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Stormwater: Tips and Strategies for Funding the Unfunded Mandate

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Stormwater: Tips and Strategies for Funding the Unfunded Mandate

Stormwater service fees have frequently been the subject of litigation. After introducing the problems associated with urban stormwater runoff and the basic legal framework, this paper briefly discusses some of the common issues that arise related to challenges to stormwater service fees, and points out tips and strategies from the lessons learned by other municipalities.

The Problem with Stormwater Runoff

Following a rain or during a snow melt, water runoff may mobilize high levels of contaminants, such as sediment, suspended solids, heavy metals and other toxic pollutants,[1] algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [2] This polluted water often runs into municipal separate sewer systems (MS4s) and is ultimately discharged into nearby streams, rivers, lakes, estuaries, wetlands, and oceans. Because this polluted stormwater runoff is not treated, it can cause changes to natural hydrologic patterns, accelerated stream flows, and the destruction of aquatic habitat. Urban runoff has been named as the foremost cause of impairment of ocean waters.[3]

Stormwater runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources."[4] According to the United States Environmental Protection Agency (EPA), urban stormwater pollution is one of the most important sources of contamination of our nation's waters, ranking as the second most prevalent source of water quality impairment in our nation's estuaries and the fourth most prevalent source of impairment in our lakes.[5]

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[1] Regulation for Revision of the Water Pollution Control Program Addressing Storm Water, 64 Fed. Reg. 68,722, 68,724, 68,727 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124).
[2] *Id*. citing *National Pollutant Discharge Elimination System Regulations for Revision of the Water Pollution Control Program Assessing Storm Water Discharges*, 64 Fed. Reg. 68722, 68724 (Dec. 8, 1999) (codified at 40 C.F.R. pt. 9, 122, 123, and 124).
[3] *Id.*
[4] *Envtl. Def. Ctr. v. EPA*, 319 F.3d 398, 405 (9th Cir. 2003) citing Richard G. Cohn-Lee and Diane M. Cameron, *Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation*, THE ENVIRONMENTAL PROFESSIONAL, Vol. 14, p. 10, at 10 (1992); *see also Natural Res. Def. Council*, 966 F.2d at 1295 (citing a study by the Nationwide Urban Runoff Program).
[5] Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S. Ill. U. L. J. 505, Spring 2002 (citing Peter H. Lehner et al., *Stormwater Strategies: Community Responses to Runoff Pollution* (Natural Resources Defense Council 1999) (citing United States Environmental

Stormwater pollution is the result of runoff containing pollutants draining off the land at high speeds, delivering more water in a shorter time to receiving water bodies. Increased volume and velocity of runoff directly correlates to the amount of impervious cover. The more impervious cover in a given area, the more runoff.[6]How we use our land greatly affects the amount and degree of stormwater pollution in our cities and towns. The mere addition of a one-acre of paved parking lot can increase the amount of runoff exponentially.[7]

The Clean Water Act and NPDES Permits.

In 1972, Congress created an amendment to the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (CWA)). The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. This goal is achieved by requiring a permit -- a National Pollutant Discharge Elimination System (NPDES) permit -- for the discharge of any pollutants to waters of the United States.[8]

Thus the Clean Water Act requires an NPDES permit for the discharge of any pollutants into the waters of the United States. NPDES permits typically impose effluent limitations on discharges from a point source.[9] A "'point source' means a discernible, confined, and discrete conveyance, including . . . a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . concentrated animal feeding operation, landfill . . . vessel or other floating craft from which pollutants are or may be discharged, but does not include return flows from irrigated agriculture or agriculture storm water runoff."[10] An "effluent limitation" is a restriction on the quantity, rate, and concentration of pollutants discharged from point sources into bodies of water.[11]

In 1987, Congress amended the CWA under 33 U.S.C. § 1342 (FWCPA § 402(p)) to require a national program for addressing the problem of stormwater discharges.[12] Under the first phase of the program, (Phase I), operators of "medium" MS4s (those serving populations greater than 100,000, but less than 249,000) and "large" MS4s (those serving populations greater than 250,000) are

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Protection Agency, *Nonpoint Source Pollution: The Nation's Largest Water Quality Problem*, EPA841-F-96-004A, Jan. 21, 1997.

[6] *Id.*

[7] Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S. Ill. U. L. J. 505, Spring 2002

[8] 33 U.S.C. §1311(a)

[9] *Id*. at § 1311(b).

