



Submitted Testimony

Pennsylvania Department of Environmental Protection Before the House Environmental Resources and Energy Committee Public Hearing on MS4 Compliance Monday, June 13, 2022

The Pennsylvania Department of Environmental Protection (DEP) is submitting this written testimony regarding the Municipal Separate Storm Sewer System (MS4) Program to Chairman Metcalfe, Chairman Vitali, and members of the committee. Thank you for the opportunity to provide comment on this important subject.

Municipal Separate Storm Sewer System (MS4) Program

Stormwater runoff is generated from rain and snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, and building rooftops. Impervious surfaces prevent the water from soaking into the ground. This runoff picks up pollutants such as trash, chemicals, oils, and dirt or sediment that can harm our streams, rivers, and lakes. To protect these resources, Stormwater Best Management Practices or BMPs are used to capture and treat pollutants in runoff. Stormwater BMPs, such as rain gardens, are typically ponds or other structures that collect runoff and infiltrate it into the ground or treat and release it. These BMPs can also serve to slow down stormwater, which can help prevent flash flooding in heavy storms.

The federal National Pollutant Discharge Elimination System (NPDES) program regulates stormwater discharges from three sources:

- Municipal Separate Storm Sewer Systems,
- Construction activities, and
- Industrial activities.

Certain operators of these sources of stormwater discharges are required to obtain an NPDES permit before they can discharge stormwater. These permitting mechanisms are designed to reduce stormwater runoff pollution to Pennsylvania's streams, rivers, and lakes. DEP implements the NPDES program in Pennsylvania on behalf of the United States Environmental Protection Agency (EPA). This allows the regulated community to get a single permit from DEP rather than separate permits from both DEP and EPA.

Development of urban and suburban areas are major contributors to pollutants in runoff as well as negative impacts to waterways caused by increased volumes and rates of runoff from impervious surfaces. Increasing the extent of areas covered with impervious surfaces in a watershed can cause problematic changes in hydrology and water quality. The MS4 program seeks to address those problems.

The MS4 program was created by federal regulations in the 1990s. The first MS4 permits in Pennsylvania were issued in 1997 to Allentown and Philadelphia as Large MS4s under "Phase I" of EPA's MS4 program. Large MS4s are those serving a population of at least 250,000 people. "Phase II" permits for Small MS4s were issued beginning in 2003; small MS4s are those with Urbanized Areas as determined by the federal Census Bureau or are designated by the permitting authority (e.g., DEP). Examples of small non-municipal MS4s that have been designated by EPA or DEP include universities, prisons, and transportation agencies. The current number of MS4s in Pennsylvania is 1,064, a figure that may increase as a result of the 2020 census. Not all Pennsylvania municipalities have been issued MS4 permits. Furthermore, even if a municipality has an Urbanized Area, DEP may waive permit requirements if certain federal criteria are met.

The basic requirements in MS4 permits are largely unchanged since 2003. Permittees are required to implement a Stormwater Management Program that employs six Minimum Control Measures (MCMs). The MCMs are:

- Public Education and Outreach on Stormwater Impacts;
- Public Involvement and Participation;
- Illicit Discharge Detection and Elimination;
- Construction Site Stormwater Runoff Control;
- Post-Construction Stormwater Management; and
- Pollution Prevention/Good Housekeeping.

The MCMs are activities that help control preventable pollution. The MCMs have not, however, been sufficient to eliminate stream impairments attributable to urban and suburban development and to sufficiently reduce pollutants to local waterways and to regional aquatic resources like the Chesapeake Bay. To help address this shortcoming and to satisfy federal obligations, in 2013, DEP introduced a requirement in MS4 general and individual NPDES permits for MS4

permittees to prepare Pollutant Reduction Plans to reduce their existing sediment and nutrient loads in stormwater draining from Urbanized Areas. In 2018, this requirement was enhanced and a target was established of a 10 percent reduction in sediment loads. Approximately 75 percent of Pennsylvania's MS4s are required to develop and implement a Pollutant Reduction Plan. The other 25 percent of MS4s either received a waiver from permit requirements or do not discharge to impaired waters and were not required to develop plans.

DEP understands that there is a financial burden on MS4s for the implementation of Pollutant Reduction Plans. MS4 permittees can select from a wide variety of BMPs depending on local opportunities, and BMPs can be on public lands or private property. Many permittees have selected stream and floodplain restoration projects because they are often considered a cost-effective option and can provide other benefits like improving resiliency to flooding. MS4 permittees can also pursue other options, such as changing the function of an old, existing flood control basin to an infiltration basin. Further, permittees have the flexibility to update Pollutant Reduction Plans at their discretion to modify the selected BMPs.

DEP strongly encourages joint or collaborative efforts for BMP projects and to satisfy other MS4 permit obligations. While MS4 permittees are under no obligation to work together, collaborative efforts assist permittees in achieving compliance with permit obligations and often result in cost savings. Municipalities that work together can share the costs and credits associated with individual BMPs, participate in a joint Pollutant Reduction Plan, or be joint permittees. They can also form a stormwater authority, which can serve either a single municipality or multiple municipalities. DEP also encourages collaborative arrangements to address stormwater pollution between municipalities and PennDOT and the Pennsylvania Turnpike Commission.

