LEGAL CONSIDERATIONS FOR

Enacting, Implementing, & Funding Stormwater Programs

NAVIGATING LITIGATION FLOODWATERS

2016 EDITION

NACWA

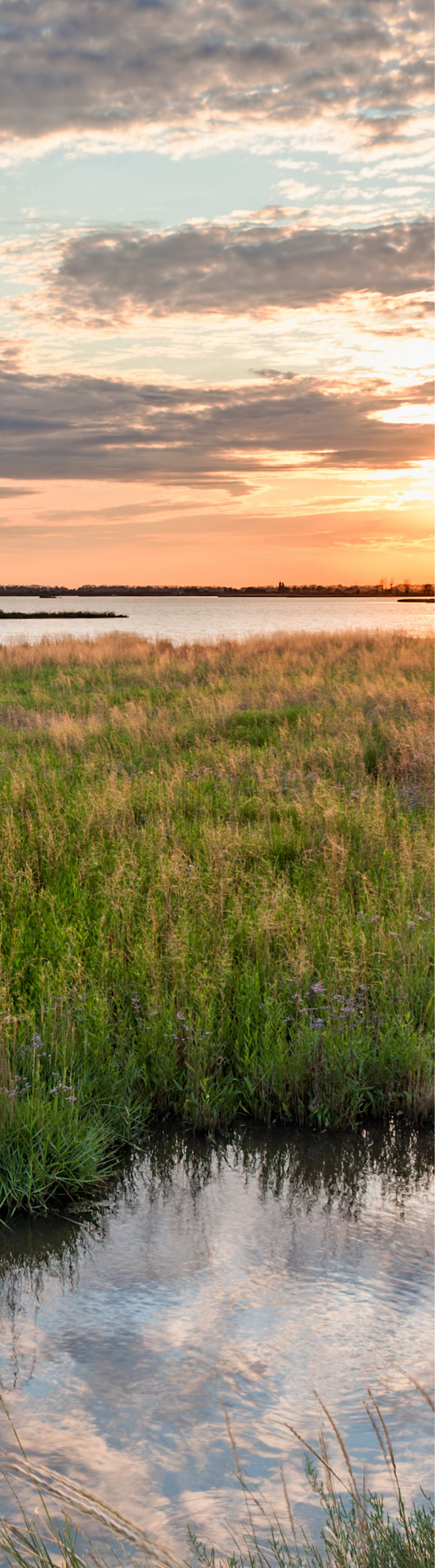
Back to Contents Page

Back to Contents Page

Contents

Back to Contents Page

Back to Contents Page



Preface

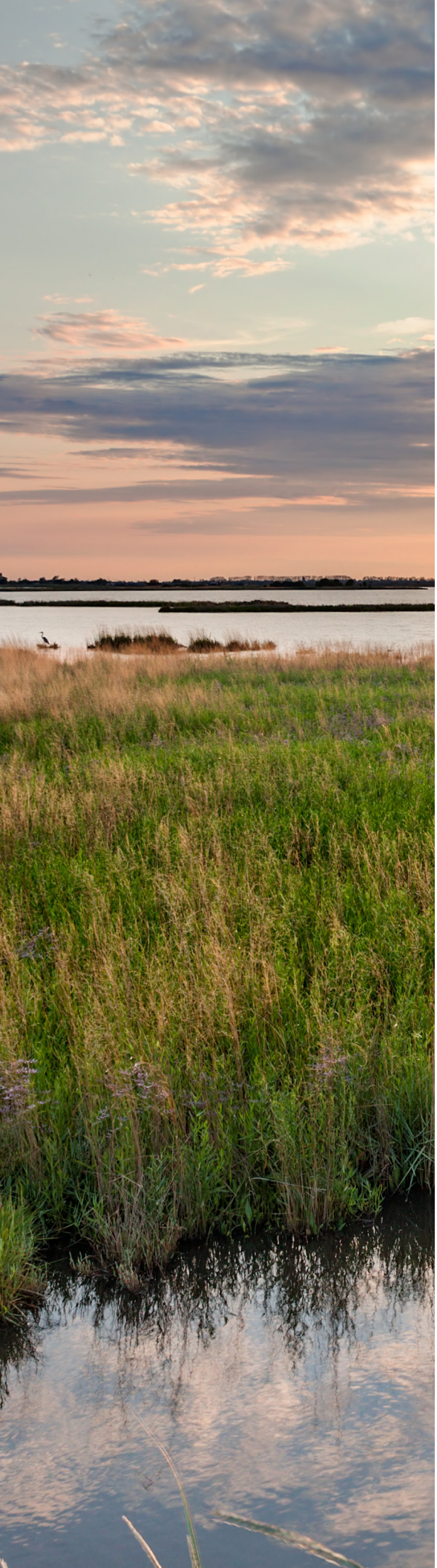
This publication provides a brief overview of current legal issues associated with user-fee funded municipal separate storm sewer systems (MS4s) stormwater programs and a summary of selected legal decisions and pending cases.

There are numerous technical publications about the structure and funding of stormwater utilities and programs (see *Resources*). Many of these sources touch on the fact that legal barriers exist. The purpose of this publication is to provide greater analysis on the types of legal issues impacting stormwater funding programs – and provide an overview of trends that are emerging based on the outcomes of key cases – to inform and prepare utilities that are creating, implementing or defending a stormwater program, utility or fee. It is not intended to provide an exhaustive review of all litigation and legal barriers associated with stormwater.

In drafting this publication, the National Association of Clean Water Agencies (NACWA) relied heavily on the ongoing and commendable work of Western Kentucky University, who has generously allowed NACWA to use the results of its annual *Stormwater Utility Survey*.[1]

NACWA offers the information in this publication to equip members with critical knowledge and tools, but the information should not be construed as legal advice to NACWA's member agencies or others who might refer to it. NACWA's publication of this work does not replace the need to conduct an independent legal evaluation of relevant issues.

NACWA welcomes feedback on this document, including suggestions for additional cases to add. Please send any thoughts or comments to Amanda Waters at awaters@nacwa.org or to Erica Spitzig at espitzig@nacwa.org



Introduction

Stormwater is a significant regulatory priority for the U.S. Environmental Protection Agency (EPA) and many states. According to EPA, urban stormwater "is a leading cause of water quality impairment and its impact is growing" as approximately 800,000 acres of land are developed in the U.S. every year.[2]

EPA sets national enforcement initiatives every three years to focus its civil and criminal enforcement resources. In February 2016, EPA announced its environmental enforcement priorities for Fiscal Years (FY) 2017 – 2019.[3] Municipal wet weather issues such as sewer overflows and stormwater continue to be one of the Agency's top seven enforcement targets: *Keeping Raw Sewage and Contaminated Stormwater out of Our Nation's Waters.*

The failure to comply with regulatory requirements may carry significant consequences. A significant portion of EPA's Clean Water Act (CWA) enforcement resources have been allocated to stormwater enforcement in recent years. While private developers have borne the initial brunt of enforcement, MS4s are being increasingly targeted for audits, information requests and administrative orders related to stormwater programs.

Stormwater requirements are appearing more frequently in federal wet weather consent decrees.[4] As an example, in February 2016 the U.S. Department of Justice lodged a federal consent decree between EPA, the state of Utah and Salt Lake County to resolve federal violations solely related to the county's stormwater management program.[5]

In addition, EPA and the States are strengthening local stormwater programs through more onerous requirements in National Pollutant Discharge Elimination System (NPDES) permits.

In summary, through permitting and enforcement, the regulatory requirements on MS4 communities and pressure from activist groups for more sophisticated stormwater management programs will only continue to increase. Thus, the need to have a legally defensible program and the ability to fund that program is critical.

Regulatory Background

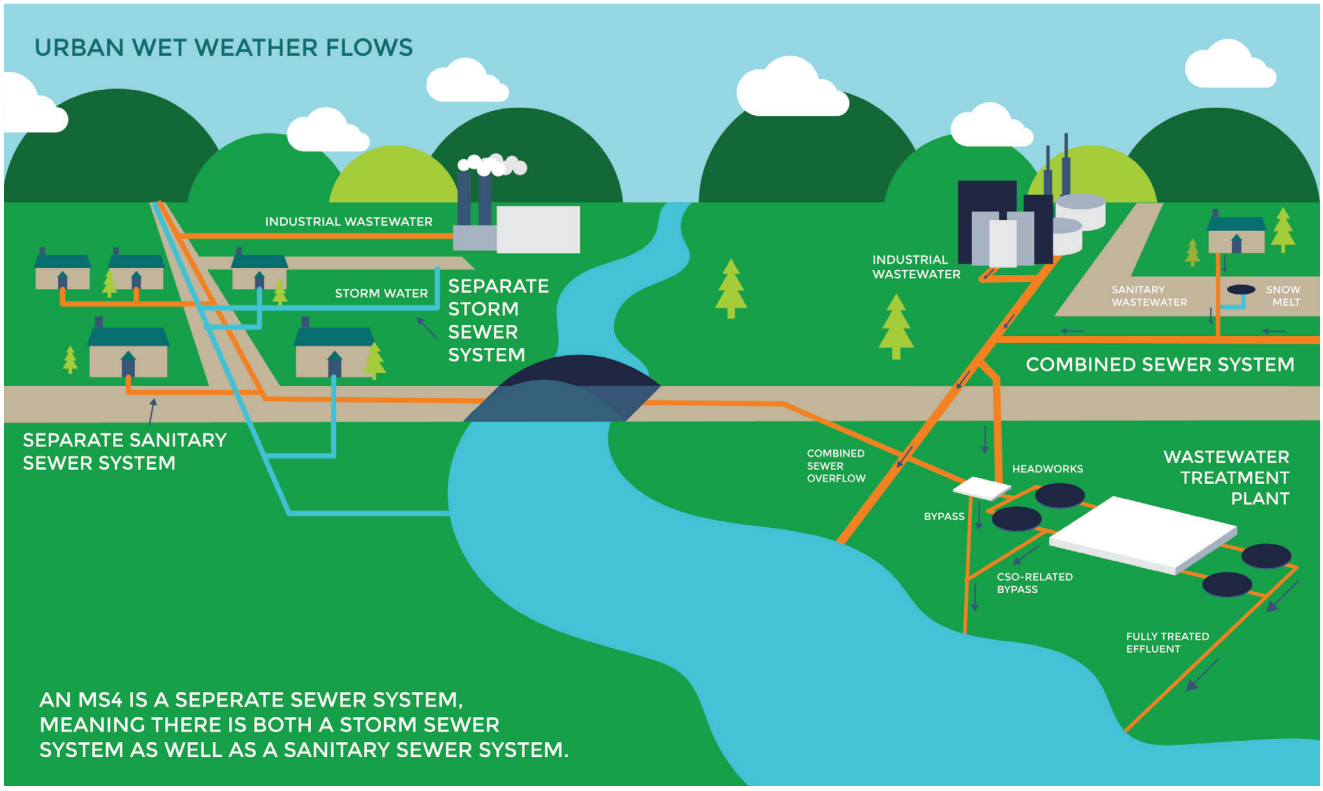
In 1987, Congress amended the CWA to require implementation of a comprehensive national program for addressing stormwater discharges.[6] Pursuant to this legislation, which is codified at 33 U.S.C. § 1342 (CWA§402), EPA developed a stormwater permitting program for MS4s.[7]

EPA implemented its MS4 stormwater program in two phases based on the population served.[8] Phase I MS4 permittees are typically subject to individual NPDES permits issued to either a single permittee or groups of co-permittees. Phase I permittees were required to apply for NPDES permit coverage between November 1991 and April 1994. The permit ap-

MS4 Definition

A conveyance or system of conveyances owned/operated by a State, city, town or other public body that discharges into waters of the US that is:

- Designed or used for collecting or conveying stormwater;
- Not a combined sewer;
- Not part of a Publicly Owned Treatment Work (POTW).[9]



plication requires information on the physical description of the MS4, the legal authority of the operator, a characterization of surrounding sources and pollutants found in the MS4s's stormwater discharge and a description of fiscal resources.[10]

Most Phase II MS4s, on the other hand, are covered under general permits issued by their respective state agencies.[11] NPDES permitting authorities were required to issue general permits for Phase II MS4s by December 9, 2002. "Automatically designated" small MS4s—those in urbanized areas—were to obtain coverage within 90 days. However, NPDES permitting authorities had the ability to phase-in coverage for other small MS4s determined to have an adverse impact on water quality in accordance with a schedule that is consistent with the State's watershed permitting approach.[11]

A. Stormwater Management Plans

Both large and small MS4s are required to develop stormwater management program (SWMP) that are designed to "reduce the discharge of pollutants to the maximum extent practicable using management practices, control technologies and system, design and engineering methods."[13] MS4s are required to develop a plan to implement the SWM using appropriate best management practices (BMPs).[14] The specific requirements in MS4 permits vary greatly around the country. Some MS4 permits contain broad requirements that outline the basic SWMP components the permittee is required to implement, giving the permittee the ability to develop a program to meet the broad requirements. Other MS4 permits are more prescriptive and detail the minimum activities and BMPs for each program element. However, 40 CFR 122.26(d)(2)(v) and 122.34(g) require all MS4s to assess the effectiveness of their stormwater programs.

