STORMWATER & WASTEWATER UPDATE

Recent Developments Impacting Municipalities

International Municipal Lawyers Association
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Houston, TX

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The Problem

- **Aging/Inadequate Infrastructure**
  - MS4s
  - POTWs
  - SSSs
  - CSSs
- **Wet-Weather Events**
- **Pollution**
- **EPA Enforcement**
- **Citizen Suits**
- **Costs of Compliance and Upgrades**



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Enforcement

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National Compliance Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters

Problem



Boom captures litter and other debris carried by stormwater.

Raw sewage overflows and inadequately controlled stormwater discharges from municipal sewer systems introduce a variety of harmful pollutants, including disease causing organisms, metals and nutrients that threaten our communities' water quality and can contribute to disease outbreaks, beach and shellfish bed closings, flooding, stream scouring, fishing advisories and basement backups of sewage.

EPA, in conjunction with state co-plaintiffs, is taking enforcement action at municipal sewer systems with Clean Water Act violations to reduce pollution and volume of stormwater runoff and to reduce unlawful discharges of raw sewage that degrade water quality in communities.

https://www.epa.gov/enforcement/national-compliance-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our
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Ongoing Enforcement

- **Consent Decrees**
  - MS4s: EPA, Civil Cases and Settlements

    Link to EPA Website
  - CSOs: EPA, Status of Civil Judicial Consent Decrees Addressing Combined Sewer System

    Link to EPA Website
- **Examples:**
  - Rockford – MS4 – $329,395 penalty
  - West Haven – SSO and MS4
  - St. Louis – $1.2 million penalty; $4.7 *billion* in upgrades over 23 years

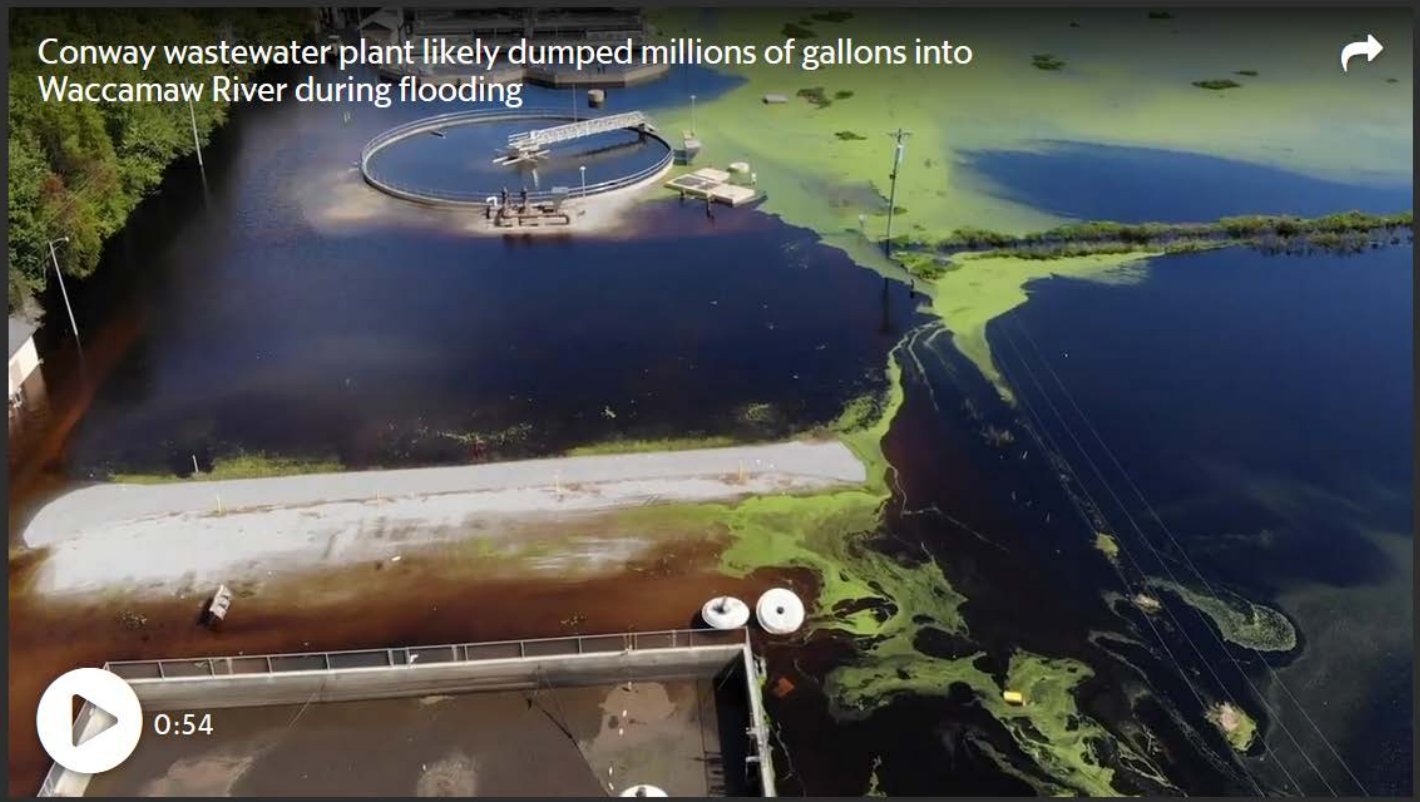
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Ongoing Enforcement