To fund BMP installation and ongoing operation and maintenance, municipalities can use traditional tax-based revenue sources. The General Assembly also directly granted municipalities and authorities the ability to assess stormwater fees, which are typically based on impervious surface area of a property since those areas do not allow rainwater to infiltrate, thus diverting it to the storm sewer system. Stormwater fees are a method to raise dedicated funding for stormwater management without resorting to broad-based tax increases. Although sometimes a point of confusion in these discussions, DEP does not impose or require the use of stormwater fees.

Funding for urban and suburban stormwater projects is also available through the Pennsylvania Infrastructure Investment Authority (PENNVEST) as well as through grant programs such as Growing Greener; however, the demand for grant funding exceeds the capacity of existing programs. With the passage of the federal Infrastructure Investment and Jobs Act (IIJA), the

Federal Government is providing an historic augmentation to Clean Water State Revolving Funds, which help fund PENNVEST-supported stormwater projects.

House Bill 2153

House Bill 2153 would appropriate \$300 million from federal money available to the Commonwealth under the American Rescue Plan Act of 2021 (ARPA) to a new Municipal Storm Water Assistance Fund, which would be managed by DEP through a new Municipal Storm Water Assistance Program. This money would go toward the development and update of the stormwater management plans required by the Storm Water Management Act (Act 167 of 1978) by counties as well as the implementation of BMPs by municipalities and non-municipal MS4s. It is important to note that ARPA funds must be obligated by December 31, 2024, and expended by December 31, 2026.

While the administration does not have a position on House Bill 2153 at this time, this bill, like all funding proposals, would need to be part of budget discussions. DEP welcomes and appreciates discussion of investment in the future of stormwater management in Pennsylvania, and we expect counties and municipalities will likewise appreciate the General Assembly's interest in identifying funding for this important work. There has been no source of dedicated funding for Act 167 Plans for approximately 12 years, and as a result, the plans have not been updated routinely to take advantage of new knowledge in the science of stormwater management. The problems that have resulted from historical development without adequate stormwater management will take long-term solutions and identifying long-term funding would be a significant step forward.

House Bill 2331

DEP has concerns with many elements of House Bill 2331 that are impractical or contravene federal law and regulations. This could have severe consequences for federal funding and the regulated community.

House Bill 2331 would amend the Storm Water Management Act (Act 167 of 1978), to include a number of new requirements. First, the bill would require DEP to conduct active water quality testing of all waterways identified as in need of a watershed stormwater plan. That would mean that all waterways in Pennsylvania would require annual water quality testing, as Act 167 applies to all waters of the Commonwealth.

DEP implements surface water monitoring and assessment programs for all of Pennsylvania's 85,500 miles of streams and rivers and 2,000,000 acres of lakes, bays, and wetlands. DEP has and continues to actively work with sibling agencies, local universities, nonprofit organizations,

and residents to collect surface water quality data in an effort to continually reassess the health of Pennsylvania's surface waters as required by Section 303(d) of the federal Clean Water Act. Existing and readily available data submitted to DEP is utilized in Pennsylvania's Integrated Water Quality Report, developed every two years, posted for public comment, and reviewed and approved by EPA. In addition to working with partners, DEP implements a Water Quality Network comprising 178 fixed stations for the purposes of assessing both surface water quality and the effectiveness of water quality management programs.

House Bill 2331 states that "if the department does not have the physical or financial resources to conduct the water quality testing under this paragraph, the department shall rely on the following to calculate the water quality standards pertaining to a watershed stormwater plan." Water quality standards are regulatory provisions in *Pennsylvania Code*, Title 25 Environmental Protection, Chapter 93 Water Quality Standards, authorized by federal law approved by EPA. These water quality standards describe the desired condition of a waterbody and the means by which that condition will be protected or achieved. Pennsylvania's regulatory process is governed by four state statutes that require several steps, including:

- The development of proposed rulemaking,
- Public participation,
- The development of final rulemaking,
- Public notification of the final rule,
- Review by the Independent Regulatory Review Commission,
- Review by General Assembly standing committees, and
- Review by the Attorney General.

Unlike other state agency rulemakings, environmental regulations also have to go through the Environmental Quality Board (EQB). Due to this extensive regulatory review process, the regulatory process to update water quality standards routinely takes more than two years to complete.

Surface water monitoring or "water quality testing" is used to describe water quality conditions that are compared to water quality standards to determine if particular surface water is meeting the goals (i.e., water quality standards) that have been established. Surface waters that do not meet established water quality standards are identified as impaired in DEP's Integrated Water Quality Report, which is updated every two years.