Back to Contents Page

B. Past National Rulemaking Efforts

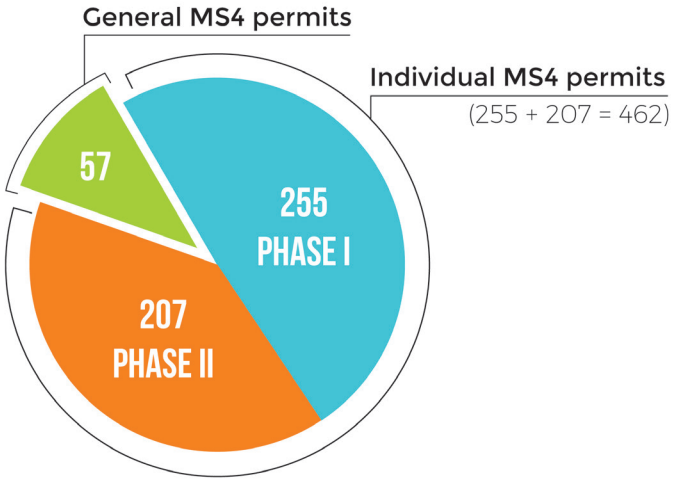
In 2009, EPA noticed its intent to initiate a rulemaking that was described as a plan to "reduce stormwater discharges from new development and redevelopment and make other regulatory improvements to strengthen its stormwater program."[15]

EPA repeatedly delayed issuing a draft rule. Instead, EPA's Office of Water announced on March 19, 2014 that it was deferring development of the stormwater rule in lieu of more targeted, less regulatory-driven efforts to help utilities better control stormwater runoff. In a statement to the press, EPA explained they are "…updating [their] stormwater strategy to focus now on pursuing a suite of immediate actions to help support communities in addressing their stormwater challenges and deferring action on rulemaking to reduce stormwater discharges from newly developed and redeveloped sites or other regulatory changes to its stormwater program ."

Current/Future Regulation

In the absence of a federal rule, EPA has turned its focus to strengthening local stormwater programs and more onerous requirements will likely arise on a permit-by-permit basis. EPA estimates that 54% of Phase I MS4 individual permits, 49% of Phase I general permits, and 60% of all Phase II, both individual and general permits, have expired. Given the number of permits due for renewal, it is anticipated that the regulatory landscape with regard to MS4s will shift rapidly.

On January 6, 2016, EPA issued a proposed rule on general National Pollutant Discharge Elimination System (NPDES) permit requirements for small MS4s[17] to comply with the U.S. Court of Appeals for the Ninth Circuit's remand in the 2003 case Envtl Def. Ctr. v. EPA and a subsequent 2014 petition related to the decision. The proposal is intended to be a narrow procedural response to the Court's requirements, but the potential impact of the proposal could be far reaching with significant substantive consequences for permitees.



(Data as of April 2016)

Source (see endnote 41)

NACWA submitted comments on March 21, 2016, to EPA on the proposed rule requesting a number of modifications and clarifications. The comments also indicate that, of the three options presented in the rule proposal, NACWA believes Option 3 (the hybrid approach) will best address the procedural and participatory elements required of the rule – while also maintaining sufficient flexibility for permitting authorities and permittees to develop and regulate their small stormwater programs. The comments also highlight concerns about the Agency's potential move away from narrative and BMP-based effluent limitations for stormwater discharges to more numeric limits. Under a court-ordered settlement in Envt'l Def. Ctr. v. EPA, EPA must finalize the rule by November 2016.

While EPA has indicated that the proposed rule is only meant to make procedural changes to the Phase II stormwater program, there are concerns that the impact could be more substantive in terms of altering the regulatory understanding of the MEP standard. This is particularly true given the environmental activists groups have expressed interest in using the rulemaking to make substantive changes to the MEP standard.

Envtl Def. Ctr. v. EPA (Ninth Cir. 2003)

Facts:

- Challenge to EPA's 1999 Phase II stormwater regulation and NPDES permit regulatory framework for small MS4s.

Plaintiffs argued:

- No EPA review the content of dischargers' notices of intent (NOIs), and
- No public participation in the permitting process.

Ninth Circuit held:

- EPA failed to require meaningful review of the BMPs at individual MS4 to ensure reductions of pollutants to the "maximum extent practicable" (MEP), as required by the CWA.[18]
- Process failed to provide adequate public notice and opportunity to request a hearing.

Stormwater Utility Scope

The universe of entities that could be affected by regulatory changes is vast. A stormwater utility is not the only structure for implementing and financing stormwater programs, but it is one of the most common.

The increasing complexity and cost of complying with stormwater regulations are not the only challenges communities face. The intensification of weather extremes can make stormwater management a moving target. In addition, utilities must attempt to forecast population and development changes when implementing a program and sizing infrastructure. These factors and many others must be taken into consideration when planning a stormwater funding mechanism. Last but certainly not least, utilities must strive to structure their fee program in such a way that maximizes the likelihood that the program will survive a possible legal challenge.

A negative court decision can be a significant barrier to implementing and funding stormwater programs, and utilities understandably want to avoid that occurrence. Understanding the types of legal cases that have already occurred regarding stormwater fees – including many of the cases discussed in this white paper – will help to provide utilities with a base of knowledge to best defend their own programs.

Although beyond the limited scope of this paper, it is also important to understand that another motivating factor for legal challenges to stormwater fees is a lack of public understanding and political support. Accordingly, MS4 permittees should develop and maintain a public outreach and education program when creating, implementing and determining the best funding methodology.[19] Public outreach, education, and involvement are also minimum control measures necessary for compliance with the MS4 permit.[20]

Proposed Phase II Rule

Option 1 - Traditional General Permit Approach

- General Permit contains all substantive requirements

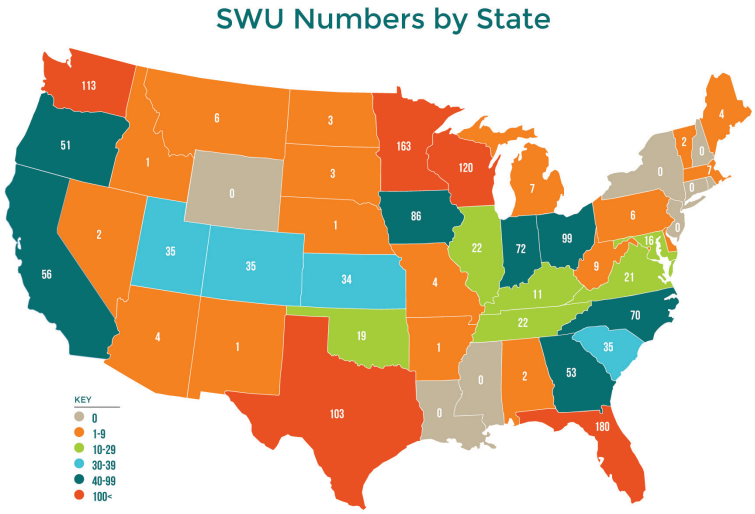
Option 2 – Procedural Approach

- Procedural requirements added to Phase II regulations requiring permitting authorities to publicly notice and take comment on proposed NOIs submitted by Phase II MS4s for coverage under General Permit

Option 3 – Hybrid Approach

- Would enable permitting authority to choose the Traditional General Permit or Procedural Approach, or to implement a combination of both

To the extent possible, utilities should attempt to pro-actively avoid legal challenges and political opposition by involving the public and engaging local leaders and elected officials from the outset when creating the utility and establishing the funding mechanism. An adequately funded and properly administered stormwater program can have profound benefits for a community including flooding abatement/reduction, drinking water supply enhancement, erosion control, drought condition alleviation, water quality improvement, aquatic life protection, and fishing/recreation benefits, all of which result in both economic and quality of life improvements. Ongoing communication regarding these economic and environmental benefits, along with the equities



Source: Western Kentucky University 2013 Stormwater Utility Survey

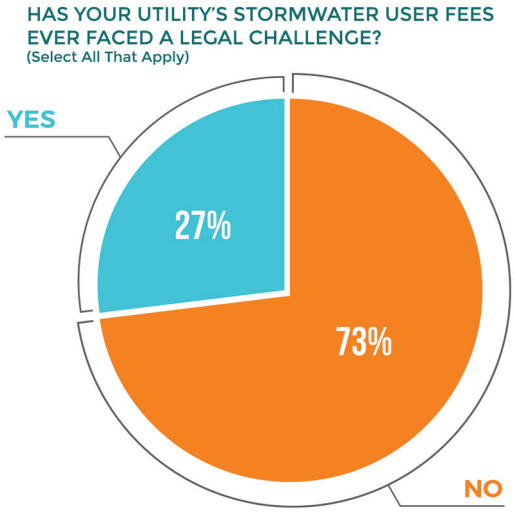
Legal Challenges

A. Overview

In its 2013 Stormwater Utility Survey, Western Kentucky University identified 72 legal challenges to stormwater utilities in the United States. Based on the survey results at that time, only 16 legal challenges had resulted in unfavorable decisions. In 44 cases, the stormwater utility prevailed.

B. Key Case Analysis And Emerging Trends

Legal challenges typically fall into two main categories: (1) Authority to Enact, Implement and Fund Program; and (2) Legality of Financing Mechanism and Methodology.

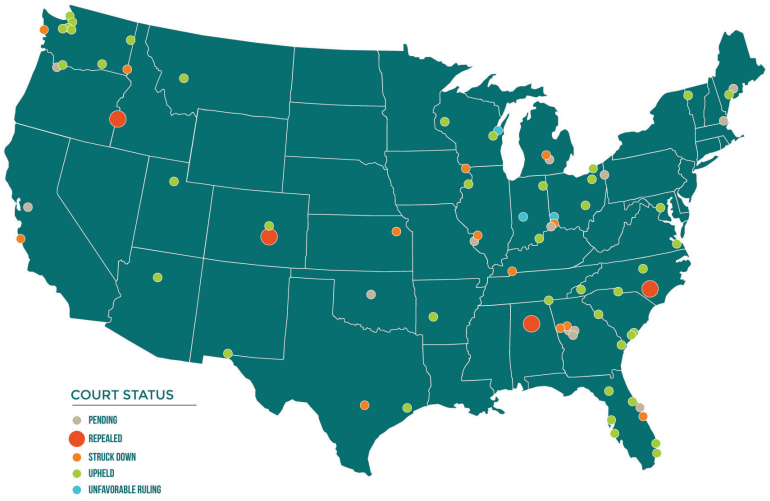


Source: 2016 Stormwater Utility Survey, Black & Veatch

of the fee methodology, will prove to be very worthwhile.

When opposition to a fee program does reach the courts, there is always the potential that a program or fee could be struck down, leaving a utility in the position of being legally responsible to comply with the CWA yet unable to administer and fund a stormwater program. In addition, opponents may be successful in getting local and state legislation passed restricting the ability to fund these mandated programs. As such, it is imperative that stormwater utilities do their "legal homework" – including all relevant laws and previous cases in their state on the issue of stormwater fees – to ensure the best chance of success for a fee program.

Challenges 2013



Source: Western Kentucky University 2013 Stormwater Utility Survey

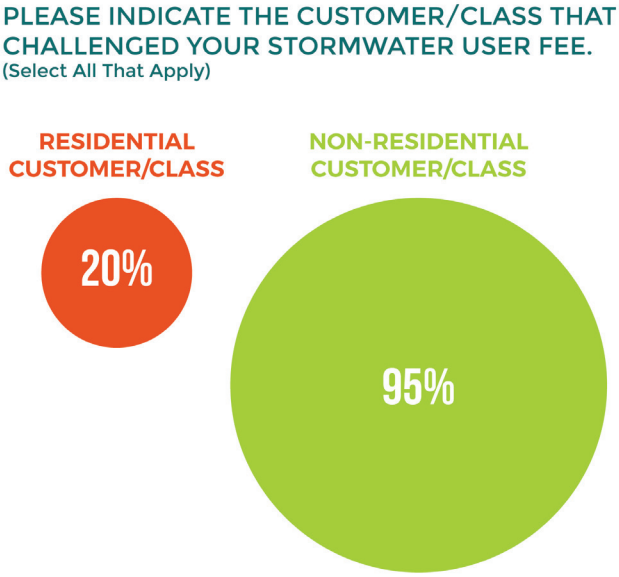
1. Authority to Enact, Implement and Fund Programs

Authority for a local or regional agency to enact and administer stormwater programs and assess user fees is most commonly derived from an enabling statute enacted by the state legislature or via the state's constitution or charter.

