

Unfortunately, stormwater fees, also called MS4 fees or “rain taxes” are a difficult issue for the legislature to resolve because municipalities charge them to offset the costs of a federal mandate. The federal program is known as the Municipal Separate Storm Sewer System (MS4) under the federal Clean Water Act. This program requires certain municipalities based on their population to implement stormwater management plans to control the amount of pollution and sediment which runs off after precipitation events into local streams and waterways.

The federal government requires our state government through our Department of Environmental Protection (DEP) to enforce these requirements on municipalities which have been designated as MS4s, which is largely done through a permit program.

The MS4 Permit is designed to help reduce the discharge of pollutants, to the maximum extent practical, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act and the Pennsylvania Clean Streams Law. The permit requires the development and implementation of a Storm Water Management Program (SWMP). The SWMP features six Minimum Control Measures (MCMs). Each MCM requires implementation of specific Best Management Practices (BMPs) to meet six measurable goals:

- Public education and outreach
- Public participation/involvement
- Illicit discharge detection and elimination
- Construction site runoff control
- Post-construction runoff control
- Pollution prevention/good housekeeping

In order to stay in compliance with these requirements, many of these municipalities need to demonstrate to the state and federal government that they are conducting projects that would reduce the amount of polluted runoff that ends up in our waterways. Because this is an ongoing expense, municipalities that have instituted a stormwater fee generally still have these in place.

It is up to the discretion of municipal officials as far as what these fees will be and how and on whom they will be charged. Municipalities decide for themselves how much money they need to raise to comply with the obligations. Municipalities can often reduce their expenses by collaborating with neighboring municipalities to get joint credit for projects and share the financial burden.

DEP oversees permitting requirements for MS4s at the state level. Efforts to update storm water infrastructure and accomplish permit requirements have shown to be costly. Neither the federal law nor the DEP mandate that municipalities charge a fee to offset these costs, however many municipalities do. It is up to each individual municipality to implement their own methods of levying fees or other methods to cover program costs and meet federal and state regulations.

These stormwater fees are either implemented directly by a municipality, or through a municipal authority such as a water or stormwater authority. While the fees implemented in different areas are unique to the specific area that they are implemented in, generally, the fees are based on the amount of impervious surface area that a property owner has, whether this property owner is a church, small business or even just a homeowner.

There have been a few court cases on this topic, the main one being a PA Commonwealth Court Case, Borough of West Chester v. PA State System of Higher Education. West Chester University contended that the MS4 fee charged by the Borough of West Chester was a tax, not a fee, and thus as a Commonwealth entity, the University should be exempt from the tax.

The Commonwealth Court weighed in on whether the MS4 fee was indeed a fee or a tax. To summarize some of their main points:

A tax is imposed by a legislature upon many, or all citizens. It raises money, is contributed to a general fund, and is spent for the benefit of the entire community. A tax is an “enforced contribution to provide for the support of government.” Where a charge is imposed by a state or municipality not in its capacity as a sovereign but rather under a voluntary, contractual relationship, it has been held not to be a tax. A “fee” is paid to a public agency for bestowing a benefit which is not shared by the general members of the community and is paid by choice. The Commonwealth Court distinguished taxes and fees in *National Cable Television Association v. United States*: Taxation is a legislative function, and a legislature may act arbitrarily, and disregard benefits bestowed by a government on a taxpayer and go solely on ability to pay. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.

Ultimately, the Court ruled that the stormwater fee was a tax because a fee is paid to a public agency bestowing a benefit that is not shared by the general community and is paid by choice, whereas a tax is an “enforced contribution to provide for the support of government.” This did not label every MS4 fee a tax but does potentially open MS4 fees in other municipalities to challenges on similar grounds, especially if the fee is determined to be a tax but was implemented by an agency without that authority. The Borough appealed the ruling to the Supreme Court, and the case is still being reviewed.

There has been legislation introduced on this topic over the years, but as mentioned earlier, a broader solution is somewhat elusive due to federally mandated compliance. Here are some bills on this topic from the current session:

- House Resolution 286 (Pugh) - Urges, the President, the EPA and Congress to address MS4 mandates.

- House Bill 234 (Gleim) – Amends the Second Class Township Code to require certain townships to offer credits or exemptions for MS4 fees for farms that implement best management practices.
- House Bill 235 (Gleim) – Amends the Municipal Authorities Act to require certain municipalities to offer credits or exemptions for MS4 fees for farms that implement best management practices.
- House Bill 958 (Gleim) – Requires DEP to use external water quality testing services to determine MS4 compliance.
- House Bill 1308 (Fleming) - Requires the Commonwealth to pay stormwater management fees levied by municipal corporations and authorities.