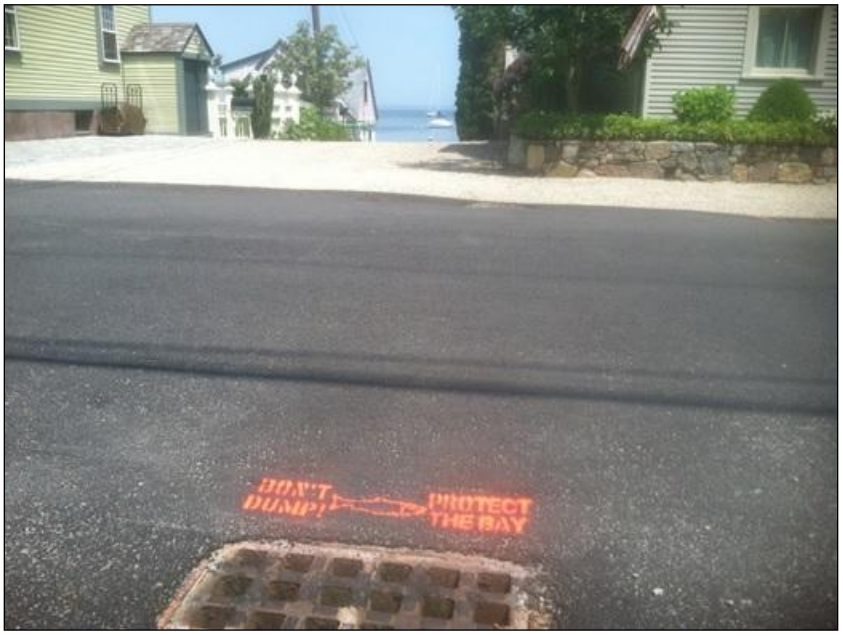
Stormwater Management Districts in Rhode Island:

Questions and Answers



This document is intended to provide only generalized legal information. It is not intended either to provide legal advice or to create an attorney-client relationship, and it is not a substitute for consulting with an attorney regarding any specific questions or problems you might have.

Conservation Law Foundation
55 Dorrance Street
Providence, Rhode Island 02903
September 2013

Rhode Island Bays, Rivers, & Watersheds Coordination Team

Contents

Cover image courtesy of Town of North Kingstown, RI.

Introduction

The Rhode Island Stormwater Management and Utility District Act of 2002 (SMD Act) authorizes municipalities to create Stormwater Management Districts (SMDs) in order "to eliminate and prevent the contamination of the state's waters and to operate and maintain existing stormwater conveyance systems." Rhode Island's municipalities have broad authority under this state law to address the well-documented problem of stormwater runoff; this authority comes with little risk. As municipalities begin to take advantage of this law and work to structure SMDs creatively and effectively, questions about the law will undoubtedly arise. For example, what is the scope of municipal authority regarding SMDs? And how can an SMD raise money to pay for its work? After a brief section setting forth the background of Rhode Island's SMD Act, this document sets out to provide more detailed answers to these questions and more.

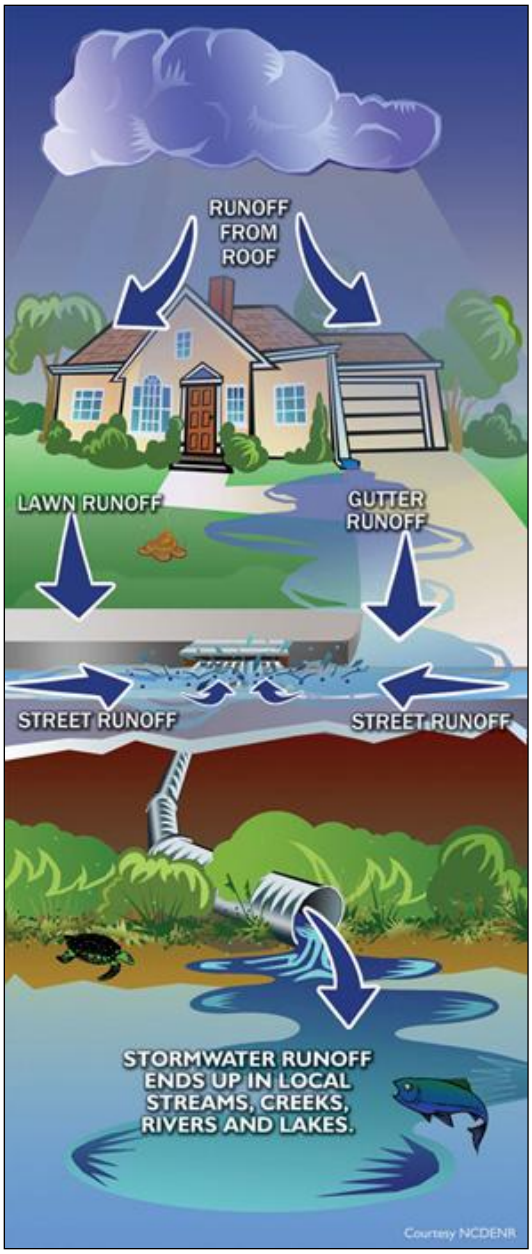
Background

In 1987, Congress amended the Clean Water Act (CWA) by passing the Water Quality Act (WQA), which requires that states take steps to address stormwater pollution. States have responded to this requirement in various ways. The response most relevant to this paper is that many states have

passed laws specifically empowering municipalities to form entities commonly called stormwater utility districts.