House Bill 2331 states that DEP can rely on data collected by conservation districts, the Pennsylvania Fish and Boat Commission, the Department of Conservation and Natural Resources, the Pennsylvania Game Commission, and state universities. DEP currently relies on and actively solicits water quality data from sibling agencies, local universities, nonprofit

organizations, and residents. This data along with surface water quality data collected by DEP has and continues to be used to describe water quality conditions across the state. An assessment of all of Pennsylvania's numerous and diverse surface waters has previously been completed for at least one protected use and DEP and its partners are actively working to continually reassess all of the Commonwealth's surface waters. However, Pennsylvania is a water-rich Commonwealth, and with 85,500 miles of streams and rivers and 2,000,000 acres of lakes, bays, and wetlands, reassessing all of Pennsylvania's surface waters requires many years of work by dedicated partners and millions of dollars.

Next, House Bill 2331 states that "if a municipality does not submit water quality data from conservation districts, the Fish and Boat Commission, the Department of Conservation and Natural Resources, the Game Commission, or state universities, a water quality testing model may be used." The purpose of this provision is unclear. If this is intended to mean that a municipality that has MS4 discharges can use a model in lieu of submitting water quality data in support of a waiver from the need for an MS4 NPDES permit, DEP would have two concerns. First, the federal criteria for waiver of small MS4 permit requirements at Title 40 of the Code of Regulations, Chapter I, Subchapter D, Part 122, Section 122.32(c) rely primarily on the municipality's population and the attainment status of surface waters receiving stormwater discharges from the MS4. Attainment status is determined under the authority of Sections 303(d) and 305(b) of the federal Clean Water Act. Water quality data is just one factor in determining whether or not a receiving water is attaining its existing and designated uses. Second, while water quality models are important tools for water resource management programs, models still require surface water quality data collection to develop, run, calibrate, maintain, and verify the models. Moreover, such models can require a greater degree of surface water data collection on the front end (i.e., to develop the models) with the goal of less data collection over longer periods of time (i.e., to refine and verify the models).

Finally, House Bill 2331 states that "if the water quality testing under this paragraph indicates that a waterway is in compliance with the Federal Water Pollution Control Act and the water quality standard is established by the department, the department shall grant a National Pollutant Discharge Elimination System permit waiver for stormwater discharge for a small municipal separate storm sewer system."

DEP's first concern with this provision is that waivers are not issued by discharge points but rather by MS4 (e.g., by municipality). EPA automatically designates all operators of small MS4s that are located within the boundaries of the Census-defined urbanized area as needing MS4 NPDES permit coverage. Waiver options are available to operators of small MS4s if discharges do not cause, or have the potential to cause, a water quality impairment and if the MS4 meets at least one of the following population criteria: the jurisdiction served by the system is less than 10,000 people, or the jurisdiction served by the system is less than 1,000 people within the

urbanized area. In other words, if an MS4 discharges to two waterways where one is impaired and the other is not, DEP would not – according to federal requirements – be able to grant a waiver because the MS4 still contributes to a water quality impairment.

The second concern is that this provision of House Bill 2331 conflicts with the federal waiver criteria for small MS4s. If DEP were to grant waivers without considering the population in the area regulated by the MS4 permit, or the impairment status of all waterways to which the MS4 discharges, we would jeopardize Pennsylvania's delegation for the NPDES program. If EPA were to rescind the delegation, every discharger in the state would need to get two separate permits – a permit under Pennsylvania's Clean Streams Law from DEP and an NPDES permit from EPA – instead of just getting one from DEP. The delegation agreement also comes with several million dollars each year in federal funding for DEP staff, equipment, supplies, and water quality monitoring, which the Federal Government would rescind as well. With fewer staff and resources to manage the program, DEP's ability to review permit applications and conduct inspections and compliance assistance would be severely diminished.

Thank you again for the opportunity to provide testimony on the MS4 program and this legislation.



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Stormwater Fee Implementation Plan:

Analysis of the Commonwealth of Pennsylvania's refusal to meet its legal financial obligation to pay the user fee and the resultant impact on the City of Harrisburg and its residents and businesses.

January 2022

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INTRODUCTION:

Capital Region Water has been working on its City Beautiful H2O Program in Harrisburg since 2015. Capital Region Water founded the program as a way to meet state and federal clean water requirements, reduce combined sewer discharges, restore failing infrastructure, improve the health of local waterways, and beautify neighborhoods through community greening.

In June 2019 as part of that program, the authority proposed a Stormwater Fee Proposal and Implementation Plan. After three formal public hearings; dozens of community meetings and forums over the course of a year; direct meetings with some of the largest and most affected property owners, including the Commonwealth of Pennsylvania; and feedback from nearly 100 residents and businesses, Capital Region Water formally and unanimously adopted an equitable fee structure in November 2019 and implemented the plan on Oct. 1, 2020.

