clean Water Act amendments are not retroactive; only those reasonable service charges assessed after January 4, 2011 may be paid by DoD facilities. Interest, penalties, or late fees levied after January 4, 2011 for stormwater charges assessed prior to January 4, 2011 are also not payable.

Subj: PAYMENT OF REASONABLE STORMWATER SERVICE CHARGES

4. Policy.

a. Navy installations receiving a demand for payment of stormwater service charges from a state or local entity shall inform Facilities Engineering Command (FEC) or Region Counsel of the demand for payment, and a coordinated review of the demand by both environmental technical and legal staff should be performed. Installations may use enclosure (1) as a template for an initial response to demands for payment and to request information needed to conduct the review. This template should be tailored to the specific circumstances applicable to the bill or demand for payment, and may be helpful in assisting commands in gathering information for the coordinated review and/or negotiating with the entity that has presented the bill for payment. The coordinated review shall include the following steps:

(1) Ensure that the charges are based on a reasonable assessment of the facility's stormwater profile using the criteria in paragraph 3. This includes, but is not limited to, careful analysis of any assumptions or algorithms used to estimate impervious surface area.

(a) Some stormwater management jurisdictions may provide credits or rate reductions based on stormwater mitigation or management measures already in place on Navy installations, such as rainwater harvesting, retention/infiltration strategies, and Low Impact Development required by reference (d). Facility Commanding Officers/Officers in Charge should explore these and other means of reducing current and future service charges to the extent practicable. Other strategies to reduce assessed fees may include requesting credit for stormwater management costs borne by the Navy due to off-site stormwater conveyed onto Navy property.

(b) We anticipate stormwater service charges will be assessed and levied at the installation level. In accordance with Section 1-2.15 of reference (e), commanding officers/officers in charge of host activities are ultimately responsible for all aspects of stormwater compliance and payment of reasonable service charges on their installations; however, host commands shall work with tenant commands and public/private venture entities (PPV) to determine the tenants' and PPV's "fair share" of any stormwater fees, so the tenant/PPV can provide their portion of the payment as appropriate.

(2) Ensure that Region Counsel is given the opportunity to review all coordinated technical and legal reviews. Region Counsel will advise through documented analysis whether the demand for payment is payable under references (b) and (c) and communicate its advice in writing to the Region Comptroller. Payment of a stormwater service charge shall not be made without Region Counsel's advice that it is payable.

Subj: PAYMENT OF REASONABLE STORMWATER SERVICE CHARGES

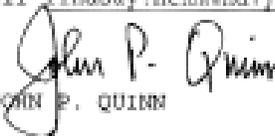
b. If after review and negotiation a decision is rendered that the stormwater service charges are valid and appropriate, the bill must be paid and cannot wait until the next Program Objective Memorandum (POM). The project should be entered as an emergent project into the Environmental Program Requirements Web (EPR Web) under Guidebook Number 08900 (Wastewater and Stormwater Fees) along with all legal and cost documents that support the requirement. Beginning in POM14, a level of effort funding has been programmed to support stormwater service charge requirements. The RSO will adjust this level of effort during POM development based on historical cost and/or increased knowledge of the requirement. A legal memorandum or assessment supporting the decision to pay should be attached to the EPR project demonstrating how the 7 criteria in paragraph 3 have been met. This memorandum or assessment only needs to be resubmitted in subsequent EPR Web projects if the original assessment changes.

c. If the Region Counsel determines that a stormwater service charge is not payable, Region Counsel shall provide a legal opinion providing the reasons for determining why the bill is not payable, along with the bill itself, to CNIC N45, who is responsible for notifying OPNAV (N45) and ADUSD (I&E) through the chain of command in accordance with reference (c) prior to communication of the determination to the state or local government entity that presented the demand for payment. In accordance with reference (b), no stormwater charge may be denied based on lack of specific appropriations act language.

5. This policy will be incorporated in the next update to reference (e).

6. Enclosure (2) provides several examples of frequently asked questions and answers to aid installations and regions in their analysis, and to ensure consistency across the Navy.

7. OPNAV N45 point of contact for this policy is Ms. Lindsay Behm, N452E, at (703) 695-5179, or email lindsay.behm@navy.mil.