Rhode Island is among the states that have passed laws allowing municipalities to form stormwater utility districts. In fact, Rhode Island's SMD Act clearly and unambiguously allows not only individual municipalities but also groups of municipalities to form these districts (called, again, Stormwater Management Districts or SMDs). No municipalities have yet taken advantage of their authority to create SMDs.

Other states' experiences suggest that Rhode Island's SMDs will stand up well to legal challenges. In fact, in just about every case where a state has a specific statute (as Rhode Island does) that permits creation of these districts, courts have upheld the district. These cases are not surprising; courts are simply ruling that these "enabling" statutes do in fact "enable" the creation of SMDs to address stormwater runoff. Nevertheless, to insulate a new district from legal vulnerability, a municipality should plan carefully.



Stormwater runs off impervious surfaces, picking up pollutants and carrying them to the bay.
[Image courtesy of North Carolina Department of Environment and Natural Resources.]

Executive Summary and Recommendations

- A municipality may create an SMD by ordinance.
- Rhode Island law provides for fifteen enumerated powers that a municipality may grant to an SMD.
- SMDs may work with the Rhode Island Department of Transportation to undertake projects involving state property.
- SMD fees are highly likely to survive any legal challenge based on the argument that the fees are an illegal tax.
- Rhode Island law allows SMDs to adopt a fee system based on units approximating a property's impervious surface, called ERUs.
- SMDs may only charge fees to properties that discharge to a"stormwater conveyance system" within the SMD's boundaries.
- The term "stormwater conveyance system" may include streets, roads, and lawns.
- SMDs' boundaries can be as expansive as a group of municipalities may agree to – even covering the entire state if all cities and towns so agree – and as narrow as a small area within a single municipality.
- Because stormwater pollution is more a watershed problem than a municipal problem, CLF recommends that municipalities work together to create watershed-based SMDs.

Scope of Municipal Authority to Create SMDs

Municipalities have been expressly granted the authority to confer specific powers on SMDs under Rhode Island law, as the following questions and answers will explore in more detail:

Q: How can a municipality create an SMD?

A: A municipality can create an SMD by passing an ordinance formally establishing the SMD. The ordinance can give the SMD the authority necessary to do its job, set out procedures by which the SMD will operate and raise funds, and place limitations and restrictions on the SMD as appropriate.

The Rhode Island Constitution gives cities and towns the right to home rule, allowing them to exercise basic local-government powers pursuant to officially adopted charters. The home-rule right, however, is not exclusive. For example, cities and towns cannot impose taxes or borrow money without approval from the General Assembly.

But by passing the SMD Act, the General Assembly clarified that local governments have express authority to create and empower SMDs. The SMD Act heads off possible challenges to SMDs by those who might claim that

a municipality has overstepped its home-rule authority by establishing an SMD. This forethought is important because in Rhode Island, home-rule-based challenges have succeeded, for example, in striking down municipalities' efforts to regulate electricity transmission within their borders. In Town of East Greenwich v. O'Neil, the Rhode Island Supreme Court nixed East Greenwich's three-year moratorium on the construction of new high-voltage power lines. Because there was no statute enabling the town to regulate power lines, the town had relied on its home-rule authority in passing the moratorium. Finding that the regulation of electricity transmission was a matter of state concern, however, the Court held that the East Greenwich ordinance was invalid for two reasons: it was preempted by state law and it exceeded the town's home-rule authority. Absent authorization from the General Assembly, the town simply had no power to address issues of electricity transmission.

Case law from other states suggests that while enabling acts may help to insulate SMDs from legal challenge, they are not panaceas. In Smith Chapel Baptist Church v. City of Durham, for example, the Supreme Court of North Carolina struck down Durham's stormwater utility ordinance because it exceeded the narrow constraints of North Carolina's enabling act. Durham's ambitious ordinance would have used funding from its stormwater utility to pay for

education, outreach, pollution prevention, and testing and monitoring. North Carolina's statute, however, limited the stormwater utility's funding to only as much as necessary to provide a physical drainage system. The Court held that Durham's stormwater utility could do no more than to construct and operate such a drainage system; for this reason, Durham's ordinance was invalid.

Rhode Island's SMD Act, however, is more broadly worded than North Carolina's, and it plainly extends powers to municipalities that go well beyond their home-rule authority – for example, the SMD Act clarifies up front that municipalities can empower SMDs to borrow money. Each municipality creating an SMD simply must be careful to pay attention to what the SMD Act authorizes and what it does not.

The SMD Act also authorizes city and town councils to join with other cities and towns to adopt ordinances creating stormwater management districts. In fact, municipalities could cooperate to draw SMDs' boundaries in a way that is coextensive with watershed boundaries. Because the generation, flow dynamics, and impacts of stormwater runoff manifest at watershed scales, CLF recommends that municipalities work together to create watershed-based SMDs**.**

A municipality plainly may create an SMD under the SMD Act, but how does it do so? The only way a municipality may act with the full force of law is to pass an ordinance formally creating an SMD, giving it the authority necessary to do its job, establishing procedures by which the SMD will operate, and setting limitations and restrictions as appropriate. To insulate the municipality and the SMD from legal challenge, the ordinance should track the specific terms of the SMD Act. The answer to the next question explores the SMD Act and addresses this recommendation more specifically.