[10] *Id.* at § 1362(14)

[11] *Id.* at § 1362(11)

[12] *Id*.

required to obtain NPDES permits.[13] In addition to the requirements for "medium" and "large" MS4s, Phase I calls for NPDES permits for several categories of industrial activity, including construction sites disturbing five or more acres of land.[14] Phase II expands Phase I to include stormwater discharges from small municipal separate storm sewer systems (those serving less than 100,000 persons) and construction sites that disturb one to five acres of land.[15]

Rather than having effluent standards like the NPDES permits for industrial stormwater discharges, NPDES permits for municipal stormwater discharges (i) are issued on either a system- or jurisdiction-wide basis; (ii) include a requirement to *effectively prohibit non-stormwater discharges into the storm sewers*; and (iii) 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 Administrator or the State determines appropriate for the control of such pollutants.[16]

Thus, under this new paradigm, cities are mandated to do more and more in terms of stormwater management. The options for funding the services a city is now required to perform include property taxes, special assessments, impact fees, service fees, user fees and other revenue sources. The funding mechanism a city selects will have a variety of legal consequences. Each mechanism will have different implications in terms of how it will be charged, levied, assessed or collected; who will pay; and how the money can be used.

Many cities have either created or are considering creating a stormwater utility. The Natural Resources Defense Council (NRDC) conducted a survey of all 50 states and found that nearly all states provide municipalities with the legal authority to establish utilities[17] and, according to a 2013 study, more than 1400 municipalities and utilities across the U.S. have implemented stormwater utility fees. [18]

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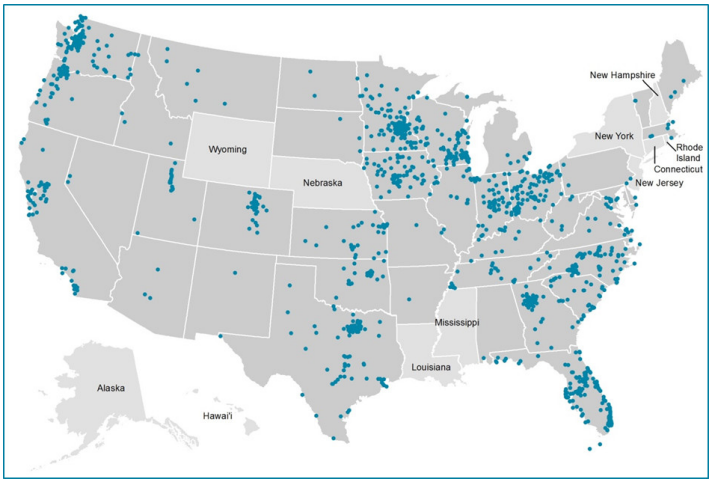
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] 33 USCS § 1342 (emphasis added)
[17] NRDC (1999), *Stormwater Strategies: Community Responses to Runoff Pollution.*
[18] *Western Kentucky University 2013 Stormwater Utility Survey*, Western Kentucky University, Bowling Green, KY.



Location of stormwater utility fee programs as of 2013.
Source: *Western Kentucky University Stormwater Utility Survey 2013*. [19]

Lessons learned from legal challenges to stormwater fees and programs.

Stormwater service fees have been the subject of litigation resulting in reported opinions from over 17 states.[20] The most frequently litigated issue is the question of whether a service charge is actually a "tax." A group of other issues also emerge, sometimes as a subset of the "fee vs. tax" issue, including whether or not the charge is voluntary, whether the fee is "reasonable" and directly related to the cost of providing the service, whether the fee benefits those it is imposed upon, and whether the fee must be used to cover the cost of providing the narrowly defined stormwater services alone, or whether any surplus can be used for capital improvements.

Municipalities charge fees for the variety of services the city provides. This is legal, and municipalities have authority to do so. Cities cannot, however, assess unauthorized taxes. Stormwater fees that generate revenue in excess of what is needed to operate the stormwater program can be found by a court to be a tax. If a stormwater fee is deemed a tax it will be struck down as invalid.

Fees have elements that distinguish them from taxes. Fees are charged in exchange for a particular governmental service that benefits the party paying the fee. Fees are voluntary, in that the party paying the fee has the option of not using the governmental service and can thereby avoid the charge. The amount of the fee is designed to recover the actual cost of the service being provided.