JOHN P. QUINN

Distribution:
CNIC (N4)
NAVFAC (ENW)
NAVSEA (04RE)
NAVAIR (1.1)

Subj: PAYMENT OF REASONABLE STORMWATER SERVICE CHARGES

Copy to:
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LETTERHEAD

5090
Ser XXX /
DATE

**BILLING ENTITY
ADDRESS**

RE: Request for Information Relating to [reference information for demand(s) for payment of stormwater service charges] on [Navy installation(s)] Pursuant to Section 313(c) of the Federal Water Pollution Control Act (Clean Water Act).

Dear [Placeholder]:

On [date], [Navy Organization] received the above-referenced demand[s] for payment of charges relating to stormwater management on [Navy installation(s) affected]. As you are no doubt aware, Section 313(c) of the Clean Water Act was amended in January 2011 through Public Law 111-378 to require Federal entities to pay "reasonable service charges" for stormwater discharge or runoff from Federal property or a Federal facility, to include reasonable nondiscriminatory fees, charges, or assessments that are: (1) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution, or volume/rate of stormwater discharge or runoff; and (2) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a system that manages a combination of stormwater and sanitary waste), including the full range of costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge.

Department of Defense and Navy policy require legal analysis of individual charges received since January 4, 2011 to confirm that they fit within the statutory definition of "reasonable service charges" payable to interstate, state, and local authorities. Based on this policy, we are not authorized to pay fees assessed prior to Jan 4, 2011 that have been added to our current bills as past due amounts or late fees. To facilitate the required analysis, [Navy organization sending this letter] requests the following information relating to the demand[s] for payment cited above:

1. Are all property owners within your jurisdiction subject to these stormwater service charges, and are the fees calculated in the same manner for all property owners to arrive at the dollar amount charged??
2. Are any facilities deemed exempt from these charges?
3. What is the total dollar amount of these service charges collected per fiscal year under this stormwater management program?
 - a. To what uses are the collected service charges being put (e.g. administration, public education, storm sewer maintenance, catch basin cleaning, street sweeping,

Enclosure [1]

best management practice (BMP) installation, BMP maintenance, etc.) and what portion or percent of the total cost is each?

- b. What is the total cost of the stormwater management program in your jurisdiction?
4. Please break down the calculations used to arrive at the dollar amount charged for **[each of]** the Navy installation[s]. **[For each installation,]** please provide the following information:
- a. If volume or rate of stormwater discharge/runoff were factors, how was the volume and/or rate of discharge/runoff calculated?
 - b. If impervious surface area was a factor in your calculation, how was the amount of impervious surface area on the Navy installation[s] calculated?
 - c. If an estimated quantity of pollutants from the Navy installation[s] was a factor, how was the quantity calculated?
 - d. Was the individual stormwater profile of the Navy installation[s] considered? If not, why not?
 - e. Was any consideration given to stormwater discharge/runoff from adjacent land onto Navy property or for jurisdiction storm sewers that cross Navy property? If not, why?
 - f. Were there alternative methods of calculating the fees under the applicable regulations? What are they? Why were they not used?
 - g. If fees vary for different categories of land use, how is Navy land use characterized **[on each installation]**?
 - h. Is a fee reduction/credit available for practices that reduce the volume/rate of stormwater runoff or the quantity of pollutants discharged?
 - i. Can property owners, including Navy installations, receive credit or rate reductions for storm water mitigation or management measures that are put in place? If so, what documentation is needed to receive credit or rate reductions?

The goal of this request is to gather all the information necessary to evaluate the demand for payment. Your response to this Information Request should be mailed to **[my point of contact for these matters, (Name), (Title)]**, at the following address:

[Contact information]

or sent by email to the address below.

Enclosure (1)

If you have any questions concerning the request or any objections to the requested information, please immediately notify [point of contact]. You may reach [him/her] at [email address] or [phone number]. Your anticipated cooperation is appreciated.

Sincerely,

[SIGNATORY]
[Title]

Enclosure (1)

FREQUENTLY ASKED QUESTIONS

Q1. My state/local entity uses the stormwater fees it collects to fund public education/outreach programs (television, newspapers, etc.) that could reach people at my Navy installation. If my Navy installation already has a public education/outreach program in place is the installation subject to the fee?

A1. Yes, because the benefit is available to the installation/facility.

Q2. If my Navy installation receives stormwater discharges from a state/local entity can we request payment for program costs affected by the run-on?

