



September 18, 2012

The Honorable Tom C. Creighton
Chairman, House Local Government Committee
The Pennsylvania House of Representatives
416 Irvis Office Building
P.O. Box 202037
Harrisburg, PA 17120-2037

Re: PaSW Coalition Comments on Senate Bill 1261

Dear Chairman Creighton:

It is with great pleasure that we, as representatives of the Pennsylvania Stormwater Coalition ("Coalition"), appear before you today and offer our comments on Senate Bill 1261 and the closely related issue of additional management authority for our various direct units of local government. In other words, we support Senate Bill 1261 not with a "Yes, but . . ."; rather we support this important House Bill with a "Yes, and . . ." I will elaborate upon this needed additional municipal corporation authority momentarily.

Let me first introduce those members of our Coalition appearing before you today. To my right is the Chairman of the Coalition, Michael J. Fox. Chairman Fox is also a Supervisor of Montgomery Township, Montgomery County. Chairman Fox has been our leader in reaching out to and coordinating with the Pennsylvania Department of Environmental Protection, the U.S. Environmental Protection Agency, our legislators, and our local government organizations on the important topic of developing effective, yet realistic stormwater management initiatives on behalf of the Coalition members.

To my left is Lawrence J. Gregan, the Executive Secretary of the Coalition, and the Township Manager for Montgomery Township. Manager Gregan not only has over 30 years of municipal government management experience, but he has first hand coordinated the effort of nearly 60 Southeast Pennsylvania communities in their effort to understand and then advocate regarding the most recent PaDEP and U.S. EPA permit program initiative for municipalities with separate storm sewer systems, usually identified as "MS4s." All of us would be pleased to respond to your questions at the conclusion of the direct testimony.

*C/O Montgomery Township, 1001 Stump Road, Montgomeryville, PA 18936
215-393-6900 (P) 215-855-6656*

We support this Senate Bill since it would clearly allow stormwater management functions to be within the scope of an authority's permitted activities assuming that is what its' sponsoring municipality so directs.

However, and very importantly, we believe that in many, many instances local municipal government would chose not to create a new municipal authority or to enlarge the mission of an existing authority if the municipal corporation itself had the authority to create a stormwater management district and charge appropriate fees to those discharging stormwater within the district. It is this authority that is lacking and that Senate Bill 1261 does not address. We believe Senate Bill 1261 should be amended to address this or that a companion bill be drafted and introduced specifically for this purpose.

Why is it likely that many municipalities would choose to utilize a stormwater fee structure directly if they had the authority to do so? There are at least two core reasons. First, authorities cannot be established and operated without cost and administrative overhead and are, by their very nature, insulated from direct municipal governance. In some communities the supervisors, commissioners or council members may prefer to directly retain the stormwater management responsibility in the interest of cost efficiency and representative government, particularly if they could establish a fee for discharge system to support needed improvement in the stormwater management system.

Second, stormwater management relates to a broad range of municipal government activities which are not as easily or neatly separated from other municipal government activities as is the provision of electric, public water, telephone and cable or sanitary waste water services. And while others may have additional reasons, the following come to my mind:

1. Stormwater from private property often discharges to and travels along public roadways already built, owned and/or maintained directly by the municipality;
2. The roadway itself requires its own stormwater drainage capacity which is built and maintained by the municipality;
3. New land development or redevelopment initiatives today require greatly enhanced stormwater management controls, and these controls are all imposed and overseen by the municipality itself; and
4. Many new or enhanced stormwater management facilities will be located upon already municipally owned property or established in conjunction with other landowners. Further if new property were to be acquired, those decisions would be made by elected officials rather than appointed authority members.

Missing from the various municipal codes is that specific authorization needed to establish, if municipal government so chooses, a stormwater management district and related fee for service structure. We are providing to this Committee the Coalition's March 24, 2011 "Legal Assessment of Municipal Corporations' Authority to Manage and Regulate Stormwater within

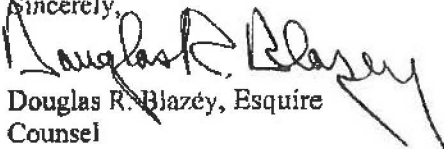
Their Municipal Boundaries” which identifies the limited manner in which municipal corporations are authorized to establish, acquire and maintain needed stormwater management facilities.

