



Pennsylvania Aggregates and Concrete Association

2040 Linglestown Rd
Suite 204
Harrisburg, PA 17110
Tel 717-234-2603
Fax 717-234-7030

August 20, 2019

Sent via email to: rziadeh@pa.gov and aneatkinso@pa.gov

Ramez Ziadeh, P.E.
Executive Deputy Secretary for Programs
Aneca Atkinson
Deputy Secretary Water Programs
Pennsylvania Department of Environmental Protection
400 Market Street
Harrisburg, PA

Dear Mr. Ziadeh and Ms. Atkinson:

As indicated in our July 19, 2019 meeting, the Pennsylvania Aggregates and Concrete Association (PACA) is requesting that the Department clarify its guidance to municipalities and municipal authorities which operate stormwater systems to assure that those entities provide appropriate exclusions or credits in relation to stormwater fees where mining or industrial facilities are themselves managing, controlling and discharging stormwater in compliance with permits currently issued by the Department.

PACA represents the aggregates (crushed stone and sand/gravel), ready mixed concrete and cement operations in Pennsylvania. PACA's members operate in all 67 counties of Pennsylvania, and comply with a myriad of environmental statutes, regulations and DEP permits. All such facilities have some version of an NPDES permit governing the management, treatment and discharge of facility stormwater in order to operate, the majority of which are individual NPDES permits. These permits have, among many other things, strict limits for sediment and pH. And all of these are subject to the Department's varied and significant permit fees.

As you are aware, municipalities that meet certain criteria must obtain NPDES permit coverage for discharges of stormwater from their municipal separate storm sewer systems (MS4s). In Pennsylvania, our understanding is that there are 1059 small jurisdiction MS4s attempting to comply with this EPA unfunded mandate. Most municipalities are attempting to fund such MS4 programs through charging "stormwater fees."

While we understand that the establishment of stormwater fees for services provided by MS4 systems is authorized by particular statutes, a number of PACA facility operators are being assessed exorbitant taxes (e.g., based on the total acreage of impervious vs pervious in quarries or similar facilities) for properties that, in most cases, do not use or discharge into the MS4 systems. And while some of these municipalities agree such properties or facilities should be exempt from those charges, they are hesitant to exempt us fearing their MS4 permits will not be approved by DEP.

We are requesting two actions by DEP. First, we are requesting that DEP issue a letter to PACA that clarifies the relationship between MS4 permits and facilities in our industry (aggregates—crushed stone and sand/gravel—ready mixed concrete and cement). Specifically, we are requesting that the Department clarify that:



-2-

- Facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) which manage, control, treat and discharge their own stormwater and that either (i) have implemented a non-discharge alternative (e.g., under a DEP-approved GP 104 Permit), or (ii) discharge directly to a stream rather than an MS4 system under a DEP-approved NPDES individual or general permit, can and should be exempted from stormwater fees.¹
- Facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) which manage, control, treat and discharge their stormwater under a DEP-approved individual or general NPDES permit, where the stormwater then flows into an MS4 system can and should be accorded substantial credits (100%) against stormwater fees in acknowledgement of the BMPs implemented under such NPDES permits.
- Where facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) located within a PRP planning area manage, control, treat and discharge their stormwater under DEP-approved NPDES permits and are accorded exemptions from stormwater fees or credits against stormwater fees, the MS4 system permittee may still take credits against PRP loading reduction requirements based upon the BMPs implemented by such facilities.

Additionally, we are requesting DEP clearly outline in this letter why it is to a municipality's advantage to exempt our industry. We would then be sharing this letter with those municipalities that have MS4 responsibilities in areas that include our industry facilities.

Second, we request the Department revise the guidance documents on their website, including the appropriate sections of the 2022 Model Stormwater Management Ordinance, to indicate and explain the exemption.

We are requesting these steps because:

1. Aggregates (crushed stone and sand/gravel), ready mixed concrete and cement operations that manage and discharge stormwater under DEP-issued NPDES Permit are directly implementing Best Management Practices (BMPs) for stormwater. PACA members have facilities where all the stormwater runoff from the facility (and in some cases stormwater coming from off-site areas surrounding the facility) is collected, managed and treated to meet the stringent NPDES standards. We have facilities that take stormwater from their neighbors, treat it and discharge in compliance with the NPDES limits in the PACA-operator's permit. We have facilities whose discharges are the actual backup water supply for towns and facilities whose discharges support trout streams.
2. The Non-Coal Mine Discharge NPDES permits held by PACA members already have effluent limitations that are more restrictive than the goals of the MS4 program.