A2. Navy facilities should seek reduction in fees for any off-installation stormwater flowing onto Navy property that is included in the calculation of Navy's contribution to local stormwater pollution.

Q3. If my facility is located on property under lease, license, or permit and the land is not owned by the Department of Navy, are assessed fees payable if based only on Navy building tenancy or impervious parking use?

A3. Stormwater fees should accrue to the property owner, not lessee. The terms of the lease should dictate whether such fees may be passed along from the property owner to the Navy as lessee. In such a case the demand for payment would arise under the lease and not under the CWA, and would thus not be covered by this policy.

Q4. My Navy installation has its own Municipal Separate Storm Sewer Systems (MS4) permit that discharges directly to waters of the United States. None of the installation's stormwater enters the city's infrastructure. The state/local entity making a demand for payment is using part of the fees to provide a stormwater educational program available to the public. Am I subject to the fee?

A4. If a permitted Navy MS4 discharges to a water body and there is no discharge to state/municipal infrastructure, the fee is not payable, regardless of the purposes to which the funds are put.

Q5. A stormwater service charge must be some "fair approximation" of the proportionate contribution of the property or facility to stormwater pollution and does not have to be an "exact approximation" correct? What is the maximum delta between fair and exact that should be acceptable when trying to determine if the charge is reasonable?

A5. Correct – it does not have to be an exact approximation. Try to negotiate to pay Navy's minimum fair share. The maximum acceptable delta between a fair approximation of stormwater fees and an exact measurement must be determined locally on a case-by-case basis using the best judgment of the available subject matter experts.

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Q6. Should my facility communicate with local utilities/cities/governments that have NOT sent us a letter/bill yet - or should we be in a reactive mode only?

A6. No, Navy installation should not reach out to entities that have not demonstrated an interest in seeking payment of stormwater fees.

Q7. If the state law or municipal ordinance exempts certain types of facilities or stormwater discharges from fees, does my installation have to pay the fees as a result of the recent amendments to Section 313 of the Clean Water Act (CWA)?

A7. The Clean Water Act amendments have no impact on previously-existing exemptions for Navy facilities under state/municipal laws and regulations. If your facility continues to meet the conditions necessary to be eligible for an exemption, there will be no change as a result of the amendment to Federal law.

Q8. The stormwater fee charges received by my DOD installation are from a locality that has a stormwater program but it is not regulated by a Municipal Separate Storm Sewer System (MS4) permit. Am I subject to the fee?

A8. The amendment to Section 313 of the CWA provides that federal facilities must pay costs associated with any stormwater management program. There is no distinction made regarding locality stormwater programs that have MS4 permits vice those that do not. Although it is unlikely that localities without MS4 permits would establish a program to collect fees, fees from localities without MS4 permits are payable provided they are "reasonable service charges."

Q9. My DoD installation operates and maintains its own regulated MS4 that discharges all collected stormwater runoff to a local MS4. Am I subject to the fee?

A9. Yes.

Q10. My Navy installation operates and maintains a regulated MS4 that discharges stormwater runoff from a portion of the property directly to waters of the United States with the remainder being discharged to a local MS4. Am I subject to all or part of the fee?

A10. You are not subject for the portion of the fee based on the stormwater runoff from the property that discharges directly to waters of the United States. You are however subject to the fee based on the stormwater runoff that is discharged to the local MS4.

Q11. My Navy installation discharges all collected stormwater runoff directly to waters of the United States through base infrastructure that is not regulated by a permit. Am I subject to the fee?

A11. If the fee is used to fund expenses for a program that covers the jurisdictional boundary of the entire locality (including the base), then you are subject to the entire fee. If the fee only funds locality expenses associated with a portion of the locality that does not include the base

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then you may not be subject to the fee or portions of the fee. Payable costs would include those associated with requirements to provide a service or benefit to everyone (e.g. public education by webinars or meetings open to everyone or in-stream monitoring) but not those associated with providing a service to specific locations (e.g. street sweeping).

Q12. My Navy installation operates and maintains its own stormwater system that is not regulated by a permit and discharges all collected stormwater runoff to a local MS4. Am I subject to the fee?