Q: What can an SMD be empowered to do?

A: A municipality may create an SMD with a broad array of substantive and administrative powers specifically authorized by the SMD Act.

The SMD Act authorizes a municipality to give an SMD fifteen specific powers. If empowered by a municipality, an SMD may:

(1) establish a fee system (much more on this later);
(2) prepare "long range stormwater management master plans";
(3) implement the plan in accordance with regulations and model ordinances;

(4) retrofit existing structures;
(5) maintain existing structures;
(6) issue bonds for capital improvement projects;
(7) hire employees;
(8) receive grants, loans or funding;
(9) grant credits to property owners who alleviate stormwater issues;
(10) make grants;
(11) acquire property;
(12) impose liens;
(13) levy fines for noncompliance;
(14) provide for an appeals process;
(15) contract for services.

These powers break down into several categories: Items like preparing long-term plans, retrofitting existing structures, maintaining existing structures, and undertaking capital improvement projects define the scope of SMDs' substantive powers. The fee-system and credit-granting authorizations also confer substantive powers on SMDs because the question of "Who pays how much, and why?" is often the central policy question of SMD administration. Items like hiring employees, acquiring property, and contracting for services give SMDs basic self-administration powers. Items like establishing a fee system, issuing bonds, receiving funds, and making grants give SMDs leeway in administering their finances. And items like levying fines,

imposing liens, and providing for an appeals process give SMDs the power to establish procedural rules and enforcement mechanisms. Whether a particular SMD has all of these powers depends on whether the ordinance that created the SMD confers the requisite legal authority; it may also depend on the terms of regulations and model ordinances promulgated to guide the implementation of SMDs. Finally, these powers may only be exercised in order "to eliminate and prevent the contamination of the state's waters and to operate and maintain existing stormwater conveyance systems." Practically, this means that an SMD cannot raise funds for a city or town's general operating budget – it must use its money to operate and maintain its stormwater system and to alleviate stormwater pollution.

Q: Can an SMD engage in education and outreach activities?

A: The SMD Act is silent on this question, so the answer is unclear.

It is important to note that Rhode Island law does not explicitly allow an SMD to engage in activities like education and public outreach. Arguably this type of activity is covered under some of the basic self-administrative powers conferred by the SMD Act – *e.g.*, an

SMD may both "hire personnel" and "contract for services in order to carry out the function of the district," and the function of the district is, quite broadly, "to eliminate and prevent the contamination of the state's waters." Moreover, an SMD may prepare a master plan and make grants for the implementation of these plans; perhaps education and outreach could be part of any such master plan. However, the SMD Act does not explicitly say so. Education and outreach are the sort of activities that the North Carolina Supreme Court declared to be an overreach in Smith Chapel Baptist Church v. City of Durham under that state's considerably narrower statute (which was subsequently amended to allow outreach activities). For this reason, any municipality creating an SMD and any SMD itself should carefully consider the statute and any further authority (ordinance, model ordinance, regulations) to determine whether it believes outreach and education activities are within the SMD's authority.

Q: Can an SMD contract with outside entities (including the Department of Transportation) to repair state-owned stormwater infrastructure with SMD-fee revenue?

A: The answer to this question is a simple yes: state law explicitly allows a municipality to give an SMD the power to maintain and repair stormwater infrastructure and to contract with outside entities to carry out the law's purposes.

In addition to these powers, which plainly allow an SMD to contract with the Department of Transportation (DOT) for purposes of maintaining or repairing stormwater infrastructure, state law also directs DOT to "cooperate with . . . municipalities in the planning and implementation of wastewater management ordinances, including the providing of funds, if available, to match the fees collected by the municipalities annually." Not only could an SMD contract with the DOT to repair state-owned stormwater infrastructure under its contracting power, but DOT has a statutory mandate to work with SMDs. This statutory scheme suggests that SMDs' contracting with DOT was explicitly considered and provided for by the general assembly in the SMD statute.

Polluted water in Providence's Waterplace Park.
Image courtesy of Max Greene.

Scope of SMDs' Authority to Raise Funds

An SMD is allowed under the SMD Act to charge a reasonable and equitable fee related to the amount of stormwater contributed by a given property to the "stormwater conveyance system"; the following questions and answers will explore how these requirements constrain the types of fee systems SMDs may implement.

Q: The law allows for a fee but not a tax – what does that mean?

A: The distinction between a fee and a tax can be nebulous, but when money is collected for a specific purpose or service – even if it is collected from all residents of a designated area – it is generally considered a fee and not a tax.

Several Rhode Island cases affirm the rule that money collected to serve a specific purpose or provide a service (even a general service) is a fee, not a tax, especially when it is collected under a state statute calling it a fee, not a tax. For example, in Kent County Water Authority v. Rhode Island Department of Health, the Rhode Island Supreme Court held that a fee imposed to defray costs incurred in regulating water supply systems was in fact a fee even though it applied broadly and did not provide for property-

specific services to water systems that paid the fee. By paying for the overall regulation of water supply systems, the fee still provided for a general service that benefited members of the fee-paying community. This is essentially what would be happening here – SMDs would impose a broadly applicable fee to defray costs incurred in regulating stormwater runoff, resulting in cleaner water overall.