¹ See Pollutant Reduction Plan (PRP) Instructions, 3800-PM-BCW0100k (Rev. 3/2017) at §IILB and Attachment A.

-3-

3. Some PACA member non-coal mines hold general permits that provide for non-discharge alternatives. Those include some situations where all stormwater is collected and stored in quarry pits or infiltration, and others where the permits provide for no discharge during storms up to some value -- e.g., less than a 2-year, 24-hour storm (see 25 Pa. Code §102.1), less than a 10-year, 24-hour storm, or in some cases even up to a 100-year storm. These facilities control stormwater well beyond what is provided in an MS4 system.
4. For a variety of reasons, it is important that stormwater fees be linked to and fairly assessed in relation to the service being provided; otherwise case law in this and other jurisdictions indicates that such fees become taxes.² Courts have upheld as allowable fees charges, such as sewer and water fees, that are tied to services provided to a property.³ But “fees” that are not tied to and proportionate to services and benefits provided to a property, or which are used for more general purposes and benefits, will be considered “taxes.”

The Illinois case of *Church of Peace v. City of Rock Island*, 828 N.E.2d 1282 (Ill. App. Ct. 2005) is noteworthy. There, while the stormwater fee assessed against a church was upheld as not being a tax because the charge was “proportional to a benefit or service rendered” and was voluntary because the church could construct its own stormwater system to avoid paying the charge. *Id.* at. 1284-1286.

The distinction between taxes and fees is critical. Taxes are not assessable against tax-exempt entities, such as churches, charitable institutions, and state and federal government owned properties (which in many communities represent substantial areas contributing stormwater to MS4 systems); while “fees” can be collected from such entities. In addition, if a stormwater assessment is classified as a “tax,” its imposition may lie beyond the statutory power of the entities seeking to collect them. Notably, the Pennsylvania Constitution prohibits any entity other than the legislature, county commissioners, or municipal governing body, from enacting a tax;⁴ municipal authorities, districts, and the like have no such taxing powers.

This issue lies at the core of a case currently pending before Commonwealth Court, in *Borough of West Chester v. Pennsylvania State System of Higher Education*, Pa. Cmwlth. Ct. No. 260 M.D. 2018, where West Chester Borough is pursuing an action against a state owned university seeking to collect stormwater fees. As noted by Commonwealth Court in its memorandum opinion overruling preliminary objections issued July 15, 2019 (2019 WL 3069642), the determination as to whether the stormwater charges in dispute constitute a fee or a tax turn on factual question as to “whether the Borough’s Stormwater System provides a discrete benefit to [the state university], as opposed to generally aiding

² See the cases discussed in the attached paper published by the Pennsylvania Bar Institute, R. T. Weston, *Stormwater Utilities – Pennsylvania Legal Issues and Experience from Other States*.

³ See, e.g., *Rankin v. Chester Municipal Authority*, 68 A.2d 458 (Pa. Super. Ct. 1949) (water fees); *Voorhis v. Peters Creek Sanitary Authority*, 430 A.2d 1017 (Pa. Commw. Ct. 1981) (sewer fees upheld, found “reasonably related to value of service rendered”).

⁴ Pa. Const. art. III, § 31.

-4-

the environment and the public at large, whether the value of the Stormwater System to [the state university] is reasonably proportional to the amount of the Stormwater Charge, and, apart from general operation, maintenance and repair of the Borough's Stormwater System, how exactly does the Borough utilize the funds generated by the Stormwater Charge." *Id.* at 12. As expressed in the Commonwealth Court's opinion, the Borough will be required to establish that the stormwater charge "constitutes a fee for service that is reasonably proportional to the value of the benefit conferred" *Id.* at 13.

For Pennsylvania MS4 communities to be able to collect stormwater "fees" (and avoid having such assessments classified as taxes), the cases in this and other states indicate that charges must be reasonable and proportional to the benefit or service rendered by the MS4 system. Conversely, the imposition of stormwater charges on entities who do not discharge to or through the MS4 system and who therefore receive no benefit from the MS4 system make the charge vulnerable to attack as an impermissible tax.