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.[21] This authority may result from statute (more than half) or caselaw. In the absence of either an enabling statute or caselaw, the home rule regime may delegate adequate self-governing authority to authorize local governments to create stormwater

utilities. If authority is unclear, local governments can request an opinion from the state Attorney General for a determination of authority.[22] Once authority is established, the utility will need to enact local ordinances to enable the program and fee.[23] Authority-based legal challenges are dependent upon the structure of the stormwater entity and the laws that enable and authorize its existence and operation. The basis for such challenges will vary by state and may even vary within a state. Thus, it is difficult to draw generalities from these cases.

Utilities should carefully review the entire legal framework authorizing the program and fee as well as any binding caselaw and persuasive precedent. If the grant of authority is ambiguous or questionable, utilities should consider requesting a state Attorney General opinion and/or working with the state legislature to make the grant of authority more explicit.

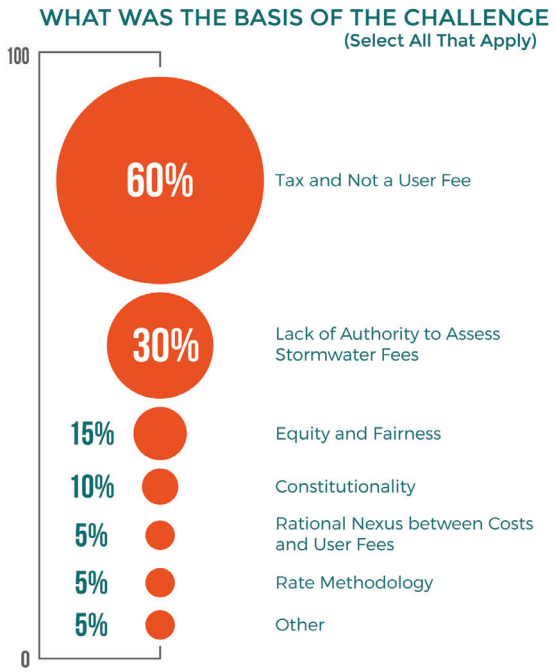


Source: 2016 Stormwater Utility Survey, Black & Veatch

Section **C. Cases** provides summaries of several cases dealing with the authority issue, which are depicted with an "A".

a. Sovereign Immunity

There have also been numerous challenges to the authority of local and regional agencies to impose stormwater fees on federal, state and Indian tribal property. Cases have dealt extensively with the question of whether the CWA waives sovereign immunity with regard to imposition of fees on these properties. Section C. Cases addressing sovereign immunity are marked "SI".



Source: 2016 Stormwater Utility Survey, Black & Veatch

In January 2011, Congress passed an amendment to the CWA clarifying federal responsibility for municipal stormwater charges.[24] Prior to the amendment, there was debate as to whether section 313(a) of the CWA[25] divested the immunity of federal agencies with respect to stormwater charges. NACWA played a critical role in securing Congressional passage of the stormwater fee amendment through its aggressive legislative advocacy efforts.

There is some question, however, as to the Amendment's application to pre-2011 amounts. For example, in 2012, the United States District Court for the Western District of Washington in United States v. Cities of Renton and Vancouver embraced arguments made by NACWA in its supporting brief, and held that the 2011 amendment to the CWA clarifying federal responsibility for municipal stormwater charges also applies to fees billed prior to the amendment's enactment. The court found that the amendment was a clarification of a pre-existing waiver of federal sovereign immunity for stormwater fees, requiring federal payment for pre-2011 unpaid amounts: "legislative history and statutory text demonstrate that even before the Stormwater Amendment, the Clean Water Act waived the government's sovereign immunity and was clear in the requirement that the government pay reasonable service

Cases dealing with the waiver of sovereign immunity for Indian tribal land and state property most often turn on whether the court deems the stormwater charge to be a fee or a tax.[26]

Back to Contents Page

charges." The court also stated that the amendment "merely stresses the government's existing responsibility to pay stormwater system fees by setting down common, long-standing requirements for the reasonableness of regulatory fees....Thus, it is clear 'in light of traditional interpretive tools' that Congress waived the Federal Government's immunity from reasonable service charges prior to January 4, 2011."

In contrast, a 2013 decision from the United States Court of Federal Claims in DeKalb County, Georgia v. United States was directly at odds with the Cities of Renton and Vancouver case. In DeKalb County, the court held that the amendment to the CWA requiring the federal government to pay reasonable stormwater charges could not be treated as a clarification of an earlier waiver with retroactive effect because the former version of the CWA did not waive the government's sovereign immunity for stormwater management charges, which the court considered to be taxes. However, the court also held that the 2011 amendment clearly obligates federal government facilities to pay local stormwater charges – regardless of whether they are classified as a "fee" or a "tax" – that have been billed after the amendment was enacted into law.

The issue of federal government responsibility for payment of stormwater fees accruing prior to January 2011 will become less and less of an issue as time passes and older delinquencies are collected or written off.

2. Legality of Financing Mechanism and Methodology

Similar to authority for the stormwater program, the legality of a specific financing mechanism will depend upon state law.[27] Cases challenging the legality of stormwater fees fall into two primary categories: (1) challenges to the fees as an illegal tax, and (2) challenges to the methodology used to calculate rates.

a. Fee vs. Tax

The majority of challenges to stormwater programs and fees involve the question of whether the stormwater charge is a user fee or a tax. Most stormwater utilities/municipalities do not have the authority to assess taxes; therefore, if a stormwater fee is deemed a tax it will be struck down as unauthorized. In such situations, it may be necessary to seek voter or legislative approval for a fee even if designed to be service-based. Courts in the majority of recent cases have ruled that stormwater assessments are user fees. These positive decisions have occurred in Colorado, Florida, Georgia, Kentucky, Illinois, South Carolina, Tennessee and Washington. Although states have different standards for distinguishing between fees and taxes, courts tend to focus on common factors, which are discussed in more detail below.[28]

Common factors considered by courts:

1. Whether the purpose of the fee is to regulate or collect revenue
2. Whether the revenue generated is segregated or allocated exclusively to regulating the activity or entity being assessed;
3. Whether the fee benefits those it is imposed upon;
4. Whether the fee is a fair approximation of the cost to the government and the benefit to the individual fee payer or the burden to which they contribute; and
5. Whether the rate is uniformly applied.

Equivalent Residential Unit (ERU)

(Also known as Equivalent Service Unit (ESU) method)

- >80% of all SWUs use ERU method
- Based on how much impervious area is on parcel, regardless of the total area of the parcel
- Method based on impact of a typical single family residential (SFR) home's impervious area footprint
- Review of representative sample of SFR parcels to determine impervious area of typical SFR parcel
  - Amount is called one ERU

Purpose of the Fee

Courts usually deem the charge to be a user fee if imposed by a local government or stormwater utility on a defined subset of citizens and/or if the fee is assessed to regulate conduct, the revenues from which are used to offset the costs to the local government or utility. Courts will likely determine that the charge is a tax if it is imposed upon all, or nearly all, citizens or properties for a general public purpose, i.e., charge is used to collect revenue. *See City of Lewiston v. Gladu, Storedahl Properties, LLC v. Clark County, Tukwila School Dist. No. 406 v. City of Tukwila , Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, Bolt v. City of Lansing and Jackson County v. City of Jackson.*

Benefits of the Fee

There is a trend in caselaw upholding stormwater charges as user fees even if the benefit is indirect or immeasurable for those upon which the fee is imposed. However, there are state courts(e.g., Michigan - *see Bolt v. City of Lansing and Jackson County v. City of Jackson*) that have held that the benefit needs to be direct: "A true 'fee' ... is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed." *Bolt, 459 Mich. at 165, 587 N.W.2d 264.*. Most utilities faced with this type of challenge can justify the benefit as a general watershed benefit – all those within a given watershed benefit from adequate stormwater management (*see City of Lewiston v. Gladu, Storedahl Properties, LLC v. Clark County, Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District and Mcleod v. Columbia County*: court acknowledged a "trend ... in favor of upholding fees that confer intangible benefits on both those who are assessed and those who are not").

Intensity of Development (ID)

- Based on percentage of impervious area relative to an entire parcel's size
- All parcels (including vacant/undeveloped) are charged a fee on the basis of their intensity of development defined as the percentage of impervious area of the parcel

Cost to the Government

Courts also frequently evaluate whether there is a fair approximation of the cost to the government and the benefit to the individual fee payer or the burden to which they contribute. In other words, there must be a correlation between the revenue generated by assessment of the stormwater fee and the costs to administer the stormwater program and fund stormwater related projects. If the revenue generated is considered excessive (far exceeding the actual costs for the utility to administer the program), the fee will likely be deemed a tax. The amount collected and expended in a given year need not balance out exactly but the differential between expenses and revenues must be reasonable. Likewise, if revenues are diverted to fund programs and projects that are unrelated to stormwater, courts have consistently ruled that the fee is a tax. Thus, should a utility's revenues exceed its expenses, it should not allocate excess revenues to other areas unrelated to stormwater. See Zelinger v. City and County of Denver, Lewiston Independent School Dist. No. 1 v. City of Lewiston, Smith Chapel Baptist Church v. City of Durham, and Bolt v. City of Lansing.

Equivalent Hydraulic Area (EHA)

- Based on the combined impact of a parcel's impervious and pervious areas in generating stormwater runoff
- Impervious area is charged at a much higher rate than pervious area

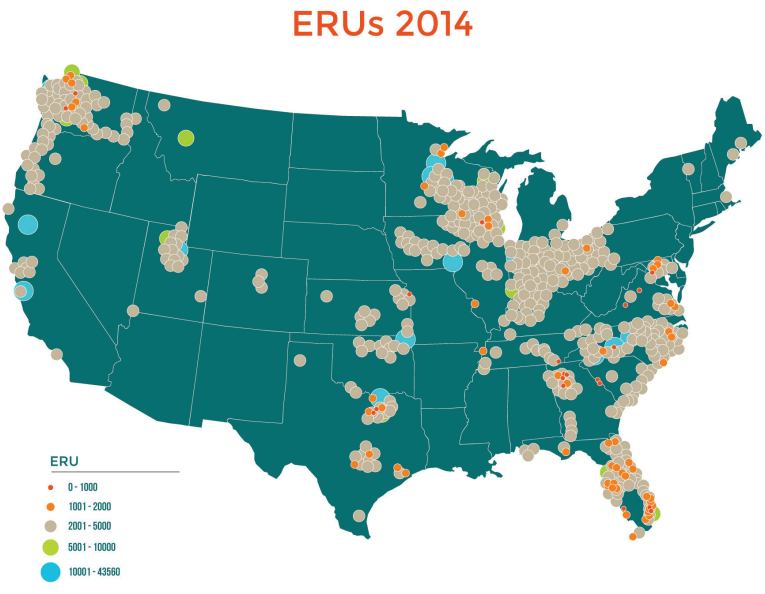
Despite the existence of these common factors, it is critical that each utility research the caselaw and precedent in its home state/jurisdiction to determine the exact factors and how the significance of each is weighed by courts.

The cases listed in Section C. Cases that address the fee v. tax issue have a "$".

b. Fee Methodology

Another commonly litigated issue is the methodology employed for determining and assessing stormwater fees. Mechanisms to fund stormwater programs include stormwater user fees, property taxes, a local government's general fund, inspection and permit fees, and land development fees and taxes. The bulk of litigation involves challenges to user-fee funded programs.

With regard to stormwater user fees, the Water Environment Federation's publication User-Fee-Funded Stormwater Programs (2013, 2nd ed.) provides a thorough analysis of the development and imple-



Source: Western Kentucky University 2014 Stormwater Utility Survey

Back to Contents Page

mentation of such programs. Impervious surface has a direct relationship with – and is the most important factor influencing stormwater runoff. It is a major component in the three most commonly used methods to calculate user fees – Equivalent Residential Unit (ERU), Intensity of Development (ID), and Equivalent Hydraulic Area (EHA). In its Region 1 and 3 Funding Stormwater Programs fact-sheets, EPA provides an explanation of each method with advantages and disadvantages.[29]

Numerous technical studies in engineering literature validate the equity of impervious surface based fee methodology, so it is not surprising that it has become the industry norm.[30] The methodology has been recognized by a number of state courts as a method to fairly and equitably apportion the cost of stormwater services to the amount of runoff generated on improved property. In City of Lewiston v. Gladu, the Supreme Judicial Court of Maine held that the city's impervious surface-based fee system makes a "fair approximation" of the benefit each property owner receives via having stormwater managed and water quality protected. The Supreme Court of North Carolina upheld the impervious surface rate methodology in Smith Chapel Baptist Church v. City of Durham "as rationally related to the amount of runoff from each lot." The court held that methodology "was not an arbitrary exercise of the City's statutory authority. Courts are usually reluctant to second guess methodology if it is based on the best available data and accepted professional methodologies (see Homewood Village, Inc. v. Unified Gov. of Athens-Clarke County).