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[19] *Western Kentucky University Stormwater Utility Survey 2013*, C. Warren Campbell, Western Kentucky University, Bowling Green, Ky.

[20] National Association of Clean Water Agencies (NACWA) (2014). *Navigating Litigation Floodwaters: Legal Considerations for Funding Municipal Stormwater Programs*.

The philosophy of utility service fees of all types is that they are cost-based. The customers pay in relation to the demands they impose on the services and facilities. For a stormwater fee to be considered a fee, rather than a tax, the cost of services must be reasonably related to the service being provided.

Courts will usually deem a charge to be a fee if it is imposed on some defined group of citizens, and if it the revenues are restricted to offset the costs of an entity's stormwater program. That is, the revenue generated by the assessment of the stormwater fee must correlate with the costs to administer the stormwater program, and to fund stormwater-related projects. Although the amounts collected and spent do not need to correlate exactly, the difference between expenses and revenues must be reasonable. *See City of Lewiston v. Gladu*, 2012 ME 42, 40 A.3d 964, *Storedahl Props, LLC v. Clark Cnty.,* 143 Wn. App. 489, 178 P.3d 377 (2008), *Tukwila Sch. Dist. No. 406 v. City of Tukwila,* 140 Wn. App. 735, 167 P.3d 1167 (2007), *McLeod v. Columbia Cnty.,* 278 Ga. 242, 599 S.E.2d 152 (2004).

Courts will usually deem the charge to be a tax, if it is imposed upon all or most citizens for a general public purpose, i.e., the charge is used to raise revenue for general governmental purposes. If revenues are expended to fund programs and projects unrelated to stormwater, courts would find the fee is a tax. *Bolt v. City of Lansing*, 587 N.W.2d 264 (Mich. 1998), *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal. App. 4th 1351 (2002).

The legality of stormwater utility fees is largely a question of state law. This paper does not cover the law of every state. To determine an appropriate fee structure, or to plan a strong defense of an existing fee structure, careful research of statutory and case law precedents in the appropriate jurisdiction is critical. Below, however, are tips taken from a review of some of the experiences of some of the municipalities or utilities that have been challenged on their stormwater utility fees.

Tips and Strategies

Regarding ordinance drafting:

- *Defining terms*. Take care when defining terms such as "stormwater operations," "stormwater programs," "stormwater projects," "stormwater-related," or "stormwater-related capital projects." These and other terms will determine what is an allowable expenditure of the funds collected under the stormwater charges.
- *Use of Terms*. Cities should take care in the use, inadvertent nonuse, or inconsistent use of its defined terms. Carefully define and use these terms throughout so that they are clear and unambiguous.
    - Cities should carefully define and use terms throughout their stormwater utility ordinance so that they are consistently used with clarity and without ambiguity throughout. If later

challenged, having unclear, vague or ambiguous language in the ordinance may open the door later to a court interpreting the ordinance, perhaps unfavorably.

- Keep in mind, a utility, particularly a newly-created stormwater utility, may be consolidating and coordinating responsibilities previously dispersed among several departments. There will likely be overlapping of functions of the utility and these other departments. Ordinances should be drafted with this in mind, carefully considering the use of terms like "water" and "wastewater." Consider describing the overlap in the recitals of the creation ordinance and provide some detail as to how future stormwater programs may exclude or include activities and functions previously handled by other departments. In addition, be sure to check existing ordinances related to those departments and they services they provided and consider removing inconsistencies in the language in a companion ordinance to the "creation ordinance."

- *Language Limiting Use of Funds*. An ordinance must include language dedicating the use of funds a utility collects to those expenditures necessary for the utility to provide stormwater services. Given the trend of ever-changing and increasing requirements being imposed on municipalities/utilities, draft this language carefully.
  - Use caution when limiting the use of stormwater funds *solely* for one category of stormwater service expenditures, i.e., *solely for stormwater operations*, or *solely for the NPDES stormwater management program.* It may be a good idea to consider various possible expenses and what-if scenarios to ensure an understanding of the language will and will not allow with regard to use of funds to reimburse the utility for costs the utility must incur in order to provide the necessary or desired level of service.
  - Be aware that limiting the expenditure of funds, for example, to those services necessary *for purposes of complying with an NPDES permit,* or *for those services within the geographical area of a city's MS4* may result in requiring an impracticable adherence to the express language in an NPDES permit, and may not take into account various services that the city will be expected to perform related to, for example, the watershed.
  - An ordinance that is drafted to allow for a significantly wider universe of allowable expenditures, such as an ordinance that includes language allowing for the use of stormwater funds for stormwater projects, which also include "water and wastewater projects" -- this language broadens the use of funds without is likely to make an ordinance more vulnerable to challenges.
- *Co-permittees*. MS4 permitees will often share the duties with other co-permittees. Review the duties to be performed by each co-permittee, consider where there is overlap, and draft the ordinance

appropriately with language that will serve to cover all costs the city expects to have to incur for stormwater management.