The simple “take-away” message of this Assessment is that if additional stormwater management facilities are needed for existing stormwater flows, the cost of constructing and maintaining those stormwater management facilities must be borne by the general taxpayer and cannot be specifically assigned to those needing or utilizing the service. If we want municipal government to be able to establish either a general or district oriented stormwater management system with related fees, additional legislative authorization is required.

We do not recommend a universal and mandatory fee system for stormwater, but a permissive authorization that allows local government to deploy or utilize a fee for service system, if it so chooses, appropriate to its specific circumstances.

In conclusion, we favor clarifying the ability of municipal authorities to address stormwater if their sponsoring municipalities wish them to undertake this task. Second, we favor enlarging the authority of our municipal corporations to create stormwater management districts and charge appropriate fees for this service. We favor flexibility and choice. We offer to participate in any effort to draft this new language and stand ready to respond to any questions you might have. Thank you for this opportunity to appear before you.

Sincerely,



Douglas R. Blazey, Esquire
Counsel

Attachment: Legal Assessment

**THE PENNSYLVANIA
STORMWATER COALITION**

**LEGAL ASSESSMENT OF MUNICIPAL
CORPORATIONS' AUTHORITY TO MANAGE AND
REGULATE STORMWATER WITHIN THEIR
MUNICIPAL BOUNDARIES**

Douglas R. Blazey, Esquire

Counsel for Coalition

Frank R. Bartle, Esquire

Local Counsel for Coalition

March 24, 2011

PREFACE

This Legal Assessment is intended to provide members of the Pennsylvania Stormwater Coalition ("PaSWC" or "Coalition") an overview of legal issues associated with the new Municipal Separate Storm Sewer System Permit ("MS4") program that is expected to be implemented during 2011 by the Pennsylvania Department of Environmental Protection ("DEP"). This document includes an analysis of various possible MS4 permit requirements in light of existing municipal authority in order to provide Coalition members with information to evaluate potential legal implications of the MS4 applications required to be filed on or before December 14, 2011 (180 days prior to the June 11, 2012 expiration of the current MS4 general permits known as PAG-13 permits). If any given community has an individual NPDES permit, that permit will contain its own expiration date.

This Legal Assessment will be provided to officials of the DEP and the U.S. Environmental Protection Agency ("EPA") for the purpose of increasing their understanding and appreciation of municipal authority and responsibilities. This Legal Assessment is also intended for those members of the public that are concerned about the effectiveness and cost of expanding stormwater management programs and for elected federal, state and county officials as municipal government seeks to obtain resources for effective stormwater management, to explain its capacities and limitations with regard to this program, and to improve the effectiveness and efficiency of the Commonwealth's stormwater management program.

This Legal Assessment is not in the form of a formal legal opinion or brief but has been developed in a more narrative format. It is intended to broadly inform Coalition members and DEP and EPA officials regarding the legal authorities (and limitations) the Pennsylvania General Assembly has provided to municipal government.

- Municipal government does not have the authority to require revisions to otherwise lawful, pre-existing land uses in the interest of reducing stormwater flows from such property.

Category No 2:

- All four municipal codes reviewed have gaps in their authorizing language that, to a greater or lesser extent, constrain the ability of municipalities to construct, maintain or operate stormwater management systems and then to recover the capital, maintenance or operating cost of these new systems through any method other than general tax revenue. In other words, there is no clear authority for municipalities to allocate the cost of stormwater management to landowners who generate stormwater runoff from their property and are users of and runoff contributors to the MS4. There is also no clear authority to allocate cost based on the benefit received from the MS4, nor is there a means to financially recognize the efforts of landowners who have taken action to control, reduce, or prevent stormwater runoff from their property.
- The Pennsylvania Municipal Authorities Act does not provide a clear alternative path to municipal government to address the construction, maintenance or operation of stormwater management systems.
- The Pennsylvania Storm Water Management Act does not provide any direct mechanism to modify stormwater drainage from existing land uses or stormwater management structures existing upon that property.