Almost immediately after rollout, the Commonwealth of Pennsylvania issued notice that it would not pay the user fee on any of its owned properties within the City of Harrisburg. Being the Commonwealth's capital city, Harrisburg has a high density of state government property within Capital Region Water's jurisdiction. **Based on impervious surfaces and monthly billings, the Commonwealth's failure to pay its fair share on 22 accounts totaling nearly 5.4 million square feet of impervious area ultimately could end up costing city ratepayers \$32,246 per month, or \$386,956 per year (Appendix A: "State Properties Subject to Stormwater Fee").**

The Commonwealth's refusal to meet its financial obligation defies legal precedent. Additionally, it contradicts actions the Commonwealth has made previously (and until recently) in other municipalities to pay similar user fees, while placing an undue burden on the City of Harrisburg and its residents --- many of whom are low-income and may have to pay the difference to ensure Capital Region Water complies with mandates established by state and federal governments.

CHALLENGES FACING HARRISBURG:

Like so many cities across the country, Harrisburg faces the challenge of maintaining and upgrading water and sewer infrastructure that was built decades ago. Almost 800 cities nationwide face a similar challenge --- upgrading an outdated and undersized combined sewer system. In Harrisburg, approximately 80 percent of its collection system was installed before 1940, meaning most of the city's stormwater infrastructure that handles rainwater is over 80 years old. The age of this infrastructure --- coupled with decades of deferred maintenance --- has resulted in several structural and operational deficiencies and debris buildup. Nearly 40 percent of Harrisburg's sewer and stormwater (rainwater) infrastructure now needs to be repaired or replaced.

Managing stormwater is a real challenge. Stormwater is water from rain, snow, or ice melt that does not get absorbed into the ground. In a natural environment, most rain, snow, or ice melt falls on pervious surfaces like grass and filters into the ground, recharging ground water and keeping water tables consistent. When stormwater runs off impervious surfaces such as streets, parking lots and building rooftops, it collects fertilizers, pesticides, pet waste, automotive fluids, sediment, debris and other pollutants before reaching a storm drain.

In a separate stormwater system, these pollutants and debris are transferred to waterways, jeopardizing the health of water used for drinking, recreation, and habitat in Harrisburg and downstream communities. About 40 percent of Harrisburg's system has a separate storm sewer system that handles only stormwater and a parallel sanitary sewer system that handles only sewage. The combined system currently treats over half of the stormwater it collects, while none of the stormwater collected by the separate storm sewer system is treated. The entire system (combined or separate) requires stormwater management practices to comply with regulatory requirements.

Pollutants from runoff pose a danger to public health and damage aquatic life. Stormwater combined with raw sewage --- as in some places in Harrisburg --- only increases the amount of pollution and damage. Capital Region Water captured and treated 92 percent of all combined sewage and stormwater in 2020, and on average treats 90 percent annually. The 8 percent that went untreated was primarily the result of heavy rains overwhelming Harrisburg's aging and undersized infrastructure. This issue is the direct result of the type of sewer system that exists in the Harrisburg area combined with the uncontrolled runoff from impervious surfaces.

Harrisburg faces another unique challenge as the state's capital city. [According to the city's previous Act 47 financial recovery plan](#), Harrisburg's biggest problem is who owns its land. The Commonwealth of Pennsylvania holds deeds on 41 percent of the city's tax-exempt land. Many of these state government properties are the source of a significant volume of stormwater runoff, as noted in **Appendix A: "State Properties Subject to Stormwater Fee."** Failure of state government to pay its fair share of the stormwater user fee only increases the financial burden on the city and its residents.

STORMWATER FEE PROPOSAL & IMPLEMENTATION:

Harrisburg is one of approximately 800 cities nationwide with a combined sewer system. State and federal regulators require these jurisdictions to control overflows of untreated combined sewage that flow into local creeks and rivers. In 2013, the city entered into a partial consent decree with state and federal regulators to create a long-term plan to control sewer overflows and reduce polluted runoff. Since then, Capital Region Water has invested more than \$170 million to improve water and wastewater infrastructure and address a backlog of deferred maintenance projects, yet more must be done.

Because of the high cost of compliance and Harrisburg's limited tax base --- **many of the city's residents qualify as low-income** --- finding creative ways to manage stormwater and polluted runoff is a priority for Capital Region Water. The goal is to cut combined sewer overflow discharges by more than half and increase existing system capacity to better manage rain and eliminate localized flooding events. The issue is how to fund the program and ensure it is equitable and affordable for city residents. Investments in the City Beautiful H2O program will total several hundreds of million dollars over the next 20 years, with more than \$200 million allocated in the first 10 years on wet-weather control projects and rehabilitation and replacement of aged and undersized infrastructure that has exceeded its useful life.

Capital Region Water explored various funding alternatives with the goal of creating an equitable approach that considers the financial capacity of city residents. A stormwater fee proved to be the best and fairest solution.

