



## The Legal Aspects of Creating and Managing Storm Water Utilities

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### Presentation

- What is a stormwater utility?
- Are stormwater utilities legal?
- Indiana's enabling legislation
- What are the common legal challenges?
- How the federal courts have weighed in
- How to avoid legal problems when developing a utility
- How to avoid legal problems when running a utility

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### What is a stormwater utility?

A stormwater utility can be any or all of the following

- A funding method
- A program concept
- An organizational entity

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### Why are stormwater utilities so popular?

- Expansion of local government roles
- Changing stormwater programs
- Shift away from general taxes to fees and demand-based funding
- Other prevailing priorities competing for general fund dollars - police, schools, etc
- Proliferation of other enterprise funds - solid waste, waste water
- Can service bond debt
- Failure of other funding methods

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### Why are stormwater utilities so popular?

- **S**table – reliable level of funding allows planning  
– not subject to multiple demands
- **A**dequate – program driven funding levels  
– planned increases in service levels
- **F**lexible – single method or mix of funding methods  
– can include special districts
- **E**quitable – property owners pay based on demand they place on the program / system

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### Can anything this good be legal?

The legal basis for establishing stormwater utilities varies from state to state:

- Legal precedence by court decisions
- Home rule powers
- Special legislation
- Enabling legislation

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### Indiana enabling legislation

Stormwater utilities in Indiana can be established in the following ways:

- Under a sanitary board or district (IC 36-9-23)
- As a stormwater management district (IC 8-1.5-5)
- As part of a redevelopment commission (IC 36-7-14)
- Under a county drainage board (HB 1798)

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### Indiana enabling legislation

Stormwater utilities in Indiana can generate revenue using the following methods:

- Through the levy of ad valorem taxes
- Through user fees
- By issuing revenue bonds
- By using General Fund revenues
- Through fees and exactions related to the stormwater program

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### Indiana enabling legislation

Stormwater utilities in Indiana can set rates using the following methods:

- Flat rates
- Impervious surfaces
- Number / size of outfalls
- Amount, strength, or character of discharge
- Improvements by owner (credit authorization)
- Improvements by County (impact fee or exaction)
- Other factors

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### No problems?

So, if the legislature says that we are “good to go” with stormwater utilities, we’re safe to implement one, right?

The authorization to create a stormwater utility makes it legal to create a utility, as long as it is done correctly. The legislation is not a shield against legal challenges, it merely states that stormwater utilities are an accepted type of enterprise in the state.



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### Who will likely challenge a utility?

- Tax exempt properties
- People with large paved areas with cheap buildings
- Sometimes residential property owners
- Sometimes fixed income
- Sometimes businesses or developers

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### Types of legal challenges

- Fee vs. Tax – attempt to circumvent tax ceilings
- Fee vs. Tax – tax exempt properties
- Authorization – “You can’t do that”
- Cost of Service – dispute what is included in costs
- Rate base – distribution of costs
- Credits – dispute the amount of credit given or conditions under which credits are given

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## Courts' reaction to complaints

- Fee vs. Tax
  - defendants typically prevail
  - Lansing MI – plaintiffs won; attempt to circumvent tax ceilings
  - Cincinnati OH – plaintiffs won; involuntary nature of fee
  - Atlanta GA – plaintiffs won; fee looked like a tax
- Rate base
  - defendants typically prevail
  - Philadelphia PA – plaintiffs won; distributed costs on water meter readings
  - Moline IL – case dropped; tiered residential rates

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## Courts' reaction to complaints

- Cost of Service
  - defendants typically prevail
  - Durham NC – cost of service included services not enabled
- Credits and exemptions
  - defendants typically prevail
  - Plaintiffs typically dispute the amount of credit given or conditions under which credits are given

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## Federal Courts

"Fee vs. Tax" is the complaint that has been filed in the courts most often. In response to these complaints the Federal courts have identified three characteristics of fee programs that differentiate them from taxes:

- Regulatory nature of the fee
- Relationship between service provided and fee charged
- Voluntary nature of the fee

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### Federal Courts - *regulatory nature*

The "regulatory nature of the fee" is very easy to address in most cities and counties as there are any number of regulatory programs that deal with streams, water bodies, and stormwater runoff, including but not limited to:

- Rule 5
- Rule 13
- TMDLs
- Floodplain regulation
- CSOOP / LTCP
- Sections 401 & 404

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### Federal Courts - *rational nexus*

- The direct relationship between the services provided and the fee charged for the services, or "*rational nexus*," is the basis of an enterprise fund.
- In other public utilities the direct relationships between services and fees are easier to determine.
- The level of service, the cost of service, and the rate base are important considerations.

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### Federal Courts - *rational nexus*

- All of the components of the stormwater program should be accounted for;
  - administrative
  - engineering
  - planning
  - operations and maintenance
  - enforcement
  - compliance
  - capital
- The cost of these services should be directly related to level of service being provided under each cost center.

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### Federal Courts - *voluntary nature*

The “*voluntary nature*” of the fee is often times seen as the most difficult of the three criteria to meet.

Plaintiffs say,

- “Participation in the utility was not elective, therefore it is not voluntary”
- “I have no other option for disposing of stormwater runoff, therefore it is not voluntary”

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### Federal Courts - *voluntary nature*

The courts have allowed some latitude.

- Voluntary nature can be provided by allowing a reduction in fees charged, or “credit,” for controlling runoff on-site or for direct discharges.
- A property owner can choose between discharging to the city’s system or on-site methods for reducing or eliminating runoff, using green design, etc.
- Legal precedence in the fact that participation in other utilities is mandated for regulatory reasons.

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### Problem avoidance – utility development

- Develop a stormwater management business plan
- Don't split fund sources (*with taxes*)
- Don't give credits for political reasons
- Think through credit amounts given and eliminate inconsistencies in amounts
- Everyone pays; don't look at ability to pay
- Roads typically don't get charged (*public vs private*)
- Develop an appropriate rate base

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### Rate bases

- Appropriate
  - Impervious area
  - Impervious plus gross area
  - Intensity of development
  - Effective hydraulic area
- Inappropriate
  - Water meters
  - Square footage of structures
  - Tax exempt vs taxable status

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### Problem avoidance – utility development

- Billing methods should be thoroughly thought out
  - Periodic (monthly or bi-monthly) or annual / semi-annual billing are allowed
  - Billing user fees on the tax bills result in minimal flexibility in enforcement as by law any properties that are delinquent on their taxes for two years go on the tax sale list
- Document all policy and guidance decisions
- Appeals process should be defined in rate ordinance

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### Problem avoidance – utility implementation

- Be consistent in dealing with appeals and requests
- Minimize political “favors”
- Document all credit and waiver policy decisions
- Remember the fund is dedicated to stormwater and don't pay for unrelated services
- Use good judgment, know when to “cave” on contested bills
- Incorporate equity builders in rate ordinance revisions
- Public notice all rate discussions

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