8. Load Allocation (L.A.): The portion of the loading capacity attributed to (1) the existing or future nonpoint sources of pollution (defined below) and (2) natural background sources.
9. Margin of Safety or MOS: A required component of the TMDL (defined below) that account for the uncertainty in the response of the waterbody to loading reductions.
10. Municipal Separate Storm Sewer System or MS4: The stormwater collection and discharge sewer system owned and operated by municipal government for the beneficial management of stormwater collected by that system.
11. National Pollutant Discharge Elimination System or NPDES: The national program for issuing, modifying, revoking, terminating, monitoring and enforcing permits and pretreatment requirements under the CWA. The MS4 permit issued to Coalition members are NPDES permits.
12. Pennsylvania General Permit Number 13 or PAG-13: This is the designation given by the DEP to the general permit issued to small MS4 operators (municipalities in urbanized areas with under 100,000 in population or municipalities outside the urbanized area but designated by the permitting authority, that is, the DEP, as requiring an MS4 permit.
13. Phase I MS4 regulation: The original Phase I EPA regulation, issued in 1990, requires medium and large cities or certain counties with populations of 100,000 or more to obtain NPDES permit coverage for their stormwater discharges.
14. Phase II MS4 regulation: The original Phase II EPA regulation, issued in 1999, requires regulated small MS4s in urbanized areas, as well as small MS4s outside an urbanized area, but designated by the permitting authority, to obtain NPDES permit covered (an MS4 permit) for their separate stormwater discharges.
15. Point Source Pollution: Pollutant loads discharged at a specific location from pipes, outfalls, and conveyance channels from either municipal or industrial waste water sources which include pollutant loads from stormwater discharges
16. Total maximum daily load or TMDL: The sum of the individual wasteload allocations (WLAS) for point sources, load allocations (LAS) for nonpoint sources and natural background, and a margin of safety (MOS). TMDLs can be expressed in terms of mass

BACKGROUND

In the early 1990's the EPA began a nationwide effort to address water pollution issues associated with stormwater discharges. This initial effort included large and medium communities (municipal entities over 100,000 in population) whose volume of stormwater in their separate storm sewer system ("MS4") was very large. This program was identified as the Phase I municipal and industrial stormwater program. Phase II of the federal program, with active implementation commencing in 1999, addressed smaller communities (those under 100,000 in population). Phase II resulted in Coalition members receiving their initial MS4 permits in the 2002 to 2004 timeframe.

However, and very importantly, these initial MS4 permits, which have been extended in Pennsylvania until midnight June 11, 2012, are, in most cases, much less demanding than the proposed MS4 permit intended to be issued to Pennsylvania municipalities in 2012. This second round permit will impose dramatically more stringent requirements than those included in the current MS4 permits.

The initial MS4 permits contained six (6) minimum control measures ("MCMs"). Since Coalition members are presently implementing the six MCMs, these measures will not be discussed in detail. MCM 1 and MCM 2, while important, are primarily focused upon public education and outreach. MCM 3 contains the only backward looking requirement which is limited to identifying and eliminating illicit connections. MCM 4, MCM 5 and MCM 6 are forward looking components directed to minimizing erosion and sedimentation from construction activities and controlling post construction run-off from new development and from direct municipal activities by coordinating land development approvals with DEP regulatory requirements. The new 2012 Pennsylvania MS4 permits will significantly expand the backward looking components.

The new backward looking components are the result of the EPA and the DEP seeking to achieve water quality standards for all waters within Pennsylvania (this same requirement applies

who either maintain their own point source discharge to a water of the United States or have land which drains in sheet flow (as a non-point source) to a Water of the United States. Legal counsel to the Coalition believes this enlarged federal expectation is fundamentally misplaced for several reasons. It is both unfunded and unwise, but, very importantly, it does not comport with federal and Pennsylvania law. Any municipality seeking to impose such expansive requirements would itself be subject to legal attack as operating beyond the authority granted to it by the General Assembly.

and MS4 program alternatives that likely lack General Assembly authorization or funding to municipal government and thus appear unrealistic if sought to be imposed by either the DEP or the U.S. EPA upon municipal government under current law. This last element is critically important to municipal government as various desirable stormwater system improvements require additional sources of revenue which have not been identified or authorized. Municipal government is very concerned about the imposition upon it of new “unfunded mandates” as those imposing these mandates do not pay the increased cost and are not accountable to those being required to fund the mandate.

II. Relevant Categories Of Municipal Legal Authority

Municipalities are creatures of a sovereign state government. As such, they have only those powers expressly granted to them. For purposes of this assessment four different categories of legal authority will be reviewed: (1) the Municipal Codes under which Coalition members operate; (2) the Municipal Authorities Act; (3) the Storm Water Management Act of 1978; and (4) the Municipalities Planning Code. This general review does not address any specific enlargement of municipal powers that might be granted to “Home Rule” communities by virtue of their Charter and the provisions of Subchapter E of Home Rule and Optional Plan Government statute (53 Pa.C.S.A. §2961 *et seq.*). Such a specific assessment is best conducted for each municipal entity independently.