If no fee was implemented, Capital Region Water would have had to recover stormwater costs by increasing wastewater rates. But the historical practice of funding stormwater expenses based on water consumption is not equitable. Wastewater billing based on water consumption does not correlate to the amount of stormwater runoff from an individual property. Residential customers previously funded half of wastewater and stormwater costs but merely create a quarter of the stormwater. **Charging a modest stormwater fee on impervious surfaces separate from wastewater fees is the best and most equitable approach because the stormwater fee is connected directly to the cause of the pollution and use of the stormwater systems.**

Capital Region Water's stormwater fee, net of credits, is expected to raise approximately \$5.3 million annually. The money will be placed in a dedicated fund for stormwater operations and projects to control sewer overflows reduce polluted runoff. Again, as a demonstration of the equitable nature of the stormwater fee:

- With a stormwater fee, residential customers would pay \$1.24 million of the \$5.3 million annually --- or 23.3 percent, their fair share based on residential stormwater runoff.
- Without the stormwater fee, relying only on wastewater rates, residential customers would pay \$2.55 million each year, or 48 percent of the total cost.

The math is clear: With a stormwater fee, residential customers will pay \$1.3 million less each year than if these costs are included in the wastewater rate, meaning the stormwater fee results in lower utility bills for residential customers. **But all of this depends on all ratepayers, including the Commonwealth of Pennsylvania, fulfilling their obligation to pay the user fee.**

In November 2019, after three formal public hearings; dozens of community meetings and forums; meetings with some of the largest and most affected property owners, **including the Commonwealth of**

Pennsylvania through meetings with several agencies, as well as the state Department of General Services' executive team; and feedback from nearly 100 residents and businesses, Capital Region Water formally and unanimously approved a 2020 budget that included for the first time a new stormwater fee, taking effect July 1, 2020 (implementation ultimately was delayed 90 days until Oct. 1, 2020, in response to the economic hardship associated with the COVID-19 pandemic). Under the approved plan, the average residential property will see a flat fee of \$6.15 per month. The properties with the most impervious surfaces, which generate the most stormwater --- such as properties owned by the Commonwealth of Pennsylvania --- will pay higher fees apportioned to the amount of runoff pollution each generates.

As a municipal authority, Capital Region Water, which is audited annually by an independent financial auditing firm, does not earn a profit and invests its revenue into operating and improving the Harrisburg area's water and wastewater systems. **It is essential that the Commonwealth of Pennsylvania fulfill its legal obligation and pay its fair share to address the stormwater its facilities generate in Harrisburg and to help clean up the runoff pollution flowing into Paxton Creek and the Susquehanna River.**

FINANCIAL IMPACTS ON HARRISBURG RATEPAYERS:

About 10 percent of Capital Region Water’s stormwater billings are related to government properties. With 22 accounts totaling nearly 5.4 million square feet of impervious area (**Appendix A: “State Properties Subject to Stormwater Fee”**), the Commonwealth of Pennsylvania comprises roughly two-thirds of fees assessed for government properties. **That means if the Commonwealth of Pennsylvania refuses to pay its legal obligations related to the fee for its impervious surfaces on its properties, residential and commercial ratepayers in the city of Harrisburg ultimately will be on the hook for an extra \$32,246 per month, or \$386,956 per year.**

That payment is larger than the sum of its parts, too. Consider that \$32,246 per month is enough for Capital Region Water to finance a \$7 million PENNVEST loan, which would enable the authority to make significant progress in meeting regulatory obligations and in reducing the impact of stormwater runoff.

The environmental impact is significant as well. To put into perspective the amount of impervious area the Commonwealth is responsible for in Capital Region Water’s jurisdiction: In a typical year, rainfall totals 40.6 inches here, with a runoff coefficient of 0.95. That means that 5 million square feet of impervious area generates about 120 million gallons of stormwater a year. That is enough to fill 15,000 tanker trucks, with each measuring 42 feet and carrying 8,000 gallons. Placed end to end, that is enough tanker trucks to stretch from Harrisburg to Washington, D.C.

USER FEES vs. TAXES:

The Commonwealth of Pennsylvania is seeking a waiver from its obligation to pay stormwater fees for its Harrisburg-based properties within Capital Region Water's jurisdiction. In correspondence to the Derry Township Municipal Authority, for example, the Pennsylvania Department of Military and Veterans Affairs argues that Commonwealth agencies "[do] not pay stormwater management fees because stormwater fees, unlike water and sewer service fees, are a tax to which the Commonwealth is immune." Several other Commonwealth agencies, including the Pennsylvania Department of Transportation (PennDOT), have advanced similar arguments in letters to other municipal authorities throughout the Commonwealth. The Commonwealth is applying the same incorrect position to fees imposed by Capital Region Water.

As further discussed below within the "Stormwater Fee Legal Precedents" section, municipal authorities may properly assess stormwater fees provided that such fees are reasonably proportional to the level of service rendered. It is telling that the General Assembly defined the charges for stormwater management services under the as "reasonable and uniform *rates*" similar to the myriad of other service charges such as sewer and water rates when it amended the Municipality Authorities Act to expressly authorize stormwater rates. **While the Commonwealth acknowledges the validity of other water and sewer fees, it counterintuitively refuses to do so for stormwater fees.**

But the Commonwealth's assessment is flawed and counter to established case law. Generally, taxes are revenue-production measures that are authorized under the taxing power of the government. While taxes finance general government operations, a fee is distinctly limited to the costs of a specific service, with those fees designed to benefit the entities from which the money is collected. The primary purpose of the stormwater fee and the use of funds is to meet the partial consent decree that Capital Region Water entered into with state and federal regulatory agencies to address system-wide stormwater deficiencies that result in polluted runoff.

