



K&L GATES

Pennsylvania Asphalt and Pavement Association
2023 Environmental Seminar

Municipal Stormwater Charges (and PA Environmental Policy Update)

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AGENDA

- **Municipal Stormwater Charges**
 - What are they are why do I have to pay them?
 - Legal/regulatory underpinnings
 - Legal vulnerabilities of stormwater fees:
 - Fees or taxes?
 - Lack of services or benefits provided
 - Limited statutory authority
 - *Borough of West Chester v. Pa. State System of Higher Education* (Pa. Cmwlth. 2023)
- **Brief PA Environmental Policy Update**

WHAT ARE STORMWATER CHARGES AND WHY DO I HAVE TO PAY THEM?

- Faced with financial burdens stemming from their own compliance obligations under the Clean Water Act, an increasing number of municipalities and municipal authorities are seeking to collect stormwater “fees” or “charges” from property owners.
- **Industrial facilities with large impervious surface areas are among those most heavily impacted by stormwater charges.**
 - Despite the fact that these entities:
 - Already expend significant sums controlling stormwater pursuant to their own regulatory obligations.
 - Often do not contribute any stormwater runoff to municipally owned/operated facilities.

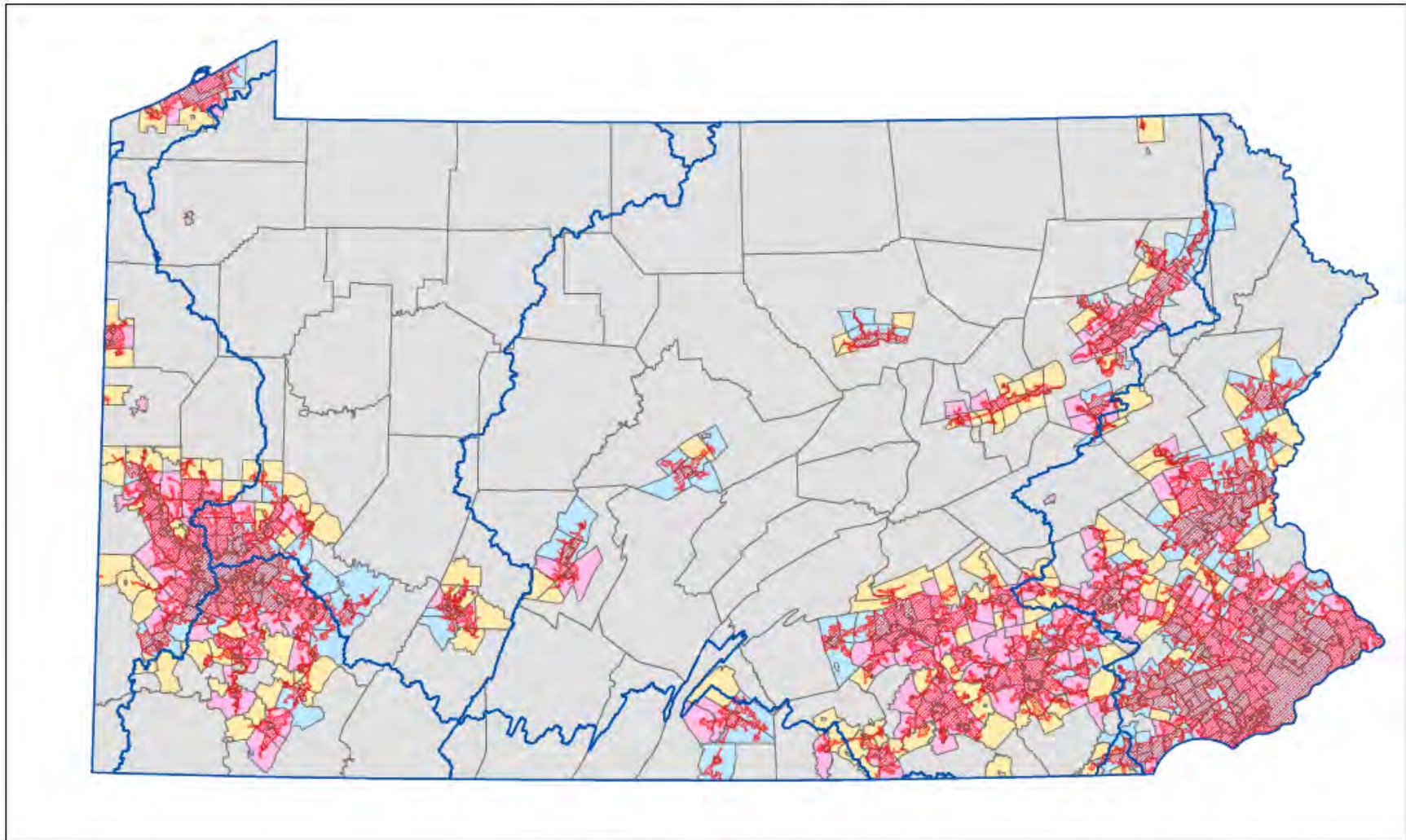
TYPICAL STORMWATER CHARGE STRUCTURE

- Fees are typically based on **property acreage**.
- Often differentiate between **pervious v. impervious** surface area.
- Exceptions (discounts or credits) are sometimes made for properties that implement stormwater best management practices (BMPs).