Regarding creation of a stormwater utility:

- *Make Use of Resources Available*. Review the numerous resources available related to creating a stormwater utility and rate structure and determine which ones will be useful to the process. Some excellent resources include:
    - *Guidance for Municipal Stormwater Funding*, prepared by the National Association of Flood and Stormwater Management Agencies under grant provided by the Environmental Protection Agency (2006);
    - *Western Kentucky University Stormwater Utility Survey 2013*, C. Warren Campbell, Western Kentucky University, Bowling Green, Kentucky.
    - *Navigating Litigation Floodwaters: Legal Considerations for Funding Municipal Stormwater Programs,* prepared by the National Association of Clean Water Agencies (NACWA) (2014).
    - *Funding Stormwater Programs* (EPA Region 1 2009, pdf). An EPA Fact Sheet for EPA Region 1.
    - *Funding Stormwater Programs* (EPA Region 3 2008, pdf). An EPA Fact Sheet for EPA Region 3.
- *Stakeholder Support*. Stakeholder support is critical. Use of a citizen's stakeholder group is an effective technique that facilitates problem understanding, a vision for the future, and shared ownership of the plan.
- *Quick Concept Study*. Perform a "Quick Concept Study" to assess basic advisability of pursing a stormwater program and funding with a stormwater user fee. This is designed to be low cost and quick, to build an internal vision for going forward, and can be authorized without an RFP or formal process.
- *Feasibility Study*. Perform a "Feasibility Study" to assess the local government's existing stormwater management program, make recommendations for future directions and changes, and assess the feasibility of funding the program with a stormwater utility (user fee) and other methods. This is designed to be low risk, to give political leaders security in a phased approach that involves others in the decision to proceed.

Regarding rate structures and features in rate structures:

- *Select an Appropriate Rate Structure*. Consider that the closer the fee correlates to a property's contribution to the stormwater runoff issue,

the more likely a rate structure will be successful if challenged. Examples of some of the stormwater rate methodologies examined by the National Association of Flood and Stormwater Management Agencies in its *Guidance for Municipal Stormwater Funding* include:[21]

- impervious area;
- a combination of impervious area and gross area;
- impervious area and the percentage of imperviousness; and
- gross property area and the intensity of development.

- *Opt–Out Provisions/Voluntary*. An element found to influence the question of whether a stormwater service charge is a fee or a tax is whether the user has a choice to accept or decline the service. Consider allowing for an "opt-out" provision that will provide for a situation where the user has a choice to accept or decline the service.
- *Development Codes*. Do the municipality's own development codes allow for low intensity development, green infrastructure, and the type of retrofits that would allow a user to lessen or eliminate their property's impact on the stormwater system?
- *Credits*. Consider providing users with credits for undertaking certain activities intended to lessen the impact of their property's contribution to stormwater runoff and pollutants. Credits can be given for reducing the impervious cover footprint, for installing green infrastructure improvements on their property.
- *Appeals***.** Consider allowing for a meaningful appeals process whereby a user can contest the stormwater charges.

Regarding surviving a legal challenge**.**

- *Legal authority*. Know the legal authority for the stormwater utility charges. Know the charter, the statutes, the applicable provisions of the state constitution, and the key case law precedents in the jurisdiction.
- *Data*. A rate methodology must have supporting data. Know the data and how it was created. Know what the data can and cannot support.
- *Experts*. Employ and contract with experts, and use them often and regularly, both the utility's own resident/employee experts as well as outside consultant experts. Be aware that a court will hear from the experts on both sides. The utility's experts should be significantly more knowledgeable than the plaintiff's experts regarding the utility in general, and both the technical and financial

[21] *Guidance for Municipal Stormwater Funding* (National Association of Flood and Stormwater Management Agencies under Grant Provided by Environmental Protection Agency, 2006).

aspects that provide the basis for the utility's extant stormwater fees, rate structure, and programs.