

The Flow Toward Stormwater Authorities in Pennsylvania

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Special to the Legal, PLW

Federal and state water quality regulations and community expectations for better flood control are putting pressure on municipalities to develop more sophisticated stormwater management programs. Municipalities have traditionally funded stormwater management through general tax revenue, which is often insufficient to support comprehensive stormwater management. Municipalities must now identify financial and operational alternatives for stormwater management to address more stringent water quality standards and more intense development.

A separate municipal stormwater authority or utility established as a user-oriented entity akin to water and wastewater authorities is one alternative that is attracting increasing attention in Pennsylvania.

Stormwater impairs water quality when pollutant laden runoff quickly delivers high volumes of water to receiving waterbodies. The volume, velocity and pollutant content of runoff are directly related to the amount of developed land in a given watershed. The most obvious and dangerous consequences of increased stormwater runoff are erosion and flooding. Additionally, pollutants flushed from the land by stormwater change the biological and chemical composition of waterbodies.

The Pennsylvania Stormwater Management Act, Act 167, requires counties to develop and municipalities to implement comprehensive watershed based stormwater management plans to address both flood control and water quality.

Many municipalities in Pennsylvania hold a municipal separate storm sewer system (MS4) permit issued by the Department of Environmental Protection (DEP) through the National Pollutant Discharge Elimination System (NPDES). This permit imposes specific stormwater management and regulatory obligations upon a municipality. These obligations involve costs that a municipality should have the power to recoup through user fees paid by those who generate stormwater runoff.

In 1987, Congress amended the Clean Water Act (CWA) to address the problem of stormwater discharges. Initiated in 1990, Phase I of the NPDES stormwater management program addressed large and medium MS4s in municipalities with more than 100,000 people. In 1999, Phase II expanded the program to include small MS4s in municipalities with greater than 1000 people. The MS4 Phase II requirements apply to about 940 municipalities across Pennsylvania.

The first round of MS4 Phase II permits were issued by the DEP in 2003. These permits were originally intended to end in March 2008, but they were extended into 2009 pending the release of revised permit requirements. The DEP developed a general permit (PAG-13) for stormwater discharges from small MS4s. The PAG-13 permit was appropriate for MS4s not located in a high-quality or exceptional value watershed. Those MS4s that are located in such a watershed were required to obtain an individual permit.

Within the first permit term, MS4s were required to adopt the Pennsylvania Model Stormwater Management Ordinance or a model ordinance from an applicable Act 167



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plan. They also had to implement six minimum control measures (MCMs) that included public education; public participation; elicit discharge protection and elimination; construction site run-off control; post-construction stormwater management; and municipal pollution prevention.

For the pending second round of MS4 Phase II permits, the DEP has revised both the PAG-13 permit and the Pennsylvania Model Stormwater Management Ordinance. Both documents are now in draft form awaiting public comment and response.

New MS4 Phase II permits will require municipalities to implement the six existing MCMs and adopt the new 2008 Pennsylvania Model Stormwater Management Ordinance or a model ordinance from an applicable Act 167 Plan approved by the DEP in 2005 or later. If an MS4 discharges to a receiving water with an approved total maximum daily load (TMDL) for specified stormwater pollutants, the municipality must implement at least two additional MCMs from a menu of options offered by the DEP; and develop and implement a stormwater TMDL plan that achieves pollutant reductions consistent with the applicable TMDL.

A stormwater authority or utility is an entity formed to implement a stormwater management program. There are usually five program elements of a stormwater utility: administration, engineering, regulation, operations and maintenance, and capital improvements. Unlike a stormwater program that draws on general tax revenue for funding, a stormwater utility is directly funded by the people who benefit from the services of the utility. Most stormwater utilities base their fees on the percentage of impervious cover on developed land.

Although Pennsylvania water and wastewater authorities have been collecting specific service fees for many decades, stormwater management functions have been typically dispersed among several municipal departments (e.g. planning, code enforcement and public works) and funded by general tax revenues. However, the use of stormwater utilities for financing and managing stormwater programs is growing rapidly across the United States. Over the past 40 years, the number of stormwater utilities has grown from just two to over 600 nationwide.

"Use" of a stormwater system is the demand a property places on the system and the benefit a property receives from the proper management of runoff. Demand has traditionally been measured in terms of runoff volume. As there is no direct way to measure runoff volume, surrogate measures, such as impervious area, are used as a basis for stormwater fees.

The most commonly contested legal issue surrounding stormwater utilities is whether

the fee charged is actually a fee or whether it is a tax. Taxes are a means for the government to raise general revenue. Fees, on the other hand, are a charge for a particular service provided. All fee payers, unlike tax payers, should receive an individual benefit from the service for which they are paying, although the benefit may be indirect or immeasurable.