The goal of this Section is to identify the clear differences in authority granted to various units of government and also those areas where their authority is ambiguous so that the need for clear, additional authority can be thoughtfully considered if our municipal corporations are to undertake any enlarged stormwater management role.

A. Municipal Codes

The Municipal Codes are those laws of the Commonwealth which instruct, empower or authorize (and also limit) each class of municipal and city government created by the General Assembly. These codes specify the general municipal prerogatives and duties, such as the construction and maintenance of various public works (roads, parks, drainage systems, sanitary sewers, and other municipal facilities), the performance of various public health and safety

Further, Section 2930 discusses “drains” in the context of installing or improving particular streets and curbs. Whether this Section would be deemed broad enough to authorize the construction of independent, off-street stormwater management systems and the recovery of the costs associated with acquiring any necessary real property and the construction of those systems, is not a trivial question. Thus, the Third Class City Code appears lacking in express authority to construct components of a stormwater management system not directly associated with street “drainage” and to establish any user fee charge based on benefits received for the on-going support of the system.

2. The Borough Code:

Article XII. of the Borough Code declares the general corporate powers of boroughs. Section 1202 (53 P.S. §46202) provides for the “Specific powers” of the corporate authority. While Section 1202 generally speaks in terms of “regulation” of various activities, it would seem, of necessity, that the various references to “drains”, “gutters” and “culverts” contemplates the municipal ownership and operation of some of them although it also authorizes the regulation of those appearing upon private property. Article XII. does not specifically provide for the recovery of capital costs or for the assessment of fees to support the operation and maintenance of the systems.

Article XVII.--Streets generally declares the authority a borough has with regard to the organization, development and maintenance of streets within the borough. Section 1701(6) provides a definition of “Improving a Street (53 P.S. §46701(6)). This definition does not specify storm sewers or drainage as a specific improvement, but it does declare that the concept of improvements is not limited to those specifically enumerated. However, there is no provision for the recovery of costs associated with an improvement undertaken by the borough. On the other hand, Section 1735 (53 P.S. §46735) authorizes the borough to establish standards for drainage facilities associated with the opening of new streets by third parties and their public dedication if privately constructed, but this section does not address the long term maintenance of such new facilities.

Article XXII.—Storm Sewers and Water Courses of the Borough Code is more specific and Section 2201(3) does provide for “the construction and maintenance of storm sewers and the

strongly suggests that the word “drain” is intended to address stormwater and other non-sanitary drainage.

While Section 2401 (53 P.S. §57401) is silent regarding the mechanism intended to recover the initial capital cost associated with the construction of “drains”, a connection fee is authorized as is a “monthly or annual rate prescribed by ordinance” which might be considered broad enough to authorize stormwater fee.² There is a significant argument that this monthly or annual rate, established pursuant to the First Class Township Code, would not include capital cost recovery for the construction of stormwater drains as Section 2501 (53 P.S. §57501) of the Code specifically authorizes the recovery of capital costs against benefited properties, but only those costs associated only with the construction of “streets . . . or of curbs, sidewalks, or sewers.” The term “drains” or “stormwater drains”, found in Section 2401, is not specifically enumerated in Section 2501. This avoidance of specification or ambiguity would likely be interpreted to disallow the recovery of the capital cost of drainage projects under Section 2501. Thus, it would appear desirable for First Class Townships to have specific stormwater capital cost and broaden operation and maintenance cost recovery authority added to its list of organic powers.

4. The Second Class Township Code:

Article XXIII. addresses “Roads, Streets, Bridges and Highways”. There is general language authorizing improvements to roads and specific language prohibiting any persons from opening or dedicating “any road or any drainage facilities for public use or travel” without first obtaining municipal approval (see §2317(a); 53 P.S. §67317(a)). Section 2320 (53 P.S. §67320) allows the Board of Supervisors to enter private lands to “cut, open, maintain and repair drains or ditches through the property when necessary to carry the water from the roads.” Except when a street and its associated “drain” is being constructed by a landowner (or developer) and is

² Part VII of Title 53 entitled “Incorporate Towns” would appear to authorize the construction of “sewers and sewer systems” and the recovery of the capital costs of these systems (53 P.S. §53407) by any “incorporated town”. There is no definition of “incorporated town” as this Act of June 19, 1913 appears to pre-date the later municipality specific codes. Nonetheless, it would appear to authorize later created “incorporated towns” or municipal entities to utilize this capital cost recovery authority. The ambiguity in this provision is whether or not the recovery of capital costs for stormwater systems or drains is supported by this section.