- **Houston POTW/SSSs**
  - 40 wastewater treatment plants and their collection systems
  - Alleged 9,319 SSOs and bypass discharges from July 2013 to June 2018
- **Complaint, *United States v. City of Houston*, No. 4:18-cv-3368 (S.D. Tex. Sept. 20, 2018).**
- **Complaint, *Bayou City Waterkeeper v. City of Houston*, No. 4:18-cv-3368 (S.D. Tex. Sept. 21, 2018).**

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LATEST NEWS



Conway wastewater plant likely dumped millions of gallons into Waccamaw River during flooding

Sep 27, 2018

Grand Strand Water and Sewer Authority's Conway wastewater treatment plant stopped working Wednesday due to flooding, but it was back operational Thursday morning after dumping millions of gallons of untreated waste water into the Waccamaw River.

By Jason Lee

https://www.myrtlebeachonline.com/latest-news/article219114330.html

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Permitting

- **Clean Water Act ("CWA")**
- **NPDES program**
  - Effluent limitations
    - **Technology-based ("TBELs")**
    - **Water-quality-based ("WQBELs")**
  - TMDLs – pollutant "diet" for impaired waters
    - **Water quality standards ("WQS")**
    - **Load and wasteload allocations**
- **Cooperative Federalism**

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Municipal Stormwater

- **EPA stormwater regulations in two phases**
- **Phase I**
  - Large MS4s (serve 250,000+)
  - Medium MS4s (serve 100,000+ but less than 250,000)
- **Phase II**
  - Small MS4s (generally, not large or medium; serve under 100,000)



https://www.epa.gov/npdes/stormwater-discharges-municipal-sources

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Municipal Stormwater

- **Controls to reduce the discharge of pollutants to the "maximum extent practicable" (MEP)**
- **MS4 permits generally do not require numerical effluent limitations.**
- **Small MS4s – Six Minimum Control Measures (MCMs)**
  - Public education programs on stormwater impacts
  - Public involvement/participation in decision-making
  - Elimination or treatment of discharges not composed entirely of stormwater
  - Erosion and sedimentation controls for construction activities
  - Requiring BMPs for post-construction stormwater management for all new developments and redevelopment projects
  - Good housekeeping/pollution prevention for municipal operations

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MS4 Developments: WQS and TMDLs

- **Permitting Impact of WQS and TMDLs**
  - Permitting authorities may include numerical limitations
  - Chesapeake Bay is "impaired" for nitrogen, phosphorous, and sediment
  - Bay is forcing actual load reductions of sediment and nutrients
- **Pennsylvania - Bay Pollution Reduction Plans**
  - Encourages financing through stormwater authority, P3, public funds
  - Encourages regional planning
  - Encourages use of codes and ordinances
    - **Land use (e.g., parking islands, minimize curbs, open section roadway)**
  - Suggests that "over requiring" BMPs as part of PCSM can also achieve reductions in loadings