FEDERAL MS4 PERMIT PROGRAM

- The Federal Clean Water Act generally prohibits the discharge of pollutants to Waters of the United States, unless a permit is obtained.
- EPA has developed special rules for discharges of pollutants conveyed through **Municipal Separate Storm Sewer Systems (MS4s)**.
 - **1990 – Phase I MS4 Rule**
 - Requires “medium” and “large” MS4s with populations > 100,000 to obtain NPDES permit coverage
 - Pennsylvania has 2 large MS4s (Philadelphia and Pittsburgh) and no medium MS4s.
 - **1999 – Phase II MS4 Rule**
 - Requires “small” MS4s in “urbanized areas” to obtain NPDES permit coverage.
 - Pennsylvania has over 1000 small MS4s (and growing).

Pennsylvania MS4 Municipalities



- MS4 Permit Waiver
- MS4 General Permit
- MS4 Individual Permit
- 2010 Urbanized Area
- Major Watersheds
- County Boundary

September 2019

MS4 PROGRAM REQUIREMENTS

- Regulated MS4s must develop, implement and enforce a **Stormwater Management Program (“SWMP”)** that addresses the following **Minimum Control Measures (“MCMs”)**:
 - Public Education and Outreach
 - Public Involvement/Participation
 - Illicit Discharge Detection and Elimination
 - Construction Site Runoff Control
 - Post-Construction Runoff Control
 - Pollution Prevention/Good Housekeeping

NPDES PERMITS FOR NON-COAL MINING AND PROCESSING FACILITIES

- Operators of non-coal mining and processing facilities are independently required to obtain NPDES permit coverage for their stormwater discharges.
- NPDES permits are required even for facilities that discharge to regulated MS4s (rather than direct discharges to surface waters)

NPDES PERMITS FOR NON-COAL MINING AND PROCESSING FACILITIES

- **Permitting Options in Pennsylvania:**
 - **Individual NPDES Permit**
 - **Coverage under PAG-03**
 - For eligible “industrial” activities (but not most mineral industry facilities).
 - **Coverage under GP-104**
 - For eligible mining activities where the only potential discharge will be composed entirely of stormwater.
 - **“No Exposure” Certificate**
 - For discharges composed entirely of stormwater where there is “no exposure” of industrial materials and activities to precipitation.
 - Must submit a No Exposure Certification to PADEP every 5 years in order to qualify.

POTENTIAL GROUNDS FOR CHALLENGING MUNICIPAL STORMWATER CHARGES

- Stormwater “**fees**” are actually unlawful “**taxes**”
- Stormwater charges cannot be imposed on properties that receive **no services or benefits** from the municipality
- Certain municipal entities have **limited statutory authority** to impose stormwater charges

FEES OR TAXES?

- **Why the distinction matters:**
 - Art. III, Sec. 31 of the Pa. Constitution prohibits any entity other than the legislature, county commissioners, or an elected municipal body from enacting a tax.
 - **Unelected municipal water authorities and districts may not enact taxes.**
 - Taxes are not assessable against tax-exempt entities.
 - Governmental entities, non-profits, religious organizations.
 - Often large property owners.

FEES OR TAXES?

- **Pennsylvania case law indicates that ...**
 - **“Fees” have the following attributes:**
 - Proportional to a benefit or service rendered to the person paying the fee.
 - Do not raise revenue in excess of program costs.
 - Dedicated to cover the cost of a particular program.
 - **“Taxes” have the following attributes:**
 - Benefit the public generally.
 - Designed to raise revenue.
 - Often transferred to general funds.

SCENARIOS TO CONSIDER

- **What stormwater services or benefits is an MS4 providing (and to whom) in the following scenarios?**
 - Direct or indirect discharge of stormwater runoff to MS4, without any control/treatment efforts by the property owner.
 - Direct or indirect discharge to MS4, after application of stormwater BMPs.
 - Discharge to stream/river, with or without BMPs.
 - Collection of all stormwater in a retention pond maintained by property owner that only discharges during extreme (100-year plus) storm events.
 - Collection of all stormwater and conveyance to the local POTW for treatment.

LACK OF SERVICES OR BENEFITS

- Even assuming a stormwater fee is indeed a “fee” and not a “tax,” that fee must be reasonably proportionate to the value of a service or benefit conferred by the MS4 operator on the property owner.
- As applied to particular properties, there are strong arguments that many stormwater fees do not meet this standard.
 - Properties that do not discharge to the MS4 system.
 - Properties that undertake significant efforts to control or eliminate stormwater discharges from their property.
- ***Query - do MS4 operators provide any discrete benefits to property owners that pay the charge?***

LIMITED STATUTORY AUTHORITY

- Under Pennsylvania law, municipalities only possess those powers specifically granted to them by the General Assembly.
- Depending on the type of governmental entity involved, there may be limitations on their ability to adopt and enforce a stormwater fee.
 - **Municipal Authorities:**
 - Express authorization to adopt stormwater fees, but subject to specific standards (reasonable and uniform, based on property characteristics, may consider BMPs).
 - **Second Class Townships:**
 - Express authorization to adopt stormwater fees, but subject to specific standards (e.g., must provide exemptions/credits to properties that implement stormwater BMPs).
 - **First Class Townships, Cities, Boroughs:**
 - No express authorization to adopt stormwater fees.