A12. If the fee is used to fund expenses for a program that covers the jurisdictional boundary of the entire locality (including the base), then you are subject to the fee. If the fee only funds locality expenses associated with a portion of the locality that does not include the base, then you may not be subject to the fee or portions of the fee. Payable costs would include those associated with requirements to provide a service or benefit to everyone (e.g. public education by webinars or meetings open to everyone or in-stream monitoring) but not those associated with providing a service to specific locations (e.g. street sweeping).

Q13. My Navy installation operates and maintains a stormwater system that is partially located in an urbanized area and therefore only part of the system is regulated by an MS4 permit. Am I subject to all or part of the fee?

A13. You are not subject to the fee for the portion of your system that is covered by your MS4 permit if you discharge to waters of the United States. If you establish your stormwater management program to cover your entire system even though only part of your system is covered by the permit, then you are not subject to the fee. If your program only covers the regulated portion of your system, you may be subject to the part of the fee for the stormwater discharges from the part of your system that is not regulated by your MS4 permit. If the fee is used to fund expenses for a program that covers the jurisdictional boundary of the entire locality (including the base), then you are subject to the fee for the portion of your base that is not covered by your program. If the fee only funds locality expenses associated with a portion of the locality that does not include the base, then you may not be subject to the fee or portions of the fee. Payable costs would include those associated with requirements to provide a service or benefit to everyone (e.g. public education by webinars or meetings open to everyone or in-stream monitoring) but not those associated with providing a service to specific locations (e.g. street sweeping).

Q14. My Navy installation does not have an MS4 permit but has an industrial stormwater permit. The stormwater regulated under this permit discharges directly to waters of the United States. Is the area covered under this permit subject to the fee?

A14. If your industrial stormwater permit requires you to address the components in the billing jurisdiction's program, you are not subject to the fee. If your industrial stormwater permit does not require you to address the components in the billing jurisdiction's program, you

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are subject to the fee if it is used to fund expenses for a program that covers the jurisdictional boundaries of the entire locality (including the base). If the fee only funds locality expenses associated with a portion of the locality that does not include the base you may not be subject to the fee or portions of the fee. Payable costs would include those associated with requirements to provide a service or benefit to everyone (e.g. public education by webinars or meetings open to everyone or in-stream monitoring) but not those associated with providing a service to specific locations (e.g. street sweeping).

Q15. My Navy installation does not have an MS4 permit but has an industrial stormwater permit. All the stormwater discharge regulated under this permit discharges to a local MS4. Is the area covered under the installation industrial stormwater permit subject to the fee?

A15. If your industrial stormwater permit requires you to address the components in the billing jurisdiction's program, you are not subject to the fee. If your industrial stormwater permit does not require you to address the components in the billing jurisdiction's program, you are subject to the fee if it is used to fund expenses for a program that covers the jurisdictional boundaries of the entire locality (including the base). If the fee only funds locality expenses associated with a portion of the locality that does not include the base you may not be subject to the fee or portions of the fee. Payable costs would include those associated with requirements to provide a service or benefit to everyone (e.g. public education by webinars or meetings open to everyone or in-stream monitoring) but not those associated with providing a service to specific locations (e.g. street sweeping).

Q16. Some or all of the jurisdictional costs that are funded by the fee are directly associated with programs/actions that provide no direct benefit to the installation. Am I subject to the fee associated with these programs/actions?

A16. If your stormwater is discharged to the local jurisdiction and you do not have a MS4 permit or an industrial permit that addresses the components in the billing jurisdiction's program, you are subject to the fees, unless the program supported by the fees does not cover the entire jurisdiction and the area subject to the fee does not include the installation.

Q17. My State or locality uses the stormwater fees it collects to increase street sweeping programs and for labeling storm drains. If neither of these services is performed on my installation, does this program meet the criteria for payment?

A17. If your stormwater is discharged to the local jurisdiction and you do not have a MS4 permit or an industrial permit that addresses street sweeping or labeling of storm drains you are subject to the fees, unless the program supported by the fees does not cover the entire jurisdiction and the area subject to the fee does not include the installation.

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Q18. If I receive a bill for stormwater fees associated with a property that is leased by my installation (e.g. public private ventures, enhance used leases, conventional leases), should I pay the fee?

A18. Since stormwater fees are assessed to property owners, responsibility for payment of reasonable fees for leased properties rests with Navy. You should determine whether the fee is reasonable utilizing guidance set forth in the policy, and work with leases to determine their "fair share" as appropriate.

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