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MS4 Developments: Citizen Suits based on WQS

- *L.A. Waterkeeper v. Pruitt*, No. 2:17-cv-03454-SVW-KS, 2018 U.S. Dist. LEXIS 150270 (C.D. Cal. Aug. 9, 2018).
- *Blue Water Balt., Inc. v. Pruitt*, Civil Action No. GLR-17-1253, 2018 U.S. Dist. LEXIS 18456 (D. Md. Feb. 5, 2018).
- *Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 24, 32 (1st Cir. 2018).
- *Compare* EPA, Residual Designation Examples

  Link to Examples on EPA Website

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Other MS4 Developments

- **81 Fed. Reg. 89320 (Dec. 9, 2016) (addressing remand in *Envtl. Def. Ctr. v. EPA*, 344 F.3d 832 (9th Cir. 2003)).**
  - Amended regulations governing small MS4s in response to a Ninth Circuit case which held two aspects of EPA's general permitting scheme were contrary to the CWA.
  - About procedure, not substance.

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Wastewater and POTWs

- **Handled differently than MS4s**
- **NPDES permit for POTW**
  - Secondary Treatment
  - WQS
  - CSO Control Policy
  - Bypasses
- **Other Concepts**
  - Blending
  - Peak Flow Management
  - Mixing Zones

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POTW Developments: Blending

- ***Iowa League of Cities v. EPA*, 711 F.3d 844, 856 (8th Cir. 2013).**
- ***Hall & Assocs. LLC v. U.S. EPA*, 315 F. Supp. 3d 519, 526 (D.D.C. 2018).**
- ***Ctr. for Regulatory Reasonableness v. EPA*, 849 F.3d 453, 454 (D.C. Cir. 2017).**
- **83 Fed. Reg. 44623 (Aug. 31, 2018).**
  - Peak Flows Management Rule (for SSSs only)
  - ***Act now***:
    - **Listening sessions on October 16, 24, and 30, 2018**
    - **Written comments on the docket by October 31, 2018**

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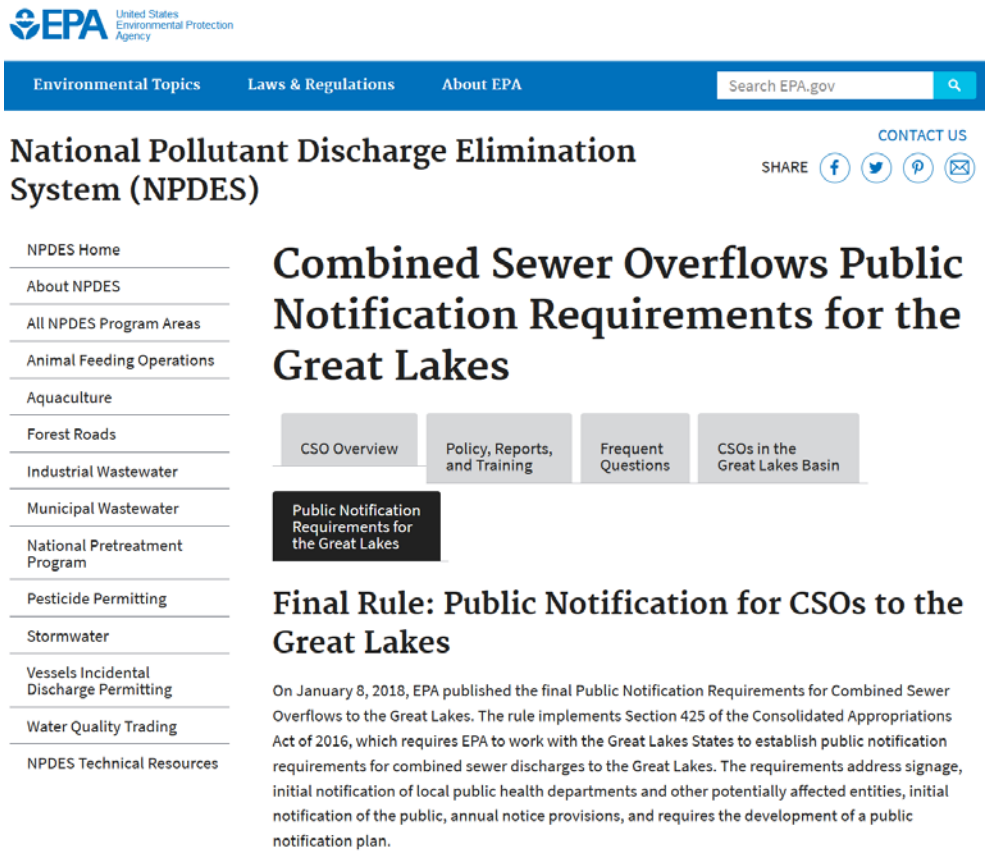
- **Comments based on POTW experience**
  - Blending
  - I&I - Identifying and prioritizing corrections
  - Improving storage capacity
- **Bottom-line: $$$**

