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New Program to Add Fees to Meet the Costs of Managing Storm Water

By **Robert L. Collings** | July 22, 2021

The old expression “you never know the worth of water till the well runs dry” is clearly supported by current conditions in the Southwest, but the worth of water can have a different meaning in the Eastern United States. We have seen more precipitation and downpours which cause floods when the rainfall cannot be absorbed into the soil quickly enough. What is the worth of water then? The cost of flood damage, the structures to manage or treat the toxicity of the discharges contributing to those floods, and perhaps increased storage if the rainfall is not being stored naturally by absorption.

Who Bears the Costs?

Many storm water management projects are built, paid for and maintained by federal and state governments and their agencies using federal and state revenues. Private commercial projects, new subdivisions and new residential developments are generally subject to zoning and building codes which impose those specific project costs on the owners/developers unless passed along to purchasers in property sales agreements. An exception to this is a local public project such as a road or a school, which may pass along those costs to local taxpayers. But what happens when existing storm sewers deteriorate, or when changing conditions (infilling with more ground cover) require major upgrades to such systems? How do those changes happen and who bears the costs?

Local governments can voluntarily undertake storm water management projects, but overwhelmingly such programs arise from, and are patterned to comply with, federal and state legal requirements. Individual property owners may take voluntary actions to manage runoff from their own property, though this is not required except in the case of new buildings or land disturbances. Pennsylvania common law applies the “common enemy” doctrine: property owners are not responsible for damage caused by rainfall flowing from their property, unless they have collected, channeled or contaminated it and these actions caused or contributed to the damage. Good neighbors should take care that voluntary projects are designed and built so that they do not create harm to others.

The federal Clean Water Act originally prohibited all discharges of pollutants from point sources (ditches, conduits, sewers, channels, swales and the like) into waters of the United States that did not meet water quality standards and other permit conditions set by law. See Clean Water Act Title III and IV, 33 U.S.C. Sections 1311, 1342. Storm water rainfall itself is not considered a pollutant, but the rainfall flowing over the surface carries pollutants from roofs, roads, and yards (lawn chemicals and pesticides) and ultimately discharges them. The courts long ago decided that point sources carrying such contaminated storm water must have permits and meet conditions imposed by law and

those permits. See *Natural Resources Defense Council v. Costle*, 568 F. 2d 1369 (D.C. Cir. 1977). Responding to pleas from the U.S. Environmental Protection Agency (“EPA”) that resources were not available for permitting and oversight of all such discharges, Congress eventually amended the law in 1987 to create a specific permit process for municipal and industrial storm water discharges under Section 402(p) of the Clean Water Act.

In general, Section 402(p) requires municipalities and many industries to keep pollutants out of the storm water they collect and discharge. The law also sets different time frames to obtain permits and achieve compliance for municipalities owning sewers and collection systems with direct “point source” storm water discharges. Municipalities with populations exceeding 250,000 were in the first wave, followed by cities with populations between 100,000 and 250,000. At this point all municipalities are regulated. Pennsylvania, which is authorized to administer the federal program, enacted a Storm Water Management Law (Act 167) in 1978, which has been amended to require all counties and municipalities to develop plans for managing storm water in each watershed. Municipalities must implement the plans and fund the costs by ordinances. Limited state funding is available, though it is hoped that the pending federal infrastructure laws may make additional federal funding available.

How Is Local Funding Generated?

Funding of local storm water management systems can be done using general revenues, but that is not the most common approach. Most municipalities look at funding schemes that charge fees and allocate the costs of implementing and maintaining public storm water systems based on average areas of property covered by impervious materials, such as buildings and paved areas. The average covered area in a property parcel is referred to as an equivalent residential unit or ERU. To collect such fees most municipalities must establish an authority under the Pennsylvania Municipal Authorities Act, 53 Pa. C.S.A. Ch. 56. Local government authorities may collect reasonable and uniform fees to implement and maintain storm water projects.