Rate methodology cases in the following section are flagged with an "M".

c. Cases

This subsection provides a non-exhaustive list and description of stormwater program and fee cases grouped in categories based on whether the decision was positive (meaning that the court upheld the utility's program), negative or still pending before the court. More detail is provided on certain cases deemed to be of greater legal significance, particularly those that include substantive analyses of factors likely to be relevant in other matters, such as the factors for determining whether a stormwater fee constitutes a tax.

POSITIVE PRECEDENT

CASE LEGEND

Authority issue - A Sovereign immunity - SI Fee v. tax issue - $ Rate methodology - M

Northeast Ohio Regional Sewer District (NEORSD) v. Bath Township, et al.

2015 OHIO 3705, Supreme Court of Ohio, September 15, 2015

A

Issue(s)/Question(s) Presented: Challenge to a municipal stormwater management program to determine whether NEORSD is authorized to administer the stormwater program and collect a fee pursuant to state statute or charter.

Holding: The Ohio Supreme Court upheld NEORSD's municipal stormwater management program and fee.

Summary: The case involved a challenge to a municipal stormwater management program instituted by NEORSD. NEORSD was successful in defending its stormwater fee program at the state trial court level. However, in September 2013 a state appellate court issued a ruling that NEORSD had no authority to enact its Regional Stormwater Management Program (SMP) and was, therefore, enjoined from implementing the program.[31] The court further held that NEORSD lacked requisite authority under state statute or the District's Charter to enact a stormwater fee and is enjoined from implementing, levying and collecting such fee. NEORSD appealed the decision to the state supreme court.

Back to Contents Page

In its 5-2 decision, the Ohio Supreme Court held that "the issues in this case are exceedingly straightforward: (1) is the Sewer District's regional stormwater management program authorized by statute and by its charter and (2) is the attendant fee structure authorized by statute and by the charter. We answer both questions in the affirmative." In December 2015, the Ohio Supreme Court denied a request for reconsideration of its September ruling.

Stop Stormwater Utility Association v. Board of County Commissioners of Adams County

District Court Case No. 2013 CV 32147, Adams County, Colorado, February 9, 2015

Issue(s)/Question(s) Presented: Whether the stormwater fee assessed by the County was a new or increased tax imposed without voter approval and therefore in violation of the state Taxpayer's Bill of Rights (TABOR).

Holding: Summary judgment granted to County. Stormwater utility fee was exempt from TABOR requirements as it was a properly imposed fee rather than a tax.

Summary: Association of property owners brought suit complaining that the County's stormwater fee was an illegal tax that violated the state Taxpayer's Bill of Rights (TABOR) prohibiting new or increased taxes without voter approval. On cross motions for summary judgment, the court found in favor of the County, holding that the stormwater utility and associated fee were exempt from the TABOR requirements and therefore not an illegal tax.

As the court explained, analysis of whether an entity is subject to TABOR requires a three-part analysis to determine (1) if the entity is government owned, (2) if the entity is a business, and (3) whether the entity receives 10 percent or more of its revenues from state and local government grants. The court determined that the stormwater utility was a government owned separate water resource utility, as established both by enabling statutes and surrounding case law. In analyzing whether the utility was a business, the court evaluated the purpose of raising the revenue, the relationship between the charge and service, and the language of the enabling statute, finding a clear link between the provision of stormwater services and the impervious surface area based fee. The court explained that because "there is a reasonable relation between the overall cost of providing the service and is imposed on those reasonably likely to benefit from or use the service because the charge is determined by the surface area of impervious surfaces, including roofs and pavement," the utility is a government owned business for purposes of TABOR. Finally, the court determined that the utility received less than 10 percent of its revenue came from state and local government grants, and the utility was therefore exempt from TABOR.

> "[T]here is a reasonable relation between the overall cost of providing the service and is imposed on those reasonably likely to benefit from or use the service because the charge is determined by the surface area of impervious surfaces, including roofs and pavement."

Homewood Village, Inc. v. Unified Gov. of Athens-Clarke County

292 Ga. 514, Supreme Court of Georgia, March 4, 2013 (Homewood Village I)
2015 WL 5559853,*3 (Middle Dist. Ga. September 18, 2015)(Homewood Village II) Order, Case No. 3:15-CV-23 (Middle Dist. Ga. April 1, 2016) (Homewood Village III)

Issue(s)/Question(s) Presented: Whether the stormwater fee assessed by the Unified Government was an unconstitutional tax that could not be assessed involuntarily.

Holding: The Supreme Court affirmed the trial court's holding that the Unified Government's stormwater ordinance imposed a permissible fee and held that summary judgment in favor of the Unified Government was properly granted.

Summary: The Unified Government brought an action against an apartment complex owner to collect unpaid stormwater fees, and the complex owner counterclaimed seeking a declaratory judgment that

the stormwater fee was actually an unconstitutional tax. The trial court issued summary judgment in favor of the Unified Government.

The Georgia Supreme Court affirmed, following its precedent in *McLeod v. Columbia County*.[32] The Court reasoned that like the ordinance at issue in McLeod, the Athens-Clarke County ordinance was a fee "intended to be and … clearly described as a charge for a particular service provided;" that it was "based on the contribution to the problem;" and that fee payers would "receive some benefit from the service for which they [were] paying."[33] Specifically, the Court explained that because the fee applied only to owners of developed land whose property would contribute stormwater runoff to the system, and could be reduced through private stormwater control measures, the charge was clearly tied to the services provided by the utility and the corresponding benefit received by property owners. Following the Georgia Supreme Court's decision, the plaintiff filed a complaint with the U.S. District Court for the Middle District of Georgia, alleging that the stormwater fee is an unconstitutional tax, and that by collecting the tax, the Unified Government is violating the Fifth and Fourteenth Amendments of the U.S. Constitution. In a September 18, 2015 opinion, *Homewood Village, LLC v. Unified Gov't of Athens-Clarke County*, the district court determined that because the charge was a fee and not a tax, it could accept jurisdiction over the case under the Tax Injunction Act, 28 U.S.C. § 1341 (TIA).[34] The TIA prohibits district courts from enjoining, suspending, or restraining a state tax where a state remedy exists. Homewood Village II at *2. On the threshold question of whether the charge was a fee or a tax, the court concurred with the Georgia Supreme Court's analysis of the fee, finding that the factors used by the Court in Homewood Village I were nearly identical to the three-part test articulated in San Juan Cellular Telephone Co. v. Public Service Commission,[35] and that the fee was therefore not a tax and jurisdiction was not prohibited by the TIA.

> **"[T]he Athens-Clarke County Ordinance, (1) establishes a Stormwater Utility and imposes a utility charge for the stormwater management services; (2) applies to residential and non-residential developed property, but not to undeveloped property, which actually contributes to the absorption of stormwater runoff, and the cost of the stormwater services is properly apportioned based primarily on horizontal impervious surface area; and (3) the properties charged receive a special benefit from the funded stormwater services, which are designed to implement federal and state policies through the control and treatment of polluted stormwater contributed by those properties."**[22]

On April 1, 2016, the Middle District of Georgia dismissed the case on cross-motions for summary judgment and judgment on the pleadings.[36] The court declined to reach the merits, instead dismissing the case pursuant to the comity doctrine, under which federal courts refrain from interfering with the fiscal operations of the state and local governments in cases where federal rights can be preserved through other means.

State of Maine, et al. v. Greater Augusta Utility District

Docket No. AP-11-052, Maine Superior Court, March 18, 2013

M

Issue(s)/Question(s) Presented: Whether the utility equitably allocated rate increases in accordance with its charter language requiring equitable allocation of operating costs between sewerage service and stormwater service customer classes. The case specifically addresses sewer and stormwater fee allocation for combined sewer overflow projects.

Holding: The Superior Court held that the utility's rate model and allocation was equitable.

Summary: The City of Hallowell and several sewer customers filed suit against the Greater Augusta Utility District (GAUD) regarding how costs were divided between sewer and stormwater customers. GAUD does not provide

stormwater services to the City of Hallowell. GAUD's charter requires that costs be equitably allocated between sewer service and stormwater service, and that the costs of stormwater service be borne entirely by Augusta ratepayers. GAUD's charter governs sewer and stormwater rates.

In 2011, GAUD adopted a new rate model that resulted in rate increase of approximately 30 percent for sewer and stormwater customers. Plaintiffs filed suit challenging the underlying allocation of flow measured by GAUD at the treatment plan (gallons of flow generated by sewer customers v. gallons from stormwater flow). In particular, the plaintiffs alleged inequitable allocation of sewer fees to the Bond Brook capital improvement project to eliminate combined sewer outflows in Augusta.

GAUD contended that it acted in accordance with its charter and performed a detailed review to ensure that stormwater-only costs were charged to stormwater customers. The project had only a small portion of the cost allocated solely to stormwater control and only that portion was entirely borne by stormwater customers. The remaining costs were allocated based upon estimated system-wide pro rata flow of sewer and stormwater using 10 years of flow data. The same system-side methodology was used to allocate operations and maintenance costs to the different customer classes. The court rejected the plaintiffs' challenges and affirmed every aspect of the 2011 rate model holding that GAUD's experts "have more experience and knowledge with regard to GAUD's system than the plaintiffs' experts."

United States v. Cities of Renton and Vancouver

2012 WL 1903429, United States District Court, W.D. Washington, May 25, 2012

SI

Issue(s)/Question(s) Presented: Federal government responsibility for payment of stormwater fees incurred prior to 2011 CWA amendment.

Holding: Federal government facilities are responsible for payment of municipal stormwater fees, including fees billed prior to January 2011 amendment to the CWA clarifying federal responsibility for payment.

Summary: The case stems from an attempt by the cities of Vancouver and Renton to collect over $100,000 in past due stormwater fees from a federal government agency with facilities within the cities' respective stormwater service areas. The agency refused payment of the fees and in July 2011 the U.S. Department of Justice, acting on behalf of the federal agencies, filed a lawsuit against Vancouver and the City of Renton requesting a declaratory judgment that the stormwater amendment does not apply to past due stormwater amounts.

In 2011, Congress passed an amendment to the CWA clarifying federal responsibility for municipal stormwater charges. The district court found that the amendment was a clarification of a pre-existing waiver of federal sovereign immunity for stormwater fees, and, therefore, required payment for pre-2011 unpaid amounts.

City of Lewiston v. Gladu

40 A.3d 964 2012 ME 42, Supreme Judicial Court of Maine, March 27, 2012

$ M

Issue(s)/Question(s) Presented:
1. Whether city's stormwater assessment was a fee or a tax; and,
2. Whether impervious surface based rate methodology was valid.

Holding: The Supreme Judicial Court held that city's stormwater assessment was a fee, rather than a tax and that the methodology was valid.

Summary: In 2011, the City of Lewiston sued a property owner seeking payment of overdue stormwater utility fees. The property owner challenged the legality of the fees. The Maine Superior Court issued a decision rejecting those claims, holding that the city's 2006 ordinance was valid and authorized the program and confirmed the legitimate purpose of the stormwater utility as funding expenses necessary to provide stormwater management services to comply with federal and state water-quality requirements. The trial court also upheld the city's use of "impervious surface" as the basis for determining the fee applied to a property. As a result, the court issued judgment for the city for $7619.70 in delinquent stormwater fees, $1197.85 in interest, and $825 in penalties, and awarded the city $2539.90 in attorney fees and $350 in collection costs. The property owner appealed the decision.

The Maine Supreme Judicial Court decision fully affirmed the lower court's decision.

With regard to the tax vs. fee issue, the Supreme Court applied a four-factor test:

1. Whether The Assessment Raises Revenue or is for a Regulatory Purpose

The property owner argued that the purpose of the assessment is to raise revenue because forty-four percent of the utility's budget goes toward debt services, including debts acquired by the City prior to the creation of the utility. The court held that the property owner failed to provide evidence that the debt acquired was not used to build or maintain stormwater infrastructure. The court held that the stormwater fee met the regulatory-purpose requirement and "[t]he fact that the Utility acquired stormwater infrastructure debt from the City does not change the fact that the Utility is using the assessment to cover the costs of regulating stormwater runoff, and part of those regulatory costs include maintaining stormwater infrastructure. Because all of the Utility's expenses are for maintaining or administering the Utility, this factor weighs in favor of concluding that the assessment is a fee and not a tax."