https://www.epa.gov/npdes/peak-flows-sewage-treatment-plants#rule

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POTW Developments: Great Lakes Basin

- **Consolidated Appropriations Act of 2016**
- **83 Fed. Reg. 712 (Jan. 8, 2018)**
  - CSOs: Minimum requirements for notification at 40 C.F.R. Part 122
  - Phased in, fully effective November 7, 2018



https://www.epa.gov/npdes/combined-sewer-overflows-public-notification-requirements-great-lakes

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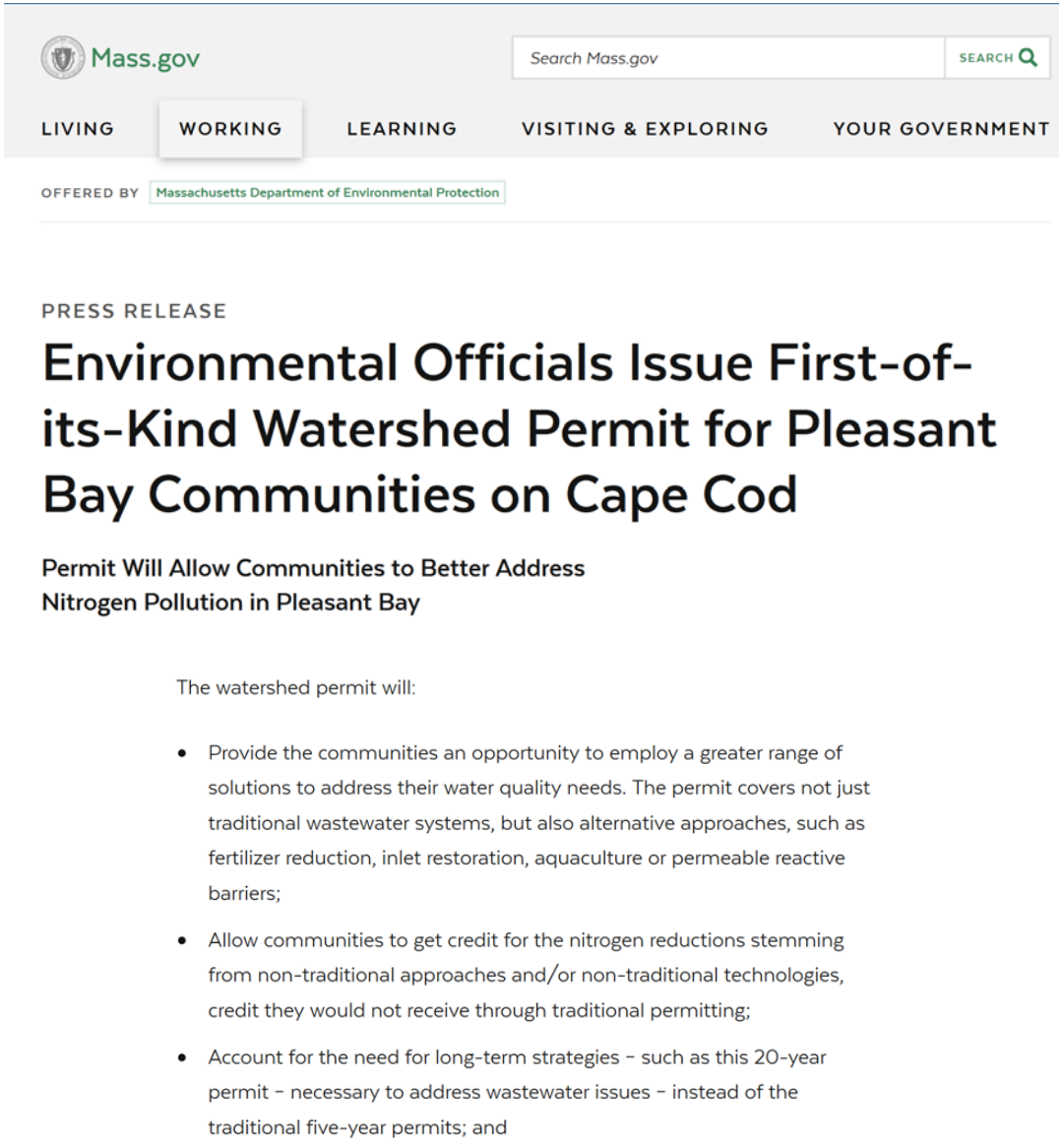
POTW Developments: Great Lakes Basin