The stormwater fee is a fee based on the stormwater a property generates --- it is not a property tax. Therefore, tax-exempt properties --- including Commonwealth properties --- also are responsible for paying the fee. As opposed to generating revenue for an array of uses as a tax would, the stormwater fee is raising dedicated revenue that will be redirected back into the system for stormwater projects. It will cover only the costs associated with improving existing stormwater systems, such as cleaning and repairing storm drains and sweeping streets; capital improvements, such pipe and treatment plant upgrades; and green infrastructure, such as planting trees, disconnecting downspouts, and installing rain gardens and pervious surfaces.

The stormwater fee charged to property owners is directly related to level of overall demand the user places on the system. Commonwealth properties generate increased stormwater runoff through impervious surface areas. Thus, stormwater fees are the appropriate and necessary legal means to support the long-term investment in Capital Region Water's stormwater infrastructure to bring the system into regulatory compliance.

Case law supports this approach. Support for stormwater charges to be considered fees exists at the federal level. By way of example, [Norfolk Southern Corp. challenged the City of Roanoke's stormwater fee in a lawsuit that claimed tax discrimination](#). The railroad questioned why lawns were deemed pervious and not subject to the fee but railroad track beds were subject to the fee for being impervious. The court found that a rational relationship exists between impervious surfaces and an appropriate stormwater fee

to be charged. This is because entities that generate greater runoff receive a special and particular benefit of disposing greater stormwater runoff.

In its decision, the U.S. Court of Appeals for the Fourth Circuit cited helpful guidance in analyzing the fundamental question of whether an assessment serves revenue-raising purposes, and therefore is a tax, or serves a regulatory purpose, and therefore is a fee. The heart of the inquiry remains the purpose and ultimate use of the assessment. The majority opinion concluded that the fees were kept in a segregated fund for a specific purpose, rather than general government activity that benefits the entire community, and incentivized decisions (either through improvements or credits) to advance the Roanoke program's regulatory objectives. Thus, the court rejected the claim that the fee was a tax and confirmed that impervious area is the best and most accurate measure for the fee and any related benefits it derives.

Pennsylvania courts also have considered the question of whether a stormwater charge is a tax or fee. Commonwealth Court recently reinforced the Norfolk Southern court's guidance when delineating between taxes and fees. In July 2019, [Commonwealth Court highlighted three factors that should be considered when determining whether a stormwater charge is a tax or fee](#): 1) whether the stormwater system provides a distinct benefit to the assessed property; 2) whether the value provided is reasonably proportional to the charge; and 3) how the municipality uses the generated funds. Capital Region Water's stormwater program satisfies each of these factors, indicating clearly that the charge is a valid fee and not a tax.

STORMWATER FEE LEGAL PRECEDENTS:

Capital Region Water's Wastewater and Stormwater Rules and Regulations are uniformly applied to all developed properties --- both taxable and tax-exempt --- and require each property owner to pay a fee that is commensurate with their use and benefit of the stormwater system.

In terms of uniformity, Capital Region Water based its stormwater fee on the amount of stormwater generated by measuring the amount of impervious area on a property. To calculate the fee, impervious areas included, but were not limited to, pavements, driveway areas, and roofs. Using impervious area for assessment is the most accurate and judicially approved measure of any property's discharge.

The Pennsylvania General Assembly expressly granted permission to both municipalities and authorities to manage stormwater and charge fees. [Act 68 of 2013](#) added stormwater responsibilities as an authorized project permitted under the Municipality Authorities Act (MAA) for existing and or newly created authorities. [Act 123 of 2014](#) added language to the MAA further defining implementation of stormwater charges, further allowing a property owner to implement best management practices ("BMPs") to curtail stormwater runoff while permitting stormwater authorities, if they choose, to incorporate these implemented BMPs into their rate structure. **Capital Region Water's design and implementation of a fair and equitable stormwater fee in the City of Harrisburg follows these laws, as designed by the Commonwealth, to the letter.**

When the state General Assembly amended the Municipality Authorities Act to expressly authorize authorities such as Capital Region Water to assess stormwater fees, the legislature did not alter or eliminate the requirement that all rates and fees be reasonable and uniform. To satisfy that requirement, Capital Region Water must apply the fee to all properties --- again, both taxable and tax-exempt --- in a uniform manner. The authority may not arbitrarily waive a fee for a particular property, including those owned by the Commonwealth of Pennsylvania. **This means the Commonwealth's request for a waiver is contrary to the very law it created.**

It also should be noted that the Commonwealth of Pennsylvania's refusal to pay is in stark contrast to the position of the federal government, which pays stormwater fees. The [Clean Water Act, Section 313 \(c\)](#), was amended in 2010 to make clear the responsibility of federal agencies to pay fees for stormwater programs. As an example, the [U.S. Government Accountability Office \(GAO\) in March 2011 sent a letter](#) to the District of Columbia Department of the Environment agreeing to pay the water and sewer authority's impervious surface area (ISA) charge, [reversing an earlier decision by GAO not to pay the fee.](#) (See Appendix B for additional information about the Clean Water Act amendments and GAO decisions.)