"[A] fee must be only a "fair approximation" of the cost to the government, even if that fee is in some instances greater than the government's actual costs."[32]

2. Direct Relationship Between the Fee and the Benefit Conferred

The court held that there was no dispute that stormwater runoff contributes to water pollution, nor that the utility provides benefits to the public by regulating runoff. The property owner's argument was that he does not receive an individual benefit that is not conferred to the public at large and that the assessment is not related to the utility's purpose of providing better water quality because the assessment is calculated by area of impervious surface, which relates to the quantity, not the quality.

The court agreed with the city that basing assessments on amount of impervious surface is a widely accepted and recommended method of calculating fees, and that the quantity of stormwater runoff is directly related to water quality and, therefore, there was a direct relationship between the assessment of the fee and the benefit conferred. Next the court analyzed whether there was enough of an individualized benefit to the property owner to warrant upholding the assessment as a fee. The court relied on the McLeod Georgia Supreme Court decision in Mcleod v. Columbia County, which acknowledged a "trend ... in favor of upholding fees that confer intangible benefits on both those who are assessed and those who are not."[37] The court held that there was a direct relationship between the fee paid and the benefit conferred if:

> [T]he fee applies to residential and non-residential developed property, but not to undeveloped property, which actually contributes to the absorption of stormwater runoff; the properties charged receive a special benefit from the funded stormwater services, which are designed to implement federal and state policies through the control and treatment of polluted stormwater contributed by those properties; and, the cost of those services was properly apportioned based primarily on horizontal impervious surface area.[38]

The court held that "viewing this factor in light of the recent trend toward upholding fees that 'confer intangible benefits on both those who are assessed and those who are not,' …, it weighs in favor of upholding the stormwater fee."

3. Voluntariness

The court then turned to the issue of voluntariness, which concerns the availability of credits—if the property owner has the ability to avoid the assessment if he wishes to do so. The court held that the assessment is not involuntary simply because the costs of avoiding the assessment (via credits) are high. The court concluded that the available credits, which provide for up to 100% fee reduction, create a voluntary fee with the caveat that the court is not presented with the question of whether a fee is voluntary if the applicable ordinance does not include a 100% fee credit.

4. A Fair Approximation of the Cost to the Government and the Benefit to the Individual

The court held that the city demonstrated through its financial reports that the assessment is based on a "fair approximation" of the cost of administering the utility and the city's impervious surface-based fee system makes a

Back to Contents Page

"fair approximation" of the benefit each property owner receives via having stormwater managed and water quality protected.

El Paso Apartment Ass'n v. City of El Paso

415 Fed.Appx. 574, United States Court of Appeals, Fifth Circuit, March 9, 2011

Issue(s)/Question(s) Presented: Landowners challenged stormwater drainage fee asserting that the fee:
1. Violated the Equal Protection Clause of Fourteenth Amendment due to different methods of measurement of "impervious cover"; and
2. Was an unconstitutional occupation tax under Texas law.

Holding: The Court of Appeals held that:
1. Water utilities public service board's use of different methods to measure "impervious cover" of residential and nonresidential properties did not violate Equal Protection Clause; and
2. Stormwater drainage fees were not unconstitutional occupation tax under Texas law.

Summary:
1. Owners and managers of apartment complexes in El Paso, represented by their trade association, challenged a stormwater drainage fee assessed on their properties arguing, inter alia, that it violated Equal Protection Clause of Fourteenth Amendment and was an unconstitutional occupation tax under Texas law.

The apartments argued that the city's decision to measure the actual square footage for some properties, including driveways, sidewalks, and parking lots, but estimate for other properties was arbitrary and irrational. The court held that the city had not granted an exemption or discount to such properties but had "no effective way to measure the actual area of impervious cover and include it on the drainage bill for residential properties, so the [city] instead used an estimate of the impervious cover on residential properties."

The court reasoned that "the amount of impervious cover on a particular piece of property is directly related to that property's use of the stormwater drainage system" and concluded that given the legitimacy of the city's objective, the "use of two different methods to measure the impervious cover on the properties in the City is rationally related to its decision to charge each property for stormwater drainage services."

2. The court then turned to the fee v. tax question:

> To determine whether a fee is in reality an occupation tax, Texas courts consider "whether the primary purpose of the exaction, when the statute or ordinance is considered as a whole, is for regulation or for raising revenue." City of Houston, 879 S.W.2d at 326. "Revenue," as used by Texas courts, "means the amount of money which is excessive and more than reasonably necessary to cover the cost of regulation." Producers Ass'n of San Antonio v. City of San Antonio, 326 S.W.2d 222, 224 (Tex. Civ.App.–San Antonio 1959, writ ref 'd n.r.e.); see also Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 461 (Tex.1997) ("The critical issue is whether the assessment is intended to raise revenue in excess of that reasonably needed for regulation."). Whether a fee is reasonably necessary to cover the cost of regulation is a question of fact. City of Houston, 879 S.W.2d at 326.

The court held that there was no evidence to suggest that the amount collected by the city was unreasonable or that it did not represent the actual cost to provide stormwater drainage services. The court next addressed the Apartments' argument that the fee was not reasonably related to stormwater drainage services on their properties and that the court should evaluate the fees on an individual basis to determine whether the amount paid directly benefits each individual payor. The court responded: "While Texas courts do require that the amount of the fee be related to the level of regulatory or licensing services received by the payers, they do not require perfect correspondence between the fee charged and the service received." The court held that the Apartments had again provided no evidence in support of the argument that the amount charged exceeds the cost to provide stormwater services to the properties. In response to the Apartments' claim that the drainage fee is unrelated to stormwater drainage services because a certain percentage is allocated to green projects (acquisition of open spaces, greenways, arroyo and wilderness areas), the court held that the Apartments offered no evidence that the acquisition of open space is

Back to Contents Page

unrelated to stormwater management.

The court then addressed the Apartments' assertion that certain properties had drainage ponds and, therefore, presented little risk of creating stormwater runoff that would burden the drainage system. The court noted that the city had a credit policy and exemption program that, upon application and approval, would provide a credit or complete exemption to property owners of land with drainage ponds. In refuting this argument, the court stated "the Apartments do not contend that any of their properties place no burden on the drainage system, or that they applied for and were denied an exemption for any of their properties."

"While Texas courts do require that the amount of the fee be related to the level of regulatory or licensing services received by the payers, they do not require perfect correspondence between the fee charged and the service received."

In conclusion, the court held that the stormwater drainage fee did not produce revenue in excess of the cost necessary to provide stormwater drainage services and there was no evidence to suggest that the fee was not reasonably related to the services provided. The court, therefore, concluded that the drainage fees were not unconstitutional occupation taxes.

Storedahl Properties, LLC v. Clark County

143 Wash.App. 489,
Court of Appeals of Washington,
Division 2, March 11, 2008

$

Issue(s)/Question(s) Presented: Whether stormwater charge is a user fee or tax.

Holding: The Court of Appeals upheld the stormwater charge as a user fee because:
1. The primary purpose of the charge was to fund activities directly related to the public health and safety impacts of stormwater runoff;
2. The county allocated charge only to authorized purposes; and
3. A direct relationship existed between charge and services provided by the charge.

Summary: Landowner brought action to contest county's clean water charge, alleging that charge, which was based on stormwater runoff, was an unconstitutional tax. The Superior Court, granted the county's motion for summary judgment, and landowner appealed.

The Court of Appeals applied a three-part test to determine whether the charge was a regulatory fee or a tax: "(1) whether the primary purpose is to raise revenue (tax) or to regulate (regulatory fee); (2) whether the money collected must be allocated only to the authorized regulatory purpose; and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer." The court held that with regard to the first factor, the applicable legislative language expressly recognized the public health and safety impacts of stormwater runoff and clearly specified the activities that could be funded.

For the second factor, the court noted that the county can use the funds "only for the cost and expense of regulating, monitoring and evaluating storm water impacts; maintaining and operating storm water control facilities; educating the public on issues related to storm water; and all or any part of the cost and expense of planning, designing, establishing, acquiring, developing, constructing, and improving any such facilities." Therefore, the court held the charge "more closely resembles a regulatory fee than a property tax." For the final factor, the court relied on the test in Tukwila Sch. Dist.,[39]140 Wash.App. at 749: as long as the rate is reasonably based on the amount of the property owner's contribution to the problem, the fee is directly related to the service provided. The court upheld the fee in question pursuant to the reasonably-based test.

Back to Contents Page

Wessels Co., LLC v. Sanitation Dist. No. 1

238 S.W.3d 673, Court of Appeals of Kentucky, March 9, 2007

A

Issue(s)/Question(s) Presented:
1. Whether sanitation district had authority to establish stormwater drainage plan and program; and
2. Whether district had statutory authority to impose a fee.

Holding: State statute providing that sanitation district may be established to develop and implement plans for collection and disposal of storm drainage authorized district to implement stormwater drainage plan, and district had statutory authority to impose surcharge for stormwater drainage plan.

Summary: In response to federal regulations, the Kentucky General Assembly in 1994 amended the enabling state statute by adding a new subsection to the stated purposes for which sanitation districts may be established: sanitation districts can be established for the purpose of development and implementation of "plans for the collection and disposal of storm drainage."

The Kentucky Court of Appeals upheld the trial court decision that the state statute "clearly and unambiguously expressed the General Assembly's intent that among the proper functions of sanitation districts is the development and implementation of 'plans for the collection and disposal of storm drainage.' " The court reasoned "[h]aving concluded that implementation of a storm water drainage system is a proper function of the district, it would be absurd to suggest that it could not impose a surcharge to finance a service required by federal regulation."

> "We believe the real purpose of the fee is, like other utilities, to provide a service to and relieve a burden created by property owners whose impervious surfaces contribute directly to runoff and pollution problems in Tukwila."

The court held that the state statute provided the requisite authority for the fee:

> The district may establish a surcharge or other rate, fee, or charge to be made applicable to users in areas where facilities are to be acquired, constructed, or established, and to amortize part or all of the costs thereof….

Tukwila School Dist. No. 406 v. City of Tukwila

140 Wash.App. 735 167 P.3d 1167, Washington Court of Appeals, Div. 1, June 11, 2007

$

Issue(s)/Question(s) Presented: Whether stormwater assessment was a user fee or tax.

Holding: The Court of Appeals held that the:
1. Primary purpose of charge was to regulate runoff, supporting a finding that the charge was a fee, not a tax;
2. Money expended on design and construction of capital facilities was allocated exclusively to regulating the activity being assessed; and
3. Charge was directly related to city's services of controlling storm and surface water runoff.

Summary: School district brought action against city, seeking declaratory judgment and tax refund, and challenging city's storm and surface water utility charge as an unlawful tax.

The court held that the stormwater fee met the regulatory-purpose requirement when it was enacted to "provide... revenue to construct, reconstruct, replace, improve, operate, repair, maintain, manage, administer, inspect, enforce facilities and activities for the storm and surface water utility plan" and to "relieve a burden created by property

Back to Contents Page

owners whose impervious surfaces contribute directly to runoff and pollution problems." The court recognized that, because property owners contributed to water quality problems through stormwater runoff from their properties, the city could charge a fee to help "defray" the costs of ameliorating the problem. The court also concluded that "[t]he construction of capital facilities is a recognized regulatory activity."

Mcleod v. Columbia County

278 Ga. 242, 599 S.E.2d 152, Supreme Court of Georgia, June 28, 2004

A $

Issue(s)/Question(s) Presented:
1. Whether county was authorized to establish a stormwater utility and fee pursuant to the Home Rule section of the state constitution; and
2. Whether the charge was a user fee or tax.

Holding: The Supreme Court affirmed the lower court ruling and held:
1. County was authorized to establish stormwater utility and to impose a utility charge for the stormwater management services;
2. The charge was a fee, not a tax; and
3. The charge did not violate landowners' rights to due process or equal protection.

Summary: Landowners brought class action in state court against county board of commissioners for adopting an ordinance for a stormwater service charge. The Superior Court entered summary judgment in favor of county. Landowners appealed to the Georgia Supreme Court.

The Supreme Court held that the Home Rule section of the Georgia Constitution grants any county or municipality the power to provide the service of "[s]torm water ... collection and disposal systems." The court further held that the state General Assembly is authorized to enact general laws relative to such services, including statutes which permit the imposition of reasonable fees.