- **Notification requirements for CSOs in Basin**
  - Signage
  - Initial notification of local (or state) public health department and other potentially affected public entities
  - Supplemental notification of local (or state) public health department and other potentially affected public entities
  - Initial notification of the public
  - Follow-up notification of the public
  - Annual notice available to the public
  - Public notification plan

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POTW Developments: WQS and TMDLs

- Permitting strategies to address WQS and cap loads
  - Massachusetts
  - Chesapeake Bay



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PRESS RELEASE

Environmental Officials Issue First-of-its-Kind Watershed Permit for Pleasant Bay Communities on Cape Cod

Permit Will Allow Communities to Better Address Nitrogen Pollution in Pleasant Bay

The watershed permit will:

- Provide the communities an opportunity to employ a greater range of solutions to address their water quality needs. The permit covers not just traditional wastewater systems, but also alternative approaches, such as fertilizer reduction, inlet restoration, aquaculture or permeable reactive barriers;
- Allow communities to get credit for the nitrogen reductions stemming from non-traditional approaches and/or non-traditional technologies, credit they would not receive through traditional permitting;
- Account for the need for long-term strategies – such as this 20-year permit – necessary to address wastewater issues – instead of the traditional five-year permits; and

https://www.mass.gov/news/environmental-officials-issue-first-of-its-kind-watershed-permit-for-pleasant-bay-communities

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POTW Developments: Other Issues

- **Challenges to TMDLs/Permit Limits**
  - *City of Kennett v. EPA*, 887 F.3d 424 (8th Cir. 2018).
- **Cooperative Federalism**
  - *S. Cal. All. of Publicly Owned Treatment Works v. U.S. EPA*, 853 F.3d 1076 (9th Cir. 2017).
- **Enforcement and Consent Decrees**
  - *Pitroff v. United States*, No. 16-cv-522-PB, 2017 U.S. Dist. LEXIS 133761 (D.N.H. Aug. 22, 2017).

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POTW Developments: Other Issues

- **Groundwater Regulation under the CWA**
  - *Hawai'i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754 (9th Cir. 2018).
  - *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018).
  - *Sierra Club v. Va. Elec. & Power Co.*, Nos. 17-1895, 17-1952, 2018 U.S. App. LEXIS 25831 (4th Cir. Sept. 12, 2018).
  - *Kentucky Utilities All. v. Kentucky Utilities Co.*, No. 18-5115, 2018 U.S. App. LEXIS 27238 (6th Cir. Sept. 24, 2018).
  - *Tenn. Clean Water Network v. TVA*, No. 17-6155, 2018 U.S. App. LEXIS 27237 (6th Cir. Sep. 24, 2018).