In June 2008, the University of Maryland Environmental Finance Center (EFC) released a report titled "Pennsylvania Stormwater Financing Initiative." The EFC report addresses a menu of financing options available to municipalities to support stormwater management programs. These options include taxes, dedicated enterprise funds, inspection fees and user fees. User fees are addressed in the context of the stormwater authority/utility.

However, the report recognized a lack of clear, legal authority to establish a stormwater authority in Pennsylvania.

The legal validity of stormwater fees and the methods for calculating them is now under discussion in Pennsylvania. Unfortunately, there is no direct statutory authorization to impose stormwater fees, especially for small MS4 municipalities. The common law, "Dillon's Rule," provides that municipal governments do not have implied powers. Municipalities have only those powers that are expressly granted to them. Because of Dillon's Rule, the absence of specific statutory authorization to impose stormwater fees creates doubt with respect to the validity of stormwater fees.

The various Pennsylvania municipal codes do not specifically provide for stormwater user fees. For example, the borough code only authorizes the financing of stormwater improvements by money available or by assessments against the benefited properties. There are no provisions for financing stormwater facilities in second-class townships. First-class townships may construct "a system of sewers and drainage" with the cost of construction paid by taxes or assessments.

Under the Pennsylvania Municipality Authorities Act, municipal authorities have the power, if authorized by their incorporating municipality, to establish sewer systems. However, the act is silent as to whether a storm sewer is considered a sewer system.

Municipal authorities may impose charges based upon the value of services provided or readily available for use. Charges may also be based on the capital cost of a system. Municipal authorities do not have the power to impose taxes.

While the rates and charges language of the Municipality Authorities Act may be extended to cover stormwater fees, there is doubt about the appropriateness of the fees because the beneficiaries of stormwater management are somewhat indefinite. Every property in a municipality benefits to some degree from having proper stormwater management.

The Uniformity Clause of the Pennsylvania Constitution requires that taxes must "be uniform upon the same classes of subjects." To abide by the Uniformity Clause, stormwater fees must be viewed as user fees and not taxes. If a fee covers the cost of operating a regulatory program, it may be enforceable without regard to the Uniformity Clause.

However, the total revenue collected from fees for a regulatory program must be based upon the cost of operating the program. Thus, to the extent that a stormwater fee is intended

to finance the capital cost of stormwater facilities, the theory of regulatory program charges might not sustain the fee.

Another consideration in establishing stormwater fees is the method of calculating them. There is no decisional law in Pennsylvania on computing stormwater fees.

However, decisions from other states have allowed for discretion in developing a formula that reflects the benefit received by a property owner from a stormwater system.

The uncertainties of statutory authority for stormwater fees in Pennsylvania could be eliminated if legislation were enacted authorizing municipalities or authorities to impose fees. Such legislation should address the issue of what properties benefit from the stormwater system and therefore must pay the fee. To eliminate the argument that the fee is actually a tax, the legislation should provide for segregating revenue and restricting its use to stormwater management.

On March 2, Pennsylvania State Senate Bill No. 524 proposed the "Integrated Water Resources Restoration, Protection and Management Act." This bill is the latest iteration of a series of measures introduced in the Pennsylvania General Assembly over the past few years to provide additional municipal authorization for stormwater management.

SB524 would require counties to implement a comprehensive stormwater management plan and would permit counties to develop an integrated water resources management plan. An integrated water resources management plan would include all elements of an Act 167 plan, plus additional requirements to regulate activities that affect water resources within a watershed.

It would also require municipalities to implement Act 167 plans or integrated water resources management plans. In the absence of county action, municipalities could join together to develop integrated water resources management plans.

SB524 would enable the formation of water resources management authorities under the Municipality Authorities Act. Water resources management authorities could be created by an individual county, multiple counties or multiple municipalities; however, an individual municipality would not be authorized to create a water resource management authority by itself.

Responsibility for operation and maintenance of stormwater facilities could be transferred to a water resources management authority under SB524. The water resources management authority would be authorized to levy a fee on property owners to pay for all costs associated with stormwater management, and it would be authorized to borrow money to finance stormwater facilities.

However, SB524 does not address whether or not MS4 NPDES permit responsibilities could be transferred to water resources management authorities.

As can be seen from the foregoing discussion, there is a legitimate need for a paradigm shift in Pennsylvania with respect to stormwater management. Municipalities should have new financial and operational alternatives to address current and future stormwater requirements. A municipal authority as proposed by SB524 is one alternative that would ride the crest of a national trend toward user-oriented stormwater utilities. •

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