For these reasons, we would request that the Department clarify its guidance to MS4 communities. The following is suggested language for these changes in the referenced documents.

PRP Development Process Summary⁵, item 7:

Add:

"Facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) which manage, control, treat and discharge their own stormwater and that either (i) have implemented a non-discharge alternative (e.g., under a DEP-approved GP 104 Permit), or (ii) discharge directly to a stream rather than an MS4 system under a DEP-approved NPDES individual or general permit, can and should be exempted from stormwater fees.

Facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) which manage, control, treat and discharge their stormwater under a DEP-approved individual or general NPDES permit, where the stormwater then flows into an MS4 system can and should be accorded substantial credits (100%) against stormwater fees in acknowledgement of the BMPs implemented under such NPDES permits.

Where facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) located within a PRP planning area manage, control, treat and discharge their stormwater under DEP-approved NPDES permits and are accorded exemptions from stormwater fees or credits against stormwater fees, the MS4 system permittee may still take credits against PRP loading reduction requirements based upon the BMPs implemented by such facilities."

⁵ Found 8/7/2019 at:

http://files.dep.state.pa.us/Water/BNPNSM/StormwaterManagement/MunicipalStormwater/PRP_TMDL_Plans/PRP%20Development%20Process%20Summary%20June%2009.pdf.

-5-

MS4 NPDES PERMITS FREQUENTLY ASKED QUESTIONS (FAQ) ⁶, page 2, insert between items D and E the following:

“Facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) which manage, control, treat and discharge their own stormwater and that either (i) have implemented a non-discharge alternative (e.g., under a DEP-approved GP 104 Permit), or (ii) discharge directly to a stream rather than an MS4 system under a DEP-approved NPDES individual or general permit, can and should be exempted from stormwater fees.

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3800-PM-BCW0100k NPDES STORMWATER DISCHARGES FROM SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEMS, POLLUTANT REDUCTION PLAN (PRP) INSTRUCTIONS,⁷ Attachment A, Parsing Guidelines for MS4s in Pollutant Reduction Plans, insert the following as the fifth bullet:

“Facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) which manage, control, treat and discharge their own stormwater and that either (i) have implemented a non-discharge alternative (e.g., under a DEP-approved GP 104 Permit), or (ii) discharge directly to a stream rather than an MS4 system under a DEP-approved NPDES individual or general permit, can and should be exempted from stormwater fees.

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⁶ Found 8/7/2019 at:

[http://files.dep.state.pa.us/Water/BNPNSM/StormwaterManagement/MunicipalStormwater/PRP_TMDL_Plans/Frequently%20Asked%20Questions%20\(FAQ\).pdf](http://files.dep.state.pa.us/Water/BNPNSM/StormwaterManagement/MunicipalStormwater/PRP_TMDL_Plans/Frequently%20Asked%20Questions%20(FAQ).pdf) .

⁷ Found 8/7/2019 at:

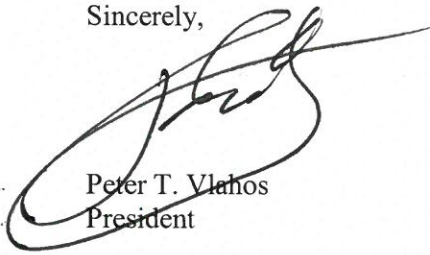
<http://www.depgreenport.state.pa.us/eLibrary/GetDocument?docId=11118&DocName=01%20NOTICE%20OF%20INTENT%20-NOI-%20INSTRUCTIONS.PDF%20%20%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E> .

-6-

Where facilities (aggregates—crushed stone and sand/gravel, ready mixed concrete and cement operations) located within a PRP planning area manage, control, treat and discharge their stormwater under DEP-approved NPDES permits and are accorded exemptions from stormwater fees or credits against stormwater fees, the MS4 system permittee may still take credits against PRP loading reduction requirements based upon the BMPs implemented by such facilities.”

Thank you for your assistance with this issue. Should you wish to discuss further, please contact me at 717-756-4070.

Sincerely,



Peter T. Vlahos
President

cc: John Stefanko, DEP Mining Program
Josie Gaskey, PACA
R. Timothy Weston, K&L Gates
Margaret O. Murphy, DEP Legal