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If The System Ain't Broke, Don't Fix It?

- **In addition to the aforementioned environmental compliance obligations, the nation's water and sewer utility infrastructure is "broke"!**
- **2018 AWWA State of the Water Industry Report**
  - AWWA conducted a survey of top issues facing the industry
    - **No. 1 – Renewal and Replacement of Aging Water and Wastewater Infrastructure**
    - **No. 2 – Financing for Capital Projects**
- **AWWA refers to current era as the "replacement age" as water and sewer infrastructure installed through postwar period has exceeded its useful life**

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Funding Sources

- **Traditionally, water and sewer utilities have funded operations primarily through user fees**
  - User fees generally include both:
    - **Fixed customer charges**
    - **Per-unit or "variable" charges**

- **AWWA projects that domestic water infrastructure will require $1 trillion of investment from 2010 – 2035**

- **EPA similarly projects necessary investment in water and wastewater systems of over $700 billion from 2012 -2032**

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Funding Sources

- **Various Industry Trends are Impacting Water and Wastewater Utility Revenues and Margins**
  - Water and sewer utilities are capital intensive compared to natural gas and electric utilities
    - **The Brattle Group calculates asset turnover (revenues to total average users) for the water utilities at 23%, compared to 36% electric utilities and 61% for the natural gas utilities**
    - **Decades of insufficient capital investment has resulted in present and future capital needs far exceeding available revenues**
  - Conservation measures continue to erode water consumption
  - Rising environmental and regulatory compliance obligations increase water and wastewater operational costs
    - **Water quality**
    - **Stormwater management**
    - **Cybersecurity**
    - **System Security and Resiliency**
  - Regulatory and stakeholder sensitivity to rate increases exacerbates regulatory lag

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Funding Sources

- **Contemporary utilities are considering new alternative ratemaking mechanisms to maintain adequate revenue streams**
  - General revenue stabilization/decoupling
    - **Automatically adjusting rates to maintain periodic revenue targets**
  - Lost Revenue Adjustment Mechanism
    - **Similar to revenue stabilization, but only adjust rates to capture revenue shortfalls associated with conservation measures**
  - Future Test Years
    - **Expanding "test year" for cost of service ratemaking to include initial year new rates are in effect and/or year in which rate case is prosecuted**
  - Distribution System Improvement Charge
    - **Automatic adjustment or surcharge to recover investment in distribution plant without traditional rate case review**
- **For municipal wastewater utilities, establishing a stormwater utility could reduce cost of service for wastewater operations**

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Stormwater Utilities

- Many municipalities currently fund stormwater management through a combination of wastewater and general fund revenues
- Stormwater utilities can develop a variety of fee structures to efficiently recover stormwater costs in proportion to customers' impact on the municipality's storm water infrastructure.
- Ability to and process for forming a stormwater municipality will vary by jurisdiction

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Stormwater Fee Structure

- **Two basic rate structure options**
  - Flat Fee – Simple per-parcel fee for all
  - Dual Fee – Separate fees for Non-Residential and Residential
    - In dual-rate situations, Residential parcels typically pay a flat fee
    - Non-Residential parcels may pay a higher flat fee or a fee based on the individual parcel area, as determined by Geographic Information System ("GIS") measurements

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Stormwater Fee Structure

- **More detailed variants**
  - Equivalent Residential Unit ("ERU")
    - ERU = average impervious area for a single family residential parcel
  - Equivalent Hydraulic Area ("EHA")
    - EHA = combined impact of impervious and pervious areas
    - Fees based on estimated runoff flows, with a higher per-unit rate for impervious area and a lower rate for pervious area
  - Tiered/Development – Fees based on sliding scale from vacant/light development to heavy development

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QUESTIONS?

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