STORMWATER FEE CREDIT AND APPEALS PROCESS:

Although a waiver cannot be provided, Capital Region Water has been in discussions with the Commonwealth and has encouraged it to examine the authority's comprehensive "[Wastewater and Stormwater Rules and Regulations](#)" to determine if any credits may be applied to Commonwealth properties, as permitted by [Act 123 of 2014](#). Under Capital Region Water's regulations, owners of improved parcels may apply for credits against the charge imposed upon them if they implement various stormwater management activities that reduce, control, or treat stormwater runoff from their property.

Since the launch of the program, Capital Region Water already has granted stormwater management fee credits to more than 45 accounts thanks to property owners who have taken extra steps to manage on-site stormwater. Credits are available for various controls, including compliance with complementary Department of Environmental Protection permitting, such as National Pollution Discharge Elimination System (NPDES) Industrial Stormwater permits and separate Municipal Separate Storm Sewer System (MS4) permits. In developing and implementing its plan, Capital Region Water has been mindful not to duplicate the stormwater management obligations that property owners may have with the Commonwealth and has instead opted to pursue partnership opportunities.

To help customers work through the credit process, Capital Region Water has provided guidance and technical assistance since March 2020 by issuing courtesy Stormwater Fee Assessments. Because of this, many of these customers were able to get these credits applied before the issuance of their first bill. This includes government entities (although, of particular note, Capital Region Water does not assess a stormwater fee on roadways --- whether city or Commonwealth roadways).

Capital Region Water also has an appeals process for reviewing a property owner's stormwater fee calculation. Approximately 100 appeals have been processed for various reasons --- primarily for corrections to the impervious area calculation and ownership changes per the property owner's request. The City of Harrisburg, another government entity, has availed itself of the appeals process and has had changes made to its fee in response. Capital Region Water has amended stormwater fees, and most corrections have been applied before the issuance of the first bill. **In challenging a fee, the ratepayer is required to carry the burden to demonstrate that the rate is unreasonable, not uniform, and not rationally related to the level of service. Rather than even attempt to carry its burden, the Commonwealth has incorrectly asserted that the fee is a tax and has refused to pay --- to the detriment of city residents it is supposed to serve.**

HISTORY OF COMPLIANCE BY THE COMMONWEALTH:

The benefits to communities from addressing polluted runoff through a stormwater fee far outweigh the speculative concern that businesses will relocate --- a frequent criticism of such forward-thinking plans. The reality is that many central Pennsylvania communities already have stormwater fee systems in place, and the number is growing. **According to the latest [Western Kentucky University Stormwater Utility Survey 2021](#), nearly 1,850 jurisdictions nationwide --- including large cities like Philadelphia, Houston and Tampa --- have similar policies in place. Fifty-eight stormwater utilities exist in Pennsylvania.**

Capital Region Water is not alone. Other municipalities and authorities are receiving similar notifications noting the state's refusal to pay. The Commonwealth now deems this stormwater fee as a tax. Many of these jurisdictions are receiving this new notification after years of state compliance, with agencies paying stormwater fees in some cases for more than five years. This turn of events is concerning on many levels for the municipalities and authorities that must meet mandates imposed by a government unwilling to address its own contributions to the problem.

CONCLUSION:

Capital Region Water's stormwater fee is the most equitable and efficient means for the authority to meet state and federal clean water requirements and address polluted runoff. State regulations permit the use of a stormwater fee to address these issues and caselaw reinforces its applicability.

The Commonwealth may argue against paying the fees, but legal precedent and the Commonwealth's own actions in making payments on other properties uphold and demonstrate the Commonwealth's legal and financial obligation.

Stated plainly, the Commonwealth's failure to pay its fair share for a fee that ultimately has been established to meet mandates established by state and federal governments could cost ratepayers \$32,246 per month, or \$386,956 per year (Appendix A: "State Properties Subject to Stormwater Fee).

Other property owners --- including those with tax-exempt property --- are fulfilling their legal financial obligations. It is time for the Commonwealth of Pennsylvania to do the same.

APPENDIX A:

State Properties Subject to Stormwater Fee

Based on the latest billing data for November 2021, the Commonwealth of Pennsylvania holds deeds on 41 percent of the City of Harrisburg’s tax-exempt land. Many of these state government properties are the source of a significant volume of stormwater runoff. With 22 accounts totaling nearly 5.4 million square feet of impervious area, the Commonwealth comprises roughly two-thirds of assessed government fees.