Other states have upheld this fee-not-tax designation for very similar reasons. For example, just last year in City of Lewiston v. Gladu, the Maine Supreme Judicial Court held that an SMD fee was in fact a fee, not a tax. Most notably, the Court noted that the fee was a fee because it served to defray costs incurred in addressing stormwater runoff. The Court quoted the Washington Court of Appeals in holding that the fee served a regulatory purpose in "provid[ing] . . . 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 "reliev[ing] a burden created by property owners whose impervious surfaces contribute directly to runoff and pollution problems." Again, the SMD fee was a fee because it provided a general service that benefited members of the fee-paying community. This reasoning has been upheld by many courts around the country.[*]

[*] See, e.g., Densmore v. Jefferson County, 813 So. 2d 844, 854 (Ala. 2001); Morningstar v. Bush, 2011 Ark. 350 (2011); McLeod v. Columbia County, 599 S.E.2d 152, 155 (Ga. 2004); Long Run Baptist Assoc., Inc. v. Louisville and Jefferson County Metropolitan

There has been some question whether the Supreme Court's recent discussion of what constitutes a tax (in the context of upholding the Affordable Care Act as a valid exercise of Congress's taxing power) might change this analysis. However, the Supreme Court's discussion simply does not apply here. Another out-of-state case – this one from Georgia – highlights why. McLeod v. Columbia County, in which a property owner subject to an SMD-type fee challenged the fee as an illegal tax, had two incarnations. The case began in federal court. The federal court held that it had no power to consider the case because – *for federal-law purposes* – the fee at issue was a local tax, so the case had to be heard in state court. The case then did move over from federal to state court. Eventually the Georgia Supreme Court held that, notwithstanding the federal court's determination, the fee at issue was indeed a fee (and not a tax) under state law. The court upheld the fee specifically because the fee was charged only to properties that contributed to stormwater pollution and was applied to pay for an indirect service in the form of abating that stormwater pollution – such an indirect link between the fee and a service it provided was enough.

Sewer Dist., 775 S.W.2d 520, 522-23 (Ky. App. 1989); City of Lewiston v. Gladu, 40 A.3d 964, 969-70 (Me. 2012); Twietmeyer v. City of Hampton, 497 S.E.2d 858, 861 (Va. 1998); Tukwila School District No. 406 v. City of Tukwila, 167 P.3d 1167, 1174-75 (Wash. App. 2007).

Similar reasoning applies to the SMD Act: the Supreme Court determined that the ACA was a tax for purposes of Congress's taxing power under the United States Constitution. That holding simply has no bearing on the question whether a fee imposed under local law is actually a fee or is instead a disguised tax. Rhode Island law is clear: a fee is a fee.[*]

For the same reason, the two states that have rejected SMD-type fees as disguised taxes are irrelevant in Rhode Island. In Lewiston Independent School District v. City of Lewiston, the Idaho Supreme Court held that a stormwater ordinance imposed an illegal tax. However, in Idaho there is no enabling statute for SMDs. This means that the legislature neither identified SMD levies specifically as a "fee" nor linked these levies to any particular service, even indirectly. A court is much more likely to take a hard look at a municipality's efforts to impose new charges on its

[*] Recently, the Supreme Court held in Koontz v. St. Johns River Water Management District that a government's decision to condition a wetlands development permit on a payment by the property owner may be an unconstitutional "exaction" or taking. This holding does not affect the constitutionality of stormwater fees under the SMD Act for two reasons. First, the Court noted that the case "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." A stormwater fee is a broadly applicable user fee, not an "exaction." Second, even if the stormwater fee were an exaction subject to takings analysis, an exaction is only unconstitutional if it lacks a "nexus" and "rough proportionality" to the problem it is designed to address. As is discussed below, the SMD Act requires that fees have a nexus to stormwater pollution and that they be proportional to the amount of runoff from a given property. Any fee that complies with the SMD Act is therefore constitutional.

residents in the absence of an affirmative power grant by the legislature, and that is just what happened there. And, in Missouri, an intermediate appellate court has held that an SMD-type fee was an illegal disguised tax, but the Missouri Supreme Court has granted review so the case is not final. Given the vast weight of contrary precedent, one would expect that the Missouri Supreme Court will end up upholding the fee.

The takeaway is that a levy directed at a specific purpose or function – even for services that provide only an indirect benefit to fee-paying properties – is generally a fee, not a tax.

Q: A fee system must be "reasonable and equitable" – what does that mean?

A: What makes a fee system "reasonable and equitable" can likely be drawn from the surrounding statute, which provides that "each contributor of runoff to the system shall pay to the extent to which runoff is contributed" and that SMDs may grant credits to property owners who alleviate stormwater issues.

These provisions of the SMD Act suggest that to be "reasonable and equitable," a fee assessed on a property should be based on how much runoff can be expected from

that property. Organizations around the country have used the square footage of impermeable surface on the property as a straightforward proxy for runoff. Many SMDs implement a fee system based on "Equivalent Residential Units," also called ERUs.

ERUs have been determined using different methods. The method that has been most commonly considered in Rhode Island, where we have good information on the actual amount of impervious surface statewide, is to set an ERU as equal to the median impervious surface of all residential properties within a municipality. For example, in Middletown the average impervious surface per single family residence is 3,668 square feet; this has been recommended as the value of an ERU there. Using this value, the average residential property in Middletown, unsurprisingly, is one ERU; the average non-residential property there is 7.8 ERUs. Another method more common elsewhere is to select a random sample of residential properties within a subject area, to measure the square footage of impermeable surface on each sample property, and to establish the mean impermeable area; this average becomes the value of the ERU. The basic idea is the same – an ERU is meant to represent the impervious surface of an average residential property – but, usually because there is incomplete data on impervious cover, the value is determined using only a representative sample.