In accordance with general law OCGA § 36-82-62(a)(3), local governments may "prescribe, revise, and collect rates, fees, tolls, or charges for the services, facilities, or commodities furnished or made available by such undertaking...." Therefore, the court held that pursuant to the Home Rule section of the Georgia Constitution and general statutory law, the county was authorized to establish the stormwater utility and to impose a utility charge for the stormwater management services.

In its analysis, the court also acknowledged a "trend ... in favor of upholding fees that confer intangible benefits on both those who are assessed and those who are not."

Negative Treatment: Declined to follow by DeKalb County, Georgia v. United States, Fed.Cl., January 28, 2013.

City of Gainesville v. State, Department of Transportation

778 So.2d 519, District Court of Appeal of Florida, First District, March 5, 2001

A SI

Issue(s)/Question(s) Presented: Whether Department of Transportation's (DOT) sovereign immunity shields it from being required to pay stormwater utility charges.

Holding: The District Court of Appeal held that:
1. City could establish a stormwater management system as a traditional utility and finance it by collecting utility fees; and
2. Sovereign immunity would not insulate DOT from having to pay valid stormwater utility charges.

Summary: The court held that the city was authorized to establish the utility by the Florida Constitution, which grants municipalities "governmental, corporate and proprietary powers to enable them to ... render municipal services" and the right to "exercise any power for municipal purposes except as otherwise provided by law." In addition, the court noted that a special act of the Legislature express granted the city "full power and authority to provide public utility services of all kinds" and implicit "is the power to construct,

Back to Contents Page

maintain and operate the necessary facilities."

Finally, the court pointed to the statute enacted that authorizes the city to construct, operate and finance a stormwater management utility and "[c]reate one or more stormwater utilities and adopt stormwater utility fees sufficient to plan, construct, operate, and maintain stormwater management systems."

The court relied on state caselaw holding that the "imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment."

The court found that the statutes clearly granted municipalities the option of establishing stormwater management systems as traditional utilities and financing them by collecting utility fees and it was a valid exercise of the city's authority to fund a "stormwater management program by assessing the cost of the program to the beneficiaries based on their relative contribution to its need."

South Carolina v. City of Charleston

513 S.E.2d 97, Supreme Court of South Carolina, February 16, 1999

Issue(s)/Question(s) Presented:
1.Whether a stormwater charge was an authorized user fee or a tax; and
2. Whether city was authorized to impose stormwater fees on state facilities.

Holding: The court found that:
1. The stormwater charge was an authorized user fee; and
2. The fee could be imposed on state property.

Summary: The State of South Carolina brought a declaratory judgment action to determine whether the city was authorized to impose stormwater fees on state facilities pursuant to a state statute, S.C. Code Ann. § 48-14-10, which authorized local governments to establish a "stormwater utility" and to fund it either through a fee or a tax assessment. The City of Charleston created its utility by local ordinance, and opted to fund it through a fee. The state argued that although denominated a fee, the charge involved was really a tax. The state supreme court found that the plain language of the statute allowed local governments to fund the utility through either a fee or an assessment, and that the city had chosen to use a fee, which could properly be imposed on state property.

Vandergriff v. City of Chattanooga

44 F. Supp. 2d 927, United States District Court, E.D. Tenn, March 31, 1998

Issue(s)/Question(s) Presented:
1. Whether a stormwater ordinance imposing a fee was constitutional; and
2. Whether the fee was authorized.

Holding: The Court held that:
1. The stormwater ordinance imposed a fee;
2. The fee was authorized by state statute; and
3. Combined Sewer Overflows (CSOs) fall within the definition of storm water facilities.

Summary: City taxpayers challenged validity of a local stormwater ordinance on various state and federal constitutional grounds.

Plaintiffs argued, inter alia, that the city stormwater ordinance violates the enabling statute because the revenues generated were not "reasonable in amount" and claimed that the city improperly spent one half of the revenues collected on CSO projects and still had an $11.6 million surplus. The surplus was obtained through bond issues, was a restricted asset to only be used for stormwater capital

"[I]mposition of fees for the use of a municipal utility system is not an exercise of the taxing power, nor is it the levy of a special assessment."

Back to Contents Page

projects and would be disbursed as necessary to fund construction projects. The court held "Given the conclusion the CSO falls within the definition of storm water facilities and the evidence proffered by Defendants, the Court finds Plaintiffs have failed to prove the revenues generated are not reasonable in amount."

The court ruled that the ordinance imposed a fee, not at tax, because the charges were based on use of the storm-water system, and applying a portion of fees to construct or expand facilities as well as to defray cost of operating the system was explicitly authorized by state statute.

City of Littleton v. State

855 P.2d 448,
Supreme Court of Colorado,
En Banc, July 6, 1993

Issue(s)/Question(s) Presented: Whether "Aquifer Protection Areas" fee was a valid regulatory fee or an unconstitutional tax.

Holding: Court upheld the validity of the fee.

Summary: Court held that a fee charged for funding certain "Aquifer Protection Areas" was not an unconstitutional tax and would be upheld if it was reasonable and designed to cover only the costs of the program. In reaching this decision, the court relied upon an earlier Washington Supreme Court decision, in Teter v. Clark County[40], which held that charge for a county storm and surface water utility was not a tax but a valid regulatory fee.

Smith v. Spokane County

948 P.2d 1301,
Court of Appeals of Washington,
November 18, 1997

Issue(s)/Question(s) Presented: Whether stormwater charge was a service fee, tax or special assessment.

Holding: Court held that the stormwater charge was a valid service fee.

Summary: City sought to collect unpaid stormwater management fees from state-owned school properties. The Colorado Supreme Court found the charge was not a tax or special assessment, but a service fee reasonably designed to meet the overall costs of the service provided. The court also found that the portion of the fee used to construct and maintain the drainage system was essential to provision of the services.

Roseburg School Dist. v. City of Roseburg

851 P.2d 595, Supreme Court of Oregon, En Banc, May 21, 1993

Issue(s)/Question(s) Presented: Whether a storm drainage utility fee of the City of Roseburg was a "tax on property" that is subject to the limitations of Article XI of the Oregon Constitution, adopted in 1990 by an initiative petition commonly known as "Ballot Measure 5." Oregon Constitution.

Holding: Court held that City's storm drainage utility fee was not a tax on property that is subject to the limitations of Article XI of the

Summary: In interpreting Article XI of the Oregon Constitution, the court held that the Article contains "a limitation on only those certain forms of revenue generation that fall within its definitions. It is not a limitation on other forms of revenue generation that do not fall within its definitions. It is clear that the constitutional provision defines those charges that it limits and, by its terms, excludes from its limits other forms of revenue generation, including income taxes, sales taxes, and any other charges not imposed upon property or upon property owners as a direct consequence of property ownership."

The dispute centered around whether the charge either was "imposed …upon property" or was "imposed … upon a property owner as a direct consequence of ownership of that property." The court held that the stormwater fee "meets neither criterion and, therefore, is not a tax within the meaning of Article XI." In reaching its decision the court relied upon the following factors:

- The city's fees for storm drainage services are not imposed upon the owner of real property as a direct consequence of ownership. Although some property owners may be responsible for paying the fee, the fee is not imposed upon property owners because of their ownership of the property, but instead is imposed upon the person responsible for paying the city's water utility charges or upon the person with the right of occupancy, whoever that may be.

- There is no provision in the municipal code for attaching a lien against the property for non-payment of the fee; thus, the property itself cannot be encumbered by the city as a result of nonpayment of the fee.

Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District

775 S.W.2d 520, Court of Appeals of Kentucky, June 23, 1989

A $

Issue(s)/Question(s) Presented: Whether a stormwater charge is a tax or a fee; whether the District had authority to impose the fee.

Holding: Kentucky Court of Appeals held that the service charge was a user fee and was reasonable and uniform in its application and that the Metropolitan Sewer District had express authority to impose the fee via the enabling state statute.

Summary: Plaintiffs challenged the constitutionality of a stormwater service charge that was based on an "Equivalent Surface Unit" approach (1 ESU for all residential parcels; 1 ESU per 2500 sq. ft. for commercial and industrial parcels).

On the fee versus tax issue, the court relied upon Veail v. Louisville and Jefferson County Metropolitan Sewer District[41], where the Kentucky Supreme Court held that the District's enabling statute was constitutional and stated that "the Act provides for no tax whatever. Charges for sewer service are not taxes anymore than are bridge tolls or water rents." The court then turned to the plaintiffs' argument that no benefit was received from the plan because they had constructed their own system or because the stormwater runoff drains from their property directly into the Ohio River. The court relied on Curtis v. Louisville and Jefferson County Metropolitan Sewer District, Ky.[xlii], to reject this argument. In the Curtis case, property owners argued that the enabling statute was unconstitutional because it established a conclusive presumption that all land within a designated surface drainage improvement area would receive some benefit. The property owners argued that the property in question was located at an elevation "high enough to provide a vested right to the free flow of surface water," and therefore could receive no benefit. The court in Curtis disagreed:

"Charges for sewer service are not taxes any more than are bridge tolls or water rents."

We think that in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values in the area. The circuit court held that all property in the area could be deemed to be benefited, and we affirm that holding.xl The Kentucky court of appeals found that the enabling statute clearly gave the District express authority to impose a service charge to fund its comprehensive county-wide drainage system, and was constitutional in all respects.

Zelinger v. City and County of Denver

724 P.2d 1356, Supreme Court of Colorado, En Banc, September 8, 1986

$

Issue(s)/Question(s) Presented: Whether a stormwater fee is a valid service charge or an unconstitutional tax.

Holding: Court ruled the charge was valid service charge.

Summary: The Colorado Supreme Court denied a class action challenge to the City of Denver's ordinance assessing fees and service charges for the city's storm drainage facilities. The court found that the ordinance was rationally related to a legitimate state purpose of

financing the maintenance and construction of new storm sewers, and that it established a valid service charge rather than an unconstitutional tax because the funds raised by the fee were not used for general revenue purposes but were segregated and used solely to pay for the costs of the "operation, repair, maintenance, improvement, renewal, replacement and reconstruction of storm drainage facilities."

NEGATIVE PRECEDENT

CASE LEGEND

Authority issue - A Sovereign immunity - SI Fee v. tax issue - $ Rate methodology - M

Green v. Village of Winnetka

Cook County, Illinois Circuit Court Case No. 2015 -CH-02430

August 19, 2015

$

Issue(s)/Question(s) Presented: Whether stormwater utility fee imposed by Village was an illegal tax.

Holding: The stormwater ordinance was properly enacted and the associated charge was a proper fee and not a tax.

Summary: Winnetka property owner brought suit challenging the legality of the stormwater fee, alleging that it was an illegal tax. The Village explained that the fee is based on equivalent runoff units, which are calculated based on the amount of impervious surface area on a property and thereby directly tied to the associated amount of stormwater runoff. The Illinois circuit court dismissed the suit, finding that the stormwater ordinance was properly enacted and that the charge was a fee rather than a tax.

"The statute clearly requires the imposition of a fee that is reasonably connected to the County's stormwater management of the property."

The property owner appealed to the First District Court of Appeals. The Appellate Court determined that the property owner's complaint states a cause of action by alleging that the stormwater utility fee is in no way related to stormwater services or use of Village property, but rather the servicing of debt. The court held that resolution of the case requires a factual determination as to the extent the stormwater fee is actually used to construct, maintain, operate or improve the stormwater system in the village of Winnetka. Thus, the court remanded the case to the circuit court for resolution of the matter.

Paul N. Chod v. Board of Appeals for Montgomery County

Circuit Court for Montgomery, MD, Civil Action No 398704V, July 22, 2015

A M

Issue(s)/Question(s) Presented:

1. Whether Montgomery County's stormwater remediation fee was invalid under §4-202.1 of the Maryland Environment Article[41], which required that the fee be "based on the share of stormwater management services related to the property."
2. If valid, whether the petitioner was entitled to a full credit for the fee.

Holding: The court found that the fee was invalid per se because it was not reasonably related to the stormwater management services provided by the County.

Back to Contents Page

Summary: Petitioner owned a 34-acre commercial development and constructed two stormwater ponds in 1991, which allegedly provided stormwater treatment for the property plus nearby properties (approximately 100 acres additional). The Petitioner signed an agreement with the County, which agreed to maintain ponds at its discretion In 2013, County billed owner $15,000. Petitioner requested a credit/fee reduction. County initially denied the request based on County's responsibility to maintain the ponds pursuant to a 1991 Agreement but later reconsidered and provided a 50% credit. Thereafter, the County reduced the credit to 25% because the credit application did not include engineering computations.

Petitioner challenged the fee arguing that it was inconsistent with 4-202.1 of State Code, which requires that the fees be "based on the share of stormwater management services related to the property." In addition, Petitioner asserted the right to a 100% credit because (1) the drainage ponds were treating an area 3 times the size of property in question, and (2) Petitioner, not the County, had maintained the ponds.