subject to management under the Act. The Act addresses in great detail “sewers” and “sewage” and the recovery of the capital and operating costs of any system established to collect and treat sanitary sewage. Whether or not the phrase “sewer system” is inclusive enough to include a “sewer system” that collects only stormwater is a matter for reasonable difference. Nonetheless, the authors are concerned that the Act’s almost exclusive focus upon sanitary sewerage would lead a reviewing court to determine that the General Assembly had not addressed or intended to include stormwater within the authorization granted to municipal authorities. Good public policy requires that this uncertainty be addressed before any EPA or DEP regulatory action assumes that municipal stormwater obligations, to be imposed by permit, can be addressed by any municipality receiving such a MS4 permit simply by forming a municipal utility to address its new obligations.

Section 5607(a)(3) of the Act authorizes flood control projects. While improved flood control and reduced flooding is a related corollary of improved stormwater management, it appears that this section authorizes improvements and construction within the authority’s jurisdiction and not for the general purpose of mitigating downstream consequences related to stormwater flows generated within the authority’s jurisdiction, but for the purpose of directly protecting the benefited community from flooding.

C. Municipalities Planning Code:

The Municipalities Planning Code (“MPC”) grants the power to plan and regulate land use through zoning, subdivision, and land development ordinances.³ The MPC is closely related to the municipal and city codes discussed above. It can be authoritatively said that the MPC both empowers and limits municipal authority over land use. The Supreme Court of Pennsylvania has made it abundantly clear that land owners have the broad and inherent right to utilize their private property, subject only to lawful restrictions as imposed under specifically authorized public health and welfare protection statutes or under the MPC.⁴

³ See Municipalities Planning Code, 53 P.S. §10101-11202 (Act of 1968, P.L. 805, No.247, as amended).

⁴ See, e.g., *Andress v. Zoning Board of Adjustment of The City of Philadelphia*, 188 A.2d 709, 712 (Pa. 1963)(stating “[o]ur State and Federal Constitutions ordain, protect and guarantee the ownership and use of private property; [t]he Constitutionally ordained right of private property

contemplate traditional public works projects or be recommendations for future redevelopment activities, *e.g.*, the repair or replacement of bridges or railroad trestles (see §680.11). Without new authorization from the General Assembly, it appears that municipalities do not have the authority to compel, as a regulatory matter, any revision to lawfully placed structures upon private property. Adequate Commonwealth funding of this program has been an issue and one that would have to be addressed if Act 167 is to serve as the primary stormwater management program in the Commonwealth as it was intended to be.

The act does not derogate any independent Clean Water Act or Clean Streams Law authority that the EPA and the DEP may have over these private landowners.

III. The Municipal Separate Storm Sewer System (MS4)

A Municipal Separate Storm Sewer System (“MS4”) is, by definition, a municipally owned and operated system. For purposes of assessing MS4 responsibility or authority over various sources of stormwater, stormwater from both non-point sources (generally sheet-runoff from real property, regardless of size, that does not discharge from that property via a ditch, swale, stream, pipe, or other defined conveyance) and from point sources will be considered in each segment of the four (4) box matrix discussed below. Thus, the Coalition matrix effectively addresses eight (8) different categories of stormwater discharges.

The Coalition seeks to identify which category of activity is or can reasonably be expected to become a municipal responsibility while simultaneously respecting existing, lawful uses of property, proposed future uses of property, and the entity with responsibility for any post construction stormwater management system and its ultimate point of discharge. The following temporal and spatial grid for the MS4 program allows for clearer assessment of responsibilities. Category Numbers 1 & 2 represent land uses previously approved or otherwise lawful. Category Numbers 3 & 4 represent new or proposed new development with associated earth disturbance activities.

permit requirements upon waste water discharges not entering the MS4 itself, whether point source or not, generated by local industry, property owners associations, farmers, or sewer plants, simply by virtue of broad health, safety and welfare authorization provided in any given municipal code has never been, to the writers' knowledge, demonstrated and would appear to be a completely inappropriate and unauthorized exercise of municipal jurisdiction.⁷ For this reason that the vertical axis of the above matrix makes the clear division between stormwater entering a municipally owned and operated MS4 system, and stormwater simply falling within the municipal boundaries that makes its own way to "waters of the Commonwealth" without entering the MS4 itself.⁸