BOROUGH OF WEST CHESTER V. PSSHE (CMWLTH. 2023)

- **Borough of West Chester:**
 - Owns and operates a small MS4 system.
 - In 2016, Borough Council adopted a stormwater charge program based on impervious surface area.
- **Pa. State System of Higher Education (PSSHE) and West Chester University (WCU):**
 - Own property in the Borough.
 - Refused to pay stormwater charges (on the basis of their tax-exempt status)
- **Borough filed petition for declaratory judgment in Commonwealth Court.**

BOROUGH OF WEST CHESTER V. PSSHE (CMWLTH. 2023)

- On January 4, 2023, Commonwealth Court issued an “unreported” opinion and order in favor of PSSHE and WCU.
 - **The Borough’s stormwater charge constitutes a tax** because it provides “*benefits that are enjoyed by the general public,*” not “individualized services provided to particular customers.”
 - “*[T]he impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property.*”
- The court’s decision calls into question the legality of stormwater charges across the Commonwealth.

BOROUGH OF WEST CHESTER V. PSSHE (CMWLTH. 2023)

- On February 1, 2023, the Borough of West Chester appealed the decision to the Pa. Supreme Court.
- In early February 2023, multiple interested persons (including PACA and the Pa. Chamber) filed applications to “report” the court’s opinion.
- On March 14, 2023, Commonwealth Court ordered that the Opinion be reported, making it precedential throughout the Commonwealth ... at least until the Pa. Supreme Court renders a decision on appeal.



Pa. Environmental Policy Update

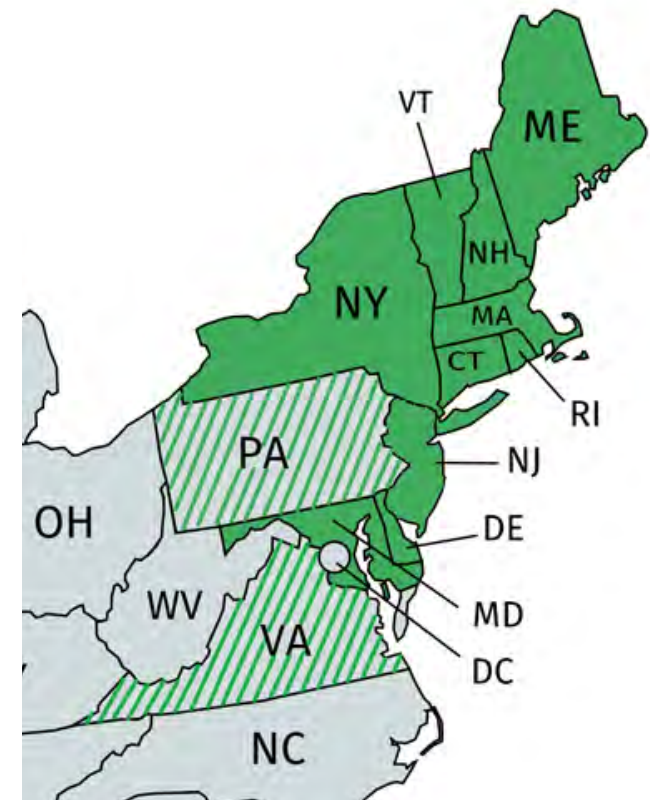


CAST OF CHARACTERS - 2023



REGIONAL GREENHOUSE GAS INITIATIVE ("RGGI") UPDATE

- Cooperative effort among 11 Northeastern states to reduce power sector CO₂ emissions
- Establishes a regional, market-based cap-and-trade program for large (25+ MW) fossil fuel-fired power plants.
- CO₂ allowances distributed through quarterly auctions.
- Generated more than \$6 billion in revenue for member states.



RGGI IN PENNSYLVANIA

- **Oct. 3, 2019** – Gov. Wolf issues Executive Order directing the PADEP to develop rules to implement RGGI in PA.
- **Sept. 24, 2020** – Gov. Wolf vetoes bill that would prohibit RGGI rules without express legislative authorization.
- **July 31, 2021** – EQB adopts final RGGI rulemaking.
- **Sept. 1, 2021** – IRRC approves final RGGI rulemaking.
- **April 4, 2022** – Senate fails to override Governor Wolf veto of concurrent resolution disapproving RGGI rulemaking.
- **April 23, 2022** – RGGI rulemaking published in Pa. Bulletin.
- **July 8, 2022** – **Commonwealth Court issues preliminary injunction (RGGI currently not in effect).**
- **Nov. 16, 2022** – Commonwealth Court hears oral argument on merits of RGGI rulemaking.
- **May 25, 2023** – Pa. Supreme Court to hear oral argument on preliminary injunction.

QUESTIONS?

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