The court held that the fee "must" be "based on the share of stormwater management services related to the property" and the charge was therefore invalid "as applied" to Petitioner's property. The court found that County services provided to property at issue were "essentially nonexistent" and that neighboring properties with no facilities were charged the same as Petitioner.

Case: Zweig v. Metropolitan St. Louis Sewer District

412 S.W.3d 223, Supreme Court of Missouri, Nov. 12, 2013

Issue(s)/Question(s) Presented: Whether a stormwater assessment was a fee or tax.

Holding: Supreme Court upheld lower court ruling that invalidated the stormwater fee as a tax requiring voter approval.

Summary: The court determined through a detailed analysis that the Metropolitan St. Louis Sewer District's (MSD) contested stormwater user charge qualified as a tax and not a user fee under Missouri state law, and further determined that the charge was invalid because it had not been put to a voter referendum as required by Missouri law. The court refused to grant the ratepayers' request for a refund of approximately $90 million in stormwater user charges, but affirmed the trial court's award of attorneys' fees of over $4 million.

The Missouri Supreme Court appeal was the result of a 2010 decision by a Missouri trial court finding that MSD's stormwater utility fees were illegal taxes, thereby invalidating the utility's entire stormwater fee program, and a March 2012 Missouri Court of Appeals decision that upheld the trial court ruling. The lower appellate court reached its decision after analyzing the MSD stormwater rate structure, which is based on impervious surface, against a number of elements of Missouri state law.

> "This Court sympathizes with MSD's predicament. The services it believes are required may cost more than district voters are willing to pay. Under the Hancock Amendment, however, that decision belongs to the voters."

The appellate court's decision also upheld the trial court's factual finding that there is no direct relationship between impervious area and stormwater runoff. Using a similar analysis under state caselaw, the Missouri Supreme Court reasoned that because the stormwater fee is based on each landowner's contribution to the overall need for MSD's stormwater services rather than that owner's actual use of the services and MSD provides services to ensure the continuous and ongoing availability of its drainage system to the district as a whole, not to individual users, the charge cannot be a valid user fee because MSD does not render a service individually in exchange for a fee.

The dissenting judge in the lower appellate court decision wrote a strong opinion in support of the MSD program and the use of impervious surface to charge for stormwater services. The dissent noted that not only are stormwater

Back to Contents Page

fees based on impervious surface the industry norm, but that "the engineering literature has validated the equity of this methodology for stormwater management user fees."

Jackson County v. City of Jackson

302 Mich.App. 90 836 N.W.2d 903, Court of Appeals of Michigan, August 1, 2013

Issue(s)/Question(s) Presented: Whether a stormwater assessment is a tax or user fee.

Holding: The Court of Appeals held that the stormwater management charge was a tax that required electorate approval, rather than a fee, pursuant to Michigan's Headlee Amendment.

Summary: Property owners and county brought action against city alleging violation of the Headlee Amendment stemming from city's adoption of ordinance that imposed stormwater management charge on all property owners.

Section 25 through 34 of article 9 of the Michigan Constitution of 1963 adopted on November 7, 1978 are known as the "Headlee Amendment ." Section 31 "prohibits local governments from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate."

The court held that the ordinance contained few provisions of regulation and no provisions that truly regulated discharge of storm and surface water runoff, with exception of provision that allowed for credits against management charge for use of city-approved stormwater best management practices and the most significant motivation for the ordinance was to generate revenue. In addition, the court held there was no particularized benefit imposed on property owners that was not also conferred upon the general public, and the usage of stormwater sewer system was not accounted for in determining amount of fee. Thus, the court held that the stormwater management charge was an unconstitutional tax in violation of the Headlee Amendment.

> "[T]he actual use of the storm water sewer system by each parcel is not accounted for with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided."

See Bolt v. City of Lansing

DeKalb County, Georgia v. United States

108 Fed.Cl. 68, United States Court of Federal Claims, January 28, 2013

Issue(s)/Question(s) Presented: Whether a stormwater charge is a fee or tax.

Holding: The Court of Federal Claims held that:
1. Court of Federal Claims could exercise jurisdiction over county's claims;
2. Stormwater management charges assessed by county were taxes that could not be imposed on federal properties without government's consent;
3. Former version of CWA did not waive government's sovereign immunity as to county's stormwater management charges; and
4. Amendment to CWA requiring government to pay reasonable stormwater management charges could not be treated as clarification of an earlier waiver with retroactive effect.

Summary: DeKalb County, Georgia, filed litigation in the U.S. Court of Federal Claims in November 2011 to collect over $280,000 in unpaid stormwater bills from a number of different federal government facilities. In January 2013, the court ruled that stormwater charges billed to the federal facilities by the County were a local tax and not a utility fee under federal law. The court also found that a 2011 amendment to the CWA, which clarified

federal responsibility for municipal stormwater charges, does not apply to charges that qualify as taxes and were billed prior to the amendment's enactment. Accordingly, the court ruled the County could not collect pre-2011 unpaid amounts.

The court did note, however, that the language of the 2011 amendment clearly establishes federal responsibility for payment of stormwater charges going forward regardless of whether they are deemed fees or taxes.

"This court cannot apply the new waiver contained in the 2011 amendment retroactively unless Congress expressly stated its intent to give the amendment retroactive effect."

The decision's finding on the CWA amendment's applicability to pre-2011 amounts was directly at odds with the 2012 United States v. Cities of Renton and Vancouver case described above, which held the amendment does apply to pre-2011 amounts. The County appealed the decision to the U.S. Court of Appeals for the Federal Circuit in March 2013 but reached a settlement with the federal government before the appeal was considered.

The settlement acknowledges the county's objection to the January 2013 U.S. Court of Federal Claims decision in the case, specifically the court's finding that 1) the stormwater charges in question were taxes and not utility fees, and 2) that a 2011 CWA Amendment clarifying federal responsibility for stormwater fees does not apply to pre-2011 charges.

Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin

891 F.Supp.2d 1058, United States District Court, E.D. Wisconsin, September 5, 2012

SI $

Issue(s)/Question(s) Presented: Whether stormwater charge is a fee or a tax; whether CWA waives sovereign immunity with regard to Indian tribe property.

Holding: The District Court held that:
1. The village's stormwater management charges constituted an impermissible tax upon tribal trust property; and
2. The CWA provision requiring federal facilities to comply with the specified state and local water pollution control requirements was not a waiver of sovereign immunity and the village was, therefore, not permitted to assess stormwater management charges upon the property held in trust for the benefit of Indian tribe.

Summary: Indian tribe filed action seeking a declaratory judgment that village lacked authority to impose charges under its stormwater management utility ordinance on parcels of land held in trust by the United States for the tribe located on reservation and within village.

City of Key West v. Florida Keys Community College

281 So.3d 494, District Court of Appeal of Florida, Third District, January 18, 2012

SI

Issue(s)/Question(s) Presented: Whether community college enjoyed sovereign immunity with respect to city's stormwater utility fees.

Holding: The District Court of Appeal held that:
1. Statute that allowed municipality to collect charges from persons, firms, or corporations served by its public works facilities did not expressly waive college's sovereign immunity from action by city; and
2. College was entitled to a refund of city's stormwater utility fees.

Summary: The City contended that the college was not protected by sovereign immunity because the enabling statute does not "exempt" state-owned property from payment of stormwater utility fees. The court held that "sovereign immunity is fundamentally different from the protection provided by an exemption. Whereas 'sovereign immunity is the rule, rather than the exception,' … the converse is true of an exemption." The State enjoys sovereign immunity unless immunity is expressly waived. The court reasoned that because the enabling statute, which specifically relates to stormwater utility fees, does not expressly waive sovereign immunity for stormwater utility fees,

the State, which includes the community college, has not waived sovereign immunity.

Lewiston Independent School Dist. No. 1 v. City of Lewiston

Supreme Court of Idaho, Moscow, 151 Idaho 800 264 P.3d 907, November 7, 2011

Issue(s)/Question(s) Presented: Whether a stormwater assessment is a regulatory fee or unauthorized tax.

Holding: The Supreme Court held that city's stormwater fee was an unauthorized tax.

Summary: Five government entities brought action against city seeking declaratory judgment that city's stormwater fee was an unconstitutional tax.

The Supreme Court of Idaho held that the city's stormwater fee was an unauthorized tax rather than a regulatory fee because the stormwater fee was used to generate funds for the non-regulatory function of repairing, maintaining, and expanding the city's preexisting stormwater system and streets, and thus, it was an unauthorized tax intended to free-up the city's general revenues.

Smith Chapel Baptist Church v. City of Durham

Supreme Court of North Carolina, August 20, 1999 350 N.C. 805, 517 S.E.2d 874

Issue(s)/Question(s) Presented:
1. Whether the City exceeded its enabling authority by enacting an ordinance and the fees thereunder; and
2. Whether the impervious area method of calculating the fees was constitutionally permissible.

Holding: The Supreme Court held:
1. City was authorized to collect fees that would finance only structural and natural stormwater and drainage systems component part of stormwater program;
2. City was authorized to impose fees on owners of developed land based on impervious areas of each lot; and
3. Landowners were entitled to full refund of illegally collected fees from city.

Summary: Owners of developed land in city sued city, alleging that it did not have authority to impose fees to operate its stormwater program. The court held that municipalities are authorized to establish and operate public enterprises like utilities pursuant to state statute. However, the court reasoned that under a plain reading of the statute, the utility fees are limited to the amount which is necessary for the City to maintain the stormwater and drainage system rather than the amount required to maintain the comprehensive Stormwater Quality Management Plan to comply with regulatory requirements.

The stormwater utility approved a local ordinance that created a stormwater utility "to develop and operate the stormwater management program." The ordinance defines the stormwater management program as one that not only includes a stormwater system, but also "includes, but is not limited to ... the development of ordinances, policies, technical materials, inspections, monitoring, outreach, and other activities related to the control of stormwater quantity and quality." The court ruled that "the ordinance on its face exceeds the express limitation of the plain and unambiguous reading of the statute, and the operation of the utility exceeds the statutory authority."

> "Rates, fees, and charges imposed under this section may not exceed the city's cost of providing a stormwater and drainage system."

The city's stormwater management fund budget divided expenditures from the stormwater management fund into three separate components: stormwater quality, stormwater quantity, and clean city. All funds collected by the utility were placed in one fund which pays for the City's entire stormwater quality program and the utility's activities substantially exceeded the providing of stormwater infrastructure.

The court stated that although the City's stormwater management program funded by the stormwater utility is a fully comprehensive stormwater quality program with separate component parts, the majority of the city's stormwater management program funds were not used to fund and maintain the stormwater and storm sewer drainage systems but rather to comply with the mandated MS4 permit requirements. The court held "the City chose to establish the [stormwater utility] as a mechanism by which it would comply with the unfunded mandates of the [CWA] related to stormwater runoff. In addition, the City also chose not to fund the expenditures through the general fund."

The court upheld the impervious surface rate methodology "as rationally related to the amount of runoff from each lot and was not an arbitrary exercise of the City's statutory authority," but noted that "[t]his finding ... does not apply to the amount of the stormwater charges that were adopted by the City ... or the use of the funds collected…."

The court held that the City's ordinance and the fees charged thereunder were invalid as a matter of law, and that plaintiffs were entitled to a full refund of the illegally collected fees plus interest.

Bolt v. City of Lansing

459 Mich. 152, 587 N.W.2d 264, Supreme Court of Michigan, December 28, 1998

Issue(s)/Questions Presented: Whether a stormwater assessment was a fee or a tax.

Holding: Stormwater charge was an improper tax.

Summary: Landowner brought original action against city, alleging that city's stormwater service charges were disguised tax for purposes of the Headlee Amendment to State Constitution. Section 31 of the Headlee Amendment "prohibits local governments from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." Thus, if an assessment is deemed a tax, voter approval is required. A user-fee would not violate the Headlee Amendment.

The Court of Appeals, 221 Mich.App. 79, 561 N.W. 2d 423, held that city's charge to landowners was a "user fee" rather than a "tax" not requiring voter approval under the Headlee Amendment, and the landowner appealed. The Supreme Court held that charge was an improper tax based on the following reasons: user fee had revenue-raising purpose; user fees were not proportionate to necessary costs of service; charges did not correspond to benefits conferred, and property owners had no choice whether to use service, or control over extent to which service was used.

"The 'mandatory user fee' has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes a tax lien of the property."