Account	Name	Monthly Fee	Impervious Area
1	PENNSYLVANIA COMMONWEALTH	\$12.92	2,144
2	COMMON WEALTH OF PA-PENDOT GOVNR PARKING LOT	\$68.27	11,392
3	COMMONWEALTH OF PA	\$5,293.31	880,559
4	COMMONWEALTH OF PA	\$2,600.84	432,609
5	COMMONWEALTH OF PA	\$8,691.18	1,445,695
6	DEPARTMENT OF TRANSPORTATION COMMONWEALTH	\$95.33	15,864
7	COMMONWEALTH OF PA-GOVERNOR'S MANSION	\$349.32	58,065
8	PENNSYLVANIA COMMONWEALTH	\$62.73	10,456
9	COMMONWEALTH OF PA-IRVIS BLDG	\$5,273.63	877,240
10	PENNSYLVANIA COMMONWEALTH DEPARTMENT OF	\$1,161.74	193,262
11	COMMONWEALTH OF PA	\$230.01	38,261
12	COMMONWEALTH OF PENNSYLVANIA	\$115.62	19,257
13	COMMONWEALTH OF PENNSYLVANI	\$501.23	83,364
14	PENNSYLVANIA NATIONAL GUARD	\$2,708.46	450,518
15	COMMONWEALTH OF PA	\$2,104.53	350,080
16	COMMONWEALTH OF PA-LABOR & INDUSTRY	\$1,097.16	182,510
17	PENNSYLVANIA COMMONWEALTH	\$147.60	24,603
18 *	PENNSYLVANIA COMMONWEALTH		9,255
19	COMMONWEALTH OF PA	\$378.84	63,088
20	COMMONWEALTH OF PA-FINANCE BLDG	\$472.32	78,604
21	COMMONWEALTH OF PA-FORUM BLDG\EDU COMM & S DR	\$615.62	102,438
22	COMMONWEALTH OF PA-RACHEL CARSON	\$265.68	44,193
	Total	\$32,246.34	5,373,457
	Annual	\$386,956.08	

* On account 18, listed above, the account receives a 100% discount valued at \$55.35 per month due to green stormwater infrastructure in place in a park in the Royal Terrace neighborhood of Harrisburg.

NOTE: The stormwater fee is based on the amount of stormwater generated by measuring the amount of **impervious area (IA)** on a property. Impervious area is any surface that prevents or impedes the infiltration of rainwater into the ground. For purposes of the fee calculation, impervious areas include, but are not limited to: pavements, driveway areas, and roofs. Any surface designed to be compacted gravel or crushed stone shall be regarded as an impervious surface.

APPENDIX B:
Helpful Resources

U.S. Court of Appeals for the Fourth Circuit (No. 18-1060)
Norfolk Southern Railway Co., Plaintiff-Appellant v. City of Roanoke, Defendant-Appellee, and Chesapeake Bay Foundation, Intervenor/Defendant – Appellee.
Argued: Nov. 1, 2018; Decided: Feb. 15, 2019
<https://www.ca4.uscourts.gov/opinions/181060.P.pdf>

Commonwealth Court of Pennsylvania (No. 260 M.D. 2018)
The Borough of West Chester, Petitioner, v. Pennsylvania State System of Higher Education and West Chester University of Pennsylvania of the State System of Higher Education, Respondents
Argued: March 13, 2019; Filed: July 15, 2019
https://drive.google.com/file/d/15YmBAQ_-J3-e_uD4syMJMHohgBOYKIBe/view

Capital Region Water
“Wastewater and Stormwater Rules and Regulations”
<https://capitalregionwater.com/wp-content/uploads/2020/10/2020-10-01-Wastewater-and-Stormwater-Rules-and-Regulations.pdf>

Municipality Authorities Act
Act 68 of 2013
<https://www.municipalauthorities.org/assets/1/6/Act-68-2013.pdf>

Municipality Authorities Act
Act 123 of 2014
<https://www.municipalauthorities.org/assets/1/6/Act-123-2014.pdf>

S. 3481
111th Congress of the United States of America
AT THE SECOND SESSION: Begun on Tuesday, the fifth day of January, 2010
Clean Water Act, Section 313 (c), to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution.
https://drive.google.com/file/d/1oaK1jI5XnY1jmFXt6TI_DvlAqVdzvjVA/view

LETTER: U.S. Government Accountability Office (GAO)
District of Columbia Water and Sewer Authority
Subject: Use of Appropriated Funds to Pay for the D.C. Water Impervious Surface Area Fee
September 29, 2010
https://drive.google.com/file/d/1pCLMqK_-EAQVt245FIAbogHHhxVAOECA/view

LETTER: U.S. Government Accountability Office (GAO)
Acting Attorney General for the District of Columbia
Subject: Public Law 111-378 and Payment of the Stormwater Charge
March 14, 2011
https://drive.google.com/file/d/1zE6GAPMwHBF_r6iiVtBK4Brx09MWLJ6u/view

Western Kentucky University

School of Engineering and Applied Sciences

Western Kentucky University Stormwater Utility Survey 2021

Summer 2021

https://digitalcommons.wku.edu/cgi/viewcontent.cgi?article=1003&context=seas_faculty_pubs