After establishing ERUs, SMDs elsewhere have taken several approaches to charging properties. Looking first at single-family residential properties, some SMDs round a property's measure of impermeable surface to the nearest ERU; some create a tiered structure by dividing the residential properties into classes based on actual square footage of impervious surface; and some charge each single-family residence as if it contains one ERU of impermeable surface. Because there tends to be relatively little variety in the impermeable surface on single-family residences, the flat single-ERU system is fairly common. Looking next at multi-family residences, sometimes each multi-family property as a whole is treated the same as a single-family residential property; sometimes each individual unit is treated as a single-family residential property; and sometimes each unit owner pays an amount equal to the property's ERUs divided by the number of units. In determining how to charge multi-family properties, an SMD should be careful to avoid disproportionate impacts on low-income residents. SMDs should also be careful to create a fee system that creates adequate incentives to property owners to reduce impervious cover. This is especially important to ensure that the imposition of SMD fees does not result in the mere "passing on" of the fees to renters or other property users that have little or no control over property management decisions. Looking finally at

commercial and industrial properties, SMDs generally charge each property for multiple ERUs. As with residential properties, sometimes all commercial properties are charged a flat rate – say, five ERUs – and sometimes SMDs differentiate among them by evaluating the actual extent of impervious surface on each commercial property and charging for an appropriate number of ERUs. Finally, it is worth noting that there is an exponential relationship between amount of impervious cover and damage to water quality. This relationship may support a tiered structure with higher rates at higher tiers, analogous to an income-tax system with higher marginal rates at higher brackets.

A municipality may also allow an SMD to grant credits to property owners who alleviate stormwater runoff on their properties. Under the SMD Act, the types of credits allowed are relatively narrow – credits may be granted for "retention and detention basins or other filtration structures" on a given property. In some other states, SMDs may grant credits for other stormwater-abatement services, including public education. Rhode Island law does not appear to allow for this sort of creative credit system. Nevertheless, even the narrow credits authorized by the SMD Act will naturally have the effect of making the system more equitable.

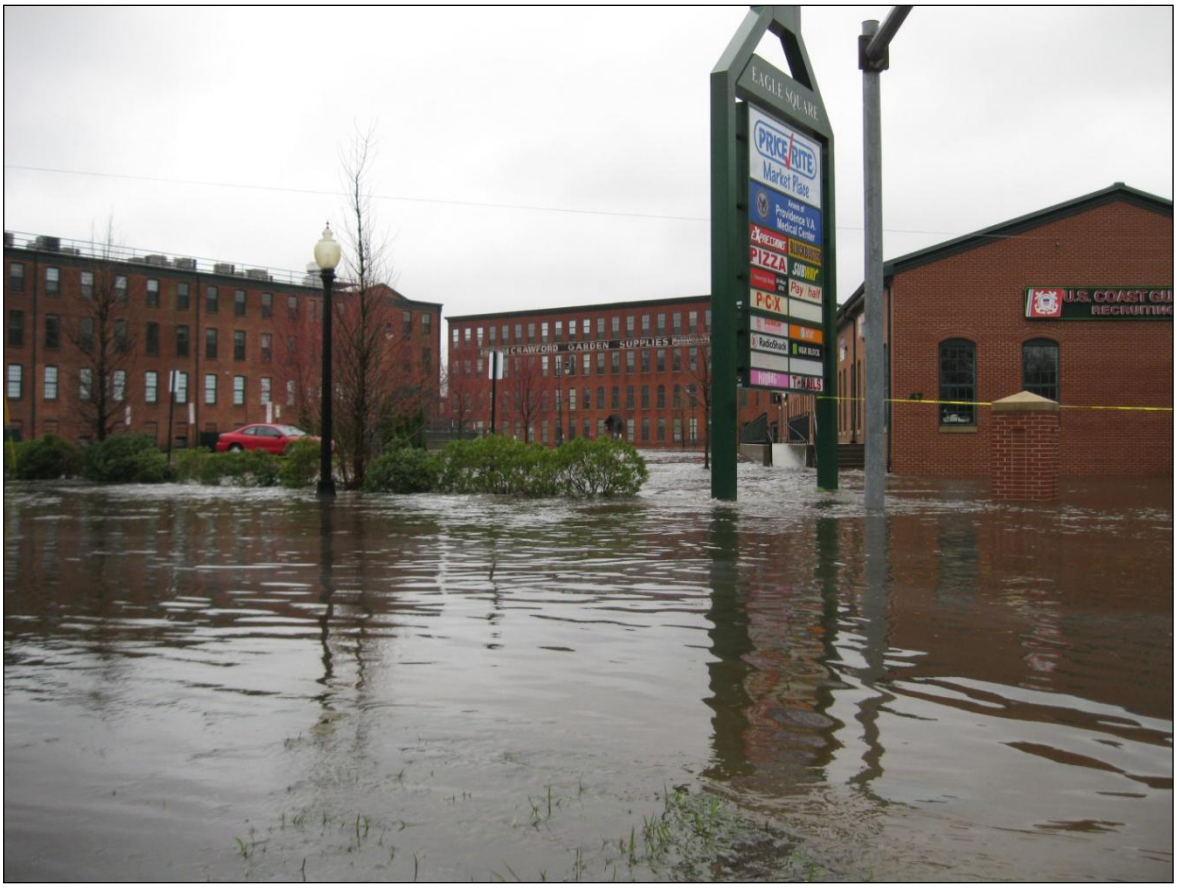
Among other municipalities whose ordinances use ERUs to determine fee amounts is Newton, Massachusetts. Notably

for Rhode Island, Newton's stormwater ordinance is authorized by a state law requiring fees to reflect "a proportionate share of the cost" and not to "exceed the amount of [the] benefit" to the property owner. This seems very similar to the "reasonable and equitable" requirement in Rhode Island law.