See Jackson County v. City of Jackson

Back to Contents Page

PENDING CASE

CASE LEGEND

Authority issue - A Sovereign immunity - SI Fee v. tax issue - $ Rate methodology - M

Beck v. City of Lubbock

Lubbock Country, Texas State District Court Case No. 2015-516-881 (filed August 2015)

M

Issue(s)/Question(s) Presented: Local business owner has brought suit requesting permanent injunction against implementation of stormwater fees alleging overcharges in excess of $15 million and misuse of the funds pursuant to the Texas Local Government Code.

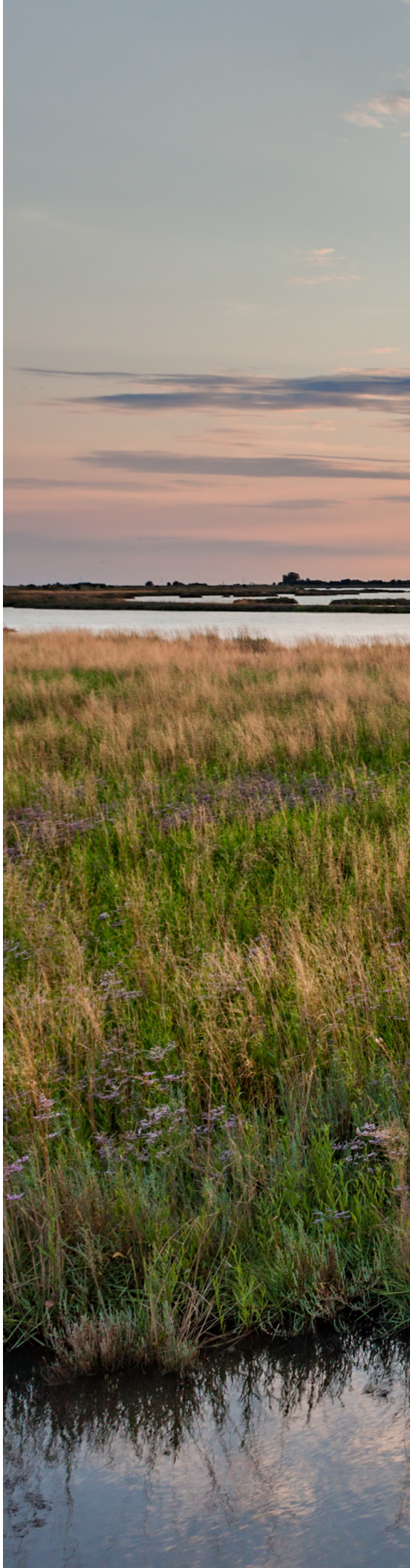
Summary: The case remains pending before the district court. The City filed an Answer denying the allegations in October 2015.

Conclusion

As the costs and regulatory complexities of MS4 programs continue to increase, clean water utilities and the communities they serve will need to raise increasing amounts of revenue to fund their stormwater management programs. This is turn will likely lead to a growing number of local challenges to stormwater utility charges. These challenges have the potential to hinder a utility's ability to administer and fund programs to address stormwater runoff, which can have significant impacts on a community. As outlined in this white paper, the legality and viability of any specific fee program will be based on a variety of factors including the specific structure of the fee and the specific law of the state in which the utility is located. What works in one state may not work in another.

At the same time, it is valuable to know how different courts across the nation have addressed this issue, including the types of legal analyses that have been used when evaluating MS4 fee programs and the kinds of factors that have been relevant in the courts' deliberations. It is also helpful to understand common trends that emerge from this body of case law and what lessons they hold for other utilities. This white paper attempts to provide NACWA members with that important information should they be faced with a legal challenge, and the Association hopes to supplement this document with a more detailed, state-by-state analysis of the issue in the future.

The importance of preserving municipal stormwater funding programs will only become more acute over the next few years, and the likelihood of challenges to these fee programs will only increase. NACWA looks forward to continued aggressive advocacy to defend these fee programs and ensure their long-term viability.



End Notes

1. C. Warren Cambell et al., Western Kentucky University 2014 Stormwater Utility Survey 52 (Western Kentucky University, 2014).

2. Suzanna M. Perea, Clean Water Act's Stormwater Program (EPA Region 6, 2013).

3. NACWA submitted comments to EPA in October 2015 when the new enforcement priorities list was first proposed, highlighting that a continued focus on municipal wet weather issues without addressing other sources of water quality impairment – especially nonpoint source runoff – will fail to achieve meaningful water quality improvements.

4. See Wet Weather Consent Decrees: Negotiation Strategies to Maximize Flexibility & Environmental Benefit (NACWA, 2015 ed.). Examples of wet weather consent decrees that include stormwater components include the following:
    a. Unified Government of Wyandotte County/Kansas City
    b. Boston Water and Sewer Commission
    c. City of Revere, Massachusetts
    d. City of Newport, Rhode Island
    e. Sewerage and Water Board of New Orleans
    f. Lexington-Fayette Urban County Government, Kentucky

5. United States v. Salt Lake County, Utah, Civ. No. 2:16-cv-00087 (D. Utah Feb. 2, 2016). The decree requires the county to comply with the MS4 permit, submit a revised stormwater management plan, devote resources and staff to stormwater management plan implementation, monitor construction sites and enforce stormwater requirements, update information regarding industrial stormwater sites within the county, and conduct illicit discharge monitoring and enforcement. The decree includes civil penalties in the amount of $280,000.

6. See Water Quality Act of 1987, Pub. L. 100-4, (Feb. 4, 1987).

7. 40 CFR § 122.26.

8. See 55 Fed. Reg. 47,990 (Nov. 16, 1990); 64 Fed. Reg. 68,722 (Dec. 8, 1999).

9. 40 CFR 122.26(b)(8).

10. 40 CFR § 122.26(d).

11. 40 CFR § 122.28.

12. EPA Stormwater Phase II Compliance Assistance Guide (Mar. 2000).

13. CWA §402(p)(3)(iii).

14. 40 CFR § 122.34.

15. 74 Fed. Reg. 68,617 (Dec. 28, 2009).

16. Chris Pomeroy, Succeeding with Your Next Generation MS4 Permit 6 (AquaLaw, 2014). DE, NC, IA, ID, and OR largely issue individual permits to their small Phase II MS4s. MI is beginning to issue all Phase II individual permits, so these numbers will change. Some states have 3 or 4 separate general permits (e.g., WA, CO, NJ). There are 3 watershed MS4 permits: Michigan 2003 watershed-based permit, WI Menomonee River watershed permit, Middle Rio Grande Watershed permit.

17. 81 Fed. Reg. 415 (Jan. 6, 2016).

18. Envtl. Def. Center, Inc. v. EPA, 344 F.3d 832, 854, 856 (9th Cir. 2003).

19. EPA, Region 1 (2009). Funding Stormwater Programs offers basic information on public education.

20. Public Education and Outreach Minimum Control Measure (EPA Fact Sheet 2.3) (PDF) ; Public Participation/Involvement Minimum Control Measures (EPA Fact Sheet 2.4) (PDF)

21. NRDC (1999). Stormwater Strategies: Community Responses to Runoff Pollution.

22. NRDC (1999). Stormwater Strategies: Community Responses to Runoff Pollution; for more information on the issue of authority to create a stormwater utility, see the following:
    - EPA, Region 1 (2009). Funding Stormwater Programs
    - EPA, Region 3 (2008). Funding Stormwater Programs

Back to Contents Page

23. For more information on ordinances, including examples see: NRDC (1999). Stormwater Strategies: Community Responses to Runoff Pollution; EPA, Region 1 (2009) Funding Stormwater Programs; EPA, Region 3 (2008) Funding Stormwater Programs.

24. P.L. 111-378, signed into law on January 4, 2011.

25. 33 U.S.C. § 1323(a).

26. National Association of Flood and Stormwater Management Agencies Under Grant Provided by Environmental Protection Agency (2006). Guidance for Municipal Stormwater Funding.

27. Id.

28. Id.

29. Funding Stormwater Programs, EPA, Region 1 (2009); Funding Stormwater Programs, EPA, Region 3 (2008).

30. Financing Stormwater Management , Ctr. for Urban Policy and the Env't at Indiana University-Purdue University Indianapolis (IUPUI) (noting this site was developed by the Center for Urban Policy and the Environment at Indiana University-Purdue University Indianapolis (IUPUI) in cooperation with the Watershed Management Institute, Inc. Funding was provided by the EPA. The site includes an annotated bibliography of existing stormwater finance materials; an archive that contains selected previously published materials concerning stormwater finance; a manual that discusses the financing options available to communities for stormwater management programs; a set of case studies that describe successful finance mechanisms that have been used in seven communities around the country; and a group of links to other useful web sites about stormwater management).

31. Northeast Ohio Regional Sewer District v. Bath Township, 999 N.E.2d 181, 2013 WL 5436646 (2013)

32. McLeod v. Columbia County, 278 Ga. 242, 599 S.E.2d 152 (2004).

33. Homewood Village, LLC v. Unified Government of Athens-Clarke County, 292 Ga. 514, 515 (2013) (quoting McLeod) (internal citations omitted).

34. Homewood Village, LLC v. Unified Gov't of Athens-Clarke County, 2015 WL 5559853, *3 (Middle Dist. Ga. September 18, 2015) (Homewood Village II).

35. San Juan Cellular Telephone Co. v. Public Service Commission, 967 F.2d 683, 685 (1st Cir. 1992).

36. See Homewood Village, LLC v. Unified Gov't of Athens-Clarke County, Civ. No 3:15- CV-00023, Order (Middle Dist. Ga. April 1, 2016)(Homewood III).

37. McLeod v. Columbia County, 278 Ga. 242, 599 S.E.2d 152 (2004).

38. Id.

39. Tukwila Sch. Dist., 140 Wash.App. 735, at 749 (2007).

40. Teter v. Clark County, x704 P.2d 1171 (Wash. 1985).

41. Veail v. Louisville and Jefferson County Metropolitan Sewer District, 303 Ky. 248, 197 S.W.2d 413, 418 (1946).

42. Curtis v. Louisville and Jefferson County Metropolitan Sewer District, Ky., 311 S.W.2d 378 (1958).

STATE, MUNICIPAL AND STORMWATER UTILITY WEBSITES AND RESOURCES BY EPA REGION

(Does not include all utilities)

REGION 1

Funding Stormwater Programs (EPA Region 1, 2009, pdf)

Evaluation of the Role of Public Outreach and Stakeholder Engagement in Stormwater Funding Decisions in New England: Lessons from Communities (EPA, 2013, pdf)

The Role of Stakeholder Engagement in Stormwater Program Funding Decisions in New England: Lessons from Communities (Ross Strategic, 2011 PPT)

Assessment of Stormwater Financing Mechanisms in New England (Charles River Watershed Association, 2007, pdf)

Connecticut Department of Environmental Protection

2004 Connecticut Stormwater Quality Manual Stormwater Management

Maine

Bangor

Rhode Island

Department of Environmental Management

Office of Water Resources: Stormwater Program

Vermont

Agency of Natural Resources

The Vermont Stormwater Management Manual

- *Volume I*
- *Volume II*

Vermont Agency of Natural Resources, Water Quality Division

REGION 2

New Jersey

Stormwater Utilities: A Funding Solution for New Jersey's Stormwater Problems (New Jersey Future 2014, website with link to report)

New York

New York Department of Environmental Conservation

- *MS4 Toolbox*
- *MS4 Permit and Forms*

East of Hudson Watershed Corporation

Albany County

New York City

Saratoga County

REGION 3

Funding Stormwater Programs (EPA Region 3 2008, pdf)

Delaware

Wilmington

Maryland

Takoma Park

Anne Arundel County
Harford County

Pennsylvania
Lancaster
Radnor

Virginia
Newport News
Richmond
Charlottesville
Hampton
Fairfax County
Blacksburg
Isle of Wight County
Frederick County

REGION 4

Florida
Watts, C. Allen, Cobb and Cole, Chapter 2: Legal Authority to Establish Stormwater Utilities (Florida Stormwater Association 2003, pdf)
Lakeland
Orlando
Jacksonville
Leon County

Georgia
Athens-Clarke County
DeKalb County
Rockdale County
Gwinnett County
Roswell
Stockbridge

North Carolina
Raleigh
South Carolina
Charleston

Tennessee
Memphis
Belle Meade

REGION 5

Indiana
Fort Wayne
Lafayette
Fishers

Minnesota
Minneapolis

Michigan
Ann Arbor

Back to Contents Page

Wisconsin
Stoughton

REGION 6

Oklahoma
Tulsa

Texas
Fort Worth

REGION 7

Iowa
Urbandale
Dubuque

REGION 8

Colorado
Adams County
Greeley

REGION 9

California
Santa Monica

REGION 10

Oregon
Bend
Salem
Marion County
Portland

Back to Contents Page

Back to Contents Page

Back to Contents Page