Most municipalities promote the fairness of using a system of fees which all public and private properties pay on an equivalent basis with simple administration. Many public and nonprofit owners of property pay no property taxes, so collecting fees in place of property taxes provides a more uniform system of allocation. Of course, fees which would apply to public properties may be passed along through property taxes, with no net benefit other than possibly incentivizing public property users to preserve open ground in order to reduce fees and avoid the need to seek unpopular tax increases. Overall, the fee system may work better than taxes, as long as the authority structure and its administrators and staff do not enhance their positions by promoting grander storm water schemes and fees than are reasonably needed. The environmental staff overseeing compliance with storm water requirements have no obligation to question the need for excessive projects.

What Are Some Fee System Alternatives?

If a fee system is being used, is the ERU system the best approach—based just on the impervious area of each parcel? The use of an ERU generally involves a tiered approach. Once the average area of impervious surface per parcel is defined, a small first tier is set for those with much less than

the average amount of impervious area. That may be set as 0.5 ERU. Parcels which have impervious ground cover area a bit smaller or larger than the average are in the 1.0 ERU tier and pay twice the fee of the first tier (unless other exceptions are provided), and parcels with more impervious area may be set at a third tier of 2.0 ERU. Does this approach favor certain properties? Larger parcels with lots of impervious area (apartments, condos, housing projects with paved common areas for parking, outdoor recreation or other uses) may benefit from a top tier of 2.0 and not pay a truly proportional amount if they are far above the average in parcel size and covered ground, unless a specific development ordinance exists to pass future costs to them. I have seen no such forward-looking subdivision and land development (SALDO) ordinance.

People with average to larger than average homes or residential complexes, longer driveways and off-street parking, may prefer alternatives to the growing use of the ERU approach allowing considerations that reward preservation of more open space for rainfall percolation and removal of rainfall from public management systems.

Local government bodies may consider the incorporation of additional factors into the fee system, such as Equivalent Hydraulic Area (EHA), Intensity of Development Factor (IDF) or Residential Equivalent Factor (REF). Each of these factors assesses different aspects of pervious surfaces or property use and management that reduce offsite flows into storm water management systems. Detailed discussions of these factors are available in reports by Western Kentucky University, the Pennsylvania Environmental Council, and public water management agencies. The engineering consulting firm Black and Veatch produced an excellent review of this topic.

Any assessment of alternatives to the simple ERU system first considers that most storm water fees are less than \$20 per month. Such relatively low fees may not generate interest in more complicated systems involving additional government review and potential disputes over small amounts. But it is important to anticipate that such costs may grow very significantly if climate change increases rainfall or intensity. Perhaps more important at this point, use of the simple ERU system should not incentivize the loss of open space or onsite management of rainfall without runoff. What issues might be reasonably considered?

- Open space: If a parcel has substantial impervious areas but also much larger pervious areas, should that balance be incentivized to maintain open space for percolation?
- If modest changes like rain barrels for onsite use can reduce water consumption and storm water runoff, should that be incentivized by some reduction in fees?
- Should pervious driveway or parking installation be recognized in some way as a reduction in the amount of impervious area in the assessment?
- Should property grade soil and plant types or other site features that promote runoff from pervious areas be charged more than other open space parcels? Does over-complexity outweigh fairness here?

Some of these ideas can be part of an improved fee system without adding much complexity to billing, occasions for re-classifying parcels, or room for dispute as costs increase. They deserve to be incorporated for fairness and to promote sound public policies, but only if they do not add significant costs on a net basis compared to the simplicity of the ERU system.

The initial formation of a storm water fee program is the best time to work on getting it right. Otherwise, once a system is set, established interests, including the self-interest of the local government agency and its staff, can make it difficult to adopt forward-looking changes.

Robert L. Collings serves as co-chair of the energy and environmental practice group and co-chair of the sustainability and environmental services practice group at Schnader Harrison Segal & Lewis. A former enforcement attorney and manager at the U.S. Environmental Protection Agency, Collings represents manufacturing, transportation, financial services, retail and real estate businesses and others with permit needs, claims, and transactional matters involving environmental or regulatory issues. Contact him at rcollings@schnader.com.

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