Courts around the country have upheld that ERUs not only reasonably represent the proportion of stormwater attributable to a given property but also meet the standards of the Constitution's Equal Protection clause (and its state counterparts). For example, in Brockmann Enterprises v. City of New Haven, an Indiana intermediate appellate court upheld an ordinance implementing essentially an ERU system. In this system, all residences were charged a flat fee, while commercial properties' fees were determined as a function of their actual square footage. The court held that the ordinance was both reasonable and constitutionally valid in creating these different classes of fee-payers. And, in Twietmeyer v. City of Hampton, a challenge to a Virginia ordinance that imposes a one-ERU fee on all residential properties and a five-ERU fee on all commercial properties, the Virginia Supreme Court created an even lower bar to clear for municipalities. Simply "[b]ecause the Ordinance" that was under attack there "differentiates between residential and non-residential property," the Supreme Court held "that the fee charged bears a rational correlation to the

amount of stormwater runoff." Other states' experiences suggest that each Rhode Island municipality has significant leeway in fashioning a reasonable and equitable fee structure.

In fact, Rhode Island courts have upheld a fee structure similar to ERUs, described as the result of "an effort to establish a fair and equitable annual fee." Recall Kent County Water Authority v. Rhode Island Department of Health, where the Rhode Island Supreme Court upheld a fee charged to water systems against a challenge that the fee was a disguised tax. In the course of its analysis, the Court examined how the fee was implemented. The authorizing statute required that "[t]he fees as established by [DOH] shall be related to the costs incurred in operating the program." DOH regulations set the fee rates: "transient non-community water systems" (basically small, seasonal water systems) paid $150; "nontransient non-community water systems" (small, year-round water systems) paid $250; and "community water systems" paid $1.10 per connection, so long as the fee amounted to no less than $250 and no more than $25,000. Thus, like a typical ERU system, the fee structure at issue was imprecise at some levels (especially very small and very large systems), albeit with more precision for medium-sized systems. That essential structure, which the court found to be valid, is still in place now.



Flooded parking lots are among the biggest sources of stormwater pollution.
Image courtesy of Jef Nickerson.

Q: A fee system may only require payment "to the extent to which runoff is contributed" – what does that mean?

A: The best answer is that a fee system may only require payment to the extent runoff is contributed to a SMD's "stormwater conveyance system."

The starting point for construing a statute is its language. Here the statute's language is: "The fee system shall be reasonable and equitable so that each contributor of runoff to the system shall pay to the extent to which runoff is contributed and the state shall be exempted from the fee system." It is plain that, taken as a whole, the sentence means that "each contributor of runoff to the system shall pay to the extent to which runoff is contributed" *to the system*. The question, therefore, is what the statute means by "the system."

On its own, the word "system" has a broad meaning: "[a] group of interacting elements functioning as a complex whole." (This and following definitions are taken from the American Heritage Dictionary) And given the statute's purpose – to authorize ordinances "designated to eliminate and prevent the contamination of the state's waters" – "system" should retain a broad meaning. However, the Supreme Court has said that "the words of a statute must be read in their context and with a view to their place in the

overall statutory scheme," and here the legislative findings and statutory purpose provide some grounds for limiting the word "system." Both sections of the statute speak of a "stormwater conveyance system." Statutorily enacted legislative findings are markers of legislative intent that may assist in interpreting words appearing later in a statute, so "stormwater conveyance system" is likely the "system" to which the General Assembly was referring later in the SMD Act.

The next question is what is a "stormwater conveyance system"? It is tempting to conflate the term with the municipal separate storm sewer systems defined in the Rhode Island Pollutant Discharge Elimination System regulations. However, "stormwater conveyance system" is actually undefined in Rhode Island and federal law. Moreover, it is a maxim of statutory interpretation that if the legislature had meant to invoke something like a piped municipal drainage system, it would have used specific language to that effect. We must look elsewhere to help us define "stormwater conveyance system."

The words "stormwater," "conveyance," and "system" each have independent meanings: DEM's Phase II Regulations define "stormwater" as "storm water runoff, snow melt runoff, and surface runoff and drainage"; the dictionary definition of "conveyance" is "the act of conveying" and to

"convey" is "to carry, transport"; "system" is "[a] group of interacting elements functioning as a complex whole." A stormwater conveyance system is therefore a group of elements that work together to carry water runoff. This compound definition is quite broad.