Municipalities recognize that they are or reasonably could be held responsible for stormwater entering their MS4, and be subject to discharge limitations and various permit conditions and may, if and as authorized by the General Assembly, seek to impose various requirements or limitations upon those discharging to the MS4. Water not entering the MS4 is simply not the responsibility of the municipality which, as a regulated point source under either the federal Clean Water Act or the Commonwealth's own Clean Streams Law, can only be held accountable for the discharge it maintains. This water is the responsibility of the person whose land generates the flow being discharged to a Water of the United States or to the Waters of the Commonwealth. The only legal vehicle that enlarges municipal obligations for the management of stormwater is found generally in the Pennsylvania Storm Water Management Act and specifically in Section 11 of that act.⁹ This Pennsylvania legislation has directed municipalities in the presence of an approved county stormwater management plan "to regulate development

⁷ By way of contrast, the General Assembly has made municipal government responsible for all sanitary sewerage generated within its boundaries. See The Pennsylvania Sewage Facilities Act of 1965, 35 P.S. § 750.1 *et seq.*

⁸ This assessment does not review the common law of stormwater which includes centuries of judicial precedent, except to say that the writers are aware of no binding precedent in this common law of urban and rural stormwater and riparian rights that imposes upon municipal government affirmative duties to manage rain simply because it falls within its boundaries.

⁹ See Pennsylvania Storm Water Management Act 32 P.S. Section 680.11. See also the Flood Plain Management Act, 32 P.S. §679.101 *et seq.*, which requires municipal participation in the National Flood Insurance Program (§679.201) and Department of Community and Economic Development regulations (§679.206).

2. Stormwater entering the MS4: Stormwater, whether from a point source or a non-point source, from property in lawful use that enters the MS4, either by virtue of prior land development approval or simply by virtue of the land typography, would effectively be considered the responsibility of the MS4, as the MS4 is maintaining the ultimate point/s of discharge. Assuming that either or both of the EPA and the DEP have the authority to regulate both the content and volume of stormwater, the MPC and attendant decisional law, would limit the municipality's ability to compel a property owner to re-submit or "revise" any previously approved facility features or the post-construction stormwater management system already existing on the property. The municipality, however, would not be prevented from making improvements to its own MS4 necessary to address otherwise lawful permit conditions and but appears, under the various municipal codes, to have limited authority to recover capital costs and charge an appropriate user fee to those discharging stormwater to the MS4 and utilizing the benefits of the municipally provided improvements. It would appear desirable to amend the municipal codes to allow the assessment of user or benefit fees. Utilizing general revenues for the purpose of constructing, operating and maintaining storm sewers provides no incentive to a landowner to make cost-effective stormwater improvements upon its own property. If a municipality were to establish a user fee, the property owner can either voluntarily determine to reconfigure its stormwater system in order to avoid or reduce a municipally imposed stormwater fee, or it can pay the fee associated with the MS4 assuming responsibility for the management of that property owner's stormwater.

3. Stormwater from New Development, not entering MS4: A municipality's ability to manage stormwater flow from new development would appear inherently broader than in the case of retroactive intervention in otherwise lawful, existing land use activities as the MPC provides authority to municipalities to address stormwater management issues.¹²

¹² To our knowledge no court has addressed the validity of a stormwater local ordinance as a component of an official subdivision and land development ordinance. Further, we are aware of no case that serves to relate provisions of an approved watershed stormwater plan pursuant to Act 167 with stormwater provision enacted for other areas within the municipality as a component of the subdivision and land development ordinance.

source, for example, sheet runoff from lawn area to a municipally maintained road system with stormwater collection components. Neither the MPC nor the Storm Water Management Act expressly authorize the collection of user fees from new development as opposed to establishing construction or performance standards for the activity. We have previously discussed each of the Municipal Codes as they impact the recovery of capital and operation and maintenance costs. Municipalities will be severely hampered in their ability to undertake cost effective and equitable stormwater projects without significant enlargement of municipal authority regarding the extent of stormwater projects that they can undertake and, most especially, clear authority for “fee for service” or direct benefit based capital, operating and maintenance cost recovery mechanisms for such projects.

IV. Additional Legal Issues

There are several additional legal issues of concern to Coalition members which we believe can and should be addressed by the DEP and the EPA:

1. What is the legal status of the requested “Stormwater TMDL Plan”? Any Stormwater TMDL Plan