The SMD Act's legislative findings offer some clues as to what types of elements are included in such a system, noting some specific means of stormwater conveyance: "Stormwater reaches the state's waters by streets, roads, lawns, and other means." Thus, the definition of "stormwater conveyance system" may include streets, roads, and lawns. Other local governments have offered definitions that would accord with such a reading. The City of Sacramento, California, for example, defines stormwater conveyance system as "those artificial and natural facilities within the city, whether publicly or privately owned, by which stormwater may be conveyed to a watercourse or waters of the United States, including any roads with drainage systems, streets, catch basins, natural and artificial channels, aqueducts, stream beds, gullies, curbs, gutters, ditches, open fields, parking lots, impervious surfaces used for parking, and natural and artificial channels or storm drains," but not any facilities covered by facility-specific (rather than municipal) NPDES permits. Finally, in the end, the SMD Act must be interpreted in such a way as "to eliminate and prevent the contamination of the state's waters

and to operate and maintain existing stormwater conveyance systems." Given an undefined term and a broad statutory purpose, we must assign "stormwater conveyance system" an equally broad meaning.

Overall, then, a fee system may only require payment to the extent runoff is contributed to an SMD's natural and artificial "stormwater conveyance system," including streets, roads, lawns, and other means of conveyance. It is important to note that whether a property contributes runoff to the stormwater conveyance system may change over time with construction of capital improvement projects. These projects may redirect or otherwise treat stormwater runoff that previously did not flow to the system.

Q: Can a municipality charge a fee to an owner located in the municipality but who does not discharge into the system?

A: A municipality may charge a fee to the extent an owner discharges into the "stormwater conveyance system," a broad term that includes more than just the piped municipal drainage system. However, some properties do not discharge into the stormwater conveyance system; these properties would be exempt from the fee.

As discussed above, a fee system may only require payment to the extent runoff is contributed to an SMD's natural and artificial "stormwater conveyance system." Even if the stormwater conveyance system includes driveways and lawns, a fee system must be "reasonable and equitable." This language means that, to be eligible for a fee, a property must have some nexus to services provided by the SMD. After all, it would not be equitable to charge a fee to a person who neither contributes to the problem being remedied by the fee nor receives any other tangible benefit from paying the fee. The services provided by the SMD, however, can be as simple as maintaining elements of the conveyance system through which runoff from a given property eventually travels, as long as there is *some* nexus.

The nexus requirement is reflected in the previously mentioned Maine case of City of Lewiston v. Gladu. There, the court based its analysis in part on the fact that properties charged a fee "receive[d] the special benefit of having their stormwater managed in an effort to comply with state and federal laws." Though the court's decision in Gladu did not explicitly say it was *necessary* for an SMD fee to have some nexus to services provided, the laws underlying the decision do say this nexus is necessary. Lewiston Ordinance § 74-302, titled "Authority and Jurisdiction," authorized the district "to assess and collect service fees from all persons owning land within the municipality that benefit from the

services provided by the utility, including all persons that own land from which stormwater runoff discharges directly or indirectly to the stormwater management systems and facilities managed by the utility."

Given this nexus requirement, can SMDs charge and regulate properties that do not discharge, even indirectly, to a stormwater management system? In general, these properties will be exempt from any SMD fees because there is no nexus to any service provided by an SMD. Again, however, it is important to note that whether a property contributes runoff to the stormwater conveyance system may change over time as physical changes occur to the property and to the system.

Legal and Financial Risks

Q: *Could a municipality or SMD be liable for poorly maintained infrastructure on private or public property?*

A: Neither a municipality nor an SMD would likely be liable for poorly maintained infrastructure on private or public property.

Tort liability generally stems from the breach of some specific duty. So, as a starting point, note that there is no

obligation in the SMD Act for municipal SMDs to acquire, maintain, repair, or be responsible in any way for existing stormwater structures on any private property. According to the statute, an SMD may make a grant to a property owner to allow that property owner to improve an existing structure if it is included in the SMD plan. However, two things must be said about this power. First, it is permissive, not mandatory. That is, SMDs are allowed to do this, but there is no obligation to do this. Second, even if an SMD does do this, the ownership of the old, decrepit structure remains with the original property owner. The SMD is not acquiring any legal liability or obligation for future repairs if it elects to make a grant to a property owner for improvements to an existing structure related to stormwater.

In addition, neither a municipality nor an SMD could be exposed to tort liability if, say, there were an accident involving a structure (*e.g.*, a retention pond) created or maintained pursuant to an ordinance establishing an SMD. In Rhode Island, "[t]he public duty doctrine protects the state and its political subdivisions [municipalities] from tort liability arising out of the performance of governmental functions not commonly undertaken by private entities." Passing a municipal ordinance, creating an SMD, and administering the fee system associated with the SMD are all governmental functions prescribed and controlled by statute and ordinance. Likewise, constructing and repairing

stormwater infrastructure for the public good would seem to fall within the public duty doctrine, just like constructing and repairing traffic signs and signals does. The Public Duty Doctrine therefore protects each municipality and SMD from liability for injuries that occur as a result of the creation or maintenance of stormwater infrastructure.

Conclusion

The SMD Act is very flexible. A municipality may give an SMD discretion to do a wide range of things, including undertaking major projects to control stormwater; buying, selling, and leasing real estate; hiring staff to implement stormwater management; and collecting fees to pay for all of these things. As a matter of policy, municipalities should consider working together to create watershed-based SMDs. There is little or no risk that an SMD's fee system will be deemed an illegal tax, but each municipality should approach the bounds of SMDs' fee-charging authority with some caution due to the imprecise language of the SMD Act. There is also little risk that implementing an SMD will lead to any serious risk of tort liability.

APPENDIX A – Rhode Island Authorities

The Rhode Island Stormwater Management and Utility District Act

§ 45-61-1 Short title. – This chapter shall be known and may be cited as the "Rhode Island Stormwater Management and Utility District Act of 2002."

§ 45-61-2 Legislative findings. – The general assembly hereby recognizes and declares that:

(1) The general assembly finds that stormwater, when not properly controlled and treated, causes pollution of the waters of the state, threatens public health, and damages property. Stormwater carries pollutants and other material from the land – such as human and animal waste, oil, gasoline, grease, fertilizers, nutrients, and sediments – into rivers, streams, ponds, coves, drinking water aquifers, and Narragansett Bay. Stormwater reaches the state's waters by streets, roads, lawns, and other means. As a result, public use of the natural resources of state for drinking water, swimming, fishing, shellfishing, and other forms of recreation is limited and in some cases prohibited.

(2) The general assembly further finds that inattention to stormwater management results in erosion of soils and destruction of both public and private property, thereby putting public safety at risk and harming property values and uses, including agriculture and industry. Therefore, to help alleviate existing and future degradation of the state's waters and the associated risks to public health and safety, and to comply with state and federal stormwater management requirements, stormwater conveyance systems must be maintained and improved. The state of Rhode Island is delegated by the United States Environmental Protection Agency to implement "Phase II" stormwater management regulations, which require municipalities and other persons to increase their capacity to control stormwater. The Department of Environmental Management's Pollution Discharge Elimination System program has promulgated these regulations.

§ 45-61-3 Declaration of purpose. – The purpose of this chapter is to authorize the cities and towns of the state to adopt ordinances creating stormwater management districts (SMD), the boundaries of which may include all or part of a city or town, as specified by such ordinance. Such ordinances shall be designated to eliminate and prevent the

contamination of the state's waters and to operate and maintain existing stormwater conveyance systems.

§ 45-61-4 Powers of councils. – The city or town council of any city or town in the state, by itself or with other cities and towns, pursuant to chapter 43 of this title, and in accordance with the purposes of this chapter, are hereby authorized to adopt ordinances creating stormwater management districts, which will be empowered, pursuant to such ordinance, to:

(1) Establish a fee system and raise funds for administration and operation of the district. The fee system shall be reasonable and equitable so that each contributor of runoff to the system shall pay to the extent to which runoff is contributed and the state shall be exempted from the fee system. However, the state department of transportation shall cooperate with the municipalities in the planning and implementation of wastewater management ordinances, including the providing of funds, if available, to match the fees collected by the municipalities annually;

(2) Prepare long range stormwater management master plans;

(3) Implement a stormwater management district in accordance with regulations and model ordinances promulgated under this chapter;

(4) Retrofit existing structures to improve water quality or alleviate downstream flooding or erosion;

(5) Properly maintain existing structures within the district;

(6) Borrow for capital improvement projects by issuing bonds or notes of the city or town;

(7) Hire personnel to carry out the functions of the districts;

(8) Receive grants, loans or funding from state and federal water quality programs;

(9) Grant credits to property owners who maintain retention and detention basins or other filtration structures on their property;

(10) Make grants for implementation of stormwater management district plans;

(11) Purchase, acquire, sell, transfer, or lease real or personal property;

(12) Impose liens;

(13) Levy fines and sanctions for noncompliance;

(14) Provide for an appeals process;

(15) Contract for services in order to carry out the function of the district.

Rhode Island cases

Kent County Water Authority v. Rhode Island Department of Health, 723 A. 2d 1132 (R.I. 1999).

Town of Lincoln v. Blackstone Valley District Commission, 1980 WL 340220 (R.I. Super. Mar. 3, 1980).

Town of Lincoln v. City of Pawtucket, 745 A.2d 139 (R.I. 2000).

Appendix B – Out-of-State Authorities

Alabama:
Densmore v. Jefferson County, 813 So. 2d 844 (Ala. 2001).

Georgia:
McLeod v. Columbia County, 254 F. Supp. 2d 1340 (S.D. Ga. 2003).
McLeod v. Columbia County, 599 S.E.2d 152 (Ga. 2004).

Idaho:
Lewiston Independent School District v. City of Lewiston, 264 P.3d 907 (Idaho 2011).

Indiana:
Bd. of Comm'rs of Hendricks Cnty. v. Town of Plainfield, 909 N.E.2d 480 (Ind. 2009).
Brockmann Enterprises v. City of New Haven, 868 N.E.2d 1130 (Ind. App. 2007)

Maine:
City of Lewiston v. Gladu, 40 A.3d 964 (Me. 2012).

Massachusetts:
For City of Newton stormwater ordinance, see http://www.newtonma.gov/civicax/filebank/documents/27364.

For Newton ordinance's enabling legislation, see Mass. Gen. L. ch. 80, § 1.

Missouri:
Zweig v. Metropolitan St. Louis Sewer District, 2012 WL 1033304 (Mo. App. 2012) (transferred to Missouri Supreme Court).

North Carolina:
Smith Chapel Baptist Church v. City of Durham, 517 S.E.2d 874 (N.C. 1999) (superseded by statute).

Virginia:
Twietmeyer v. City of Hampton, 497 S.E.2d 858 (Va. 1998).

Washington:
Tukwila School District No. 406 v. City of Tukwila, 167 P.3d 1167 (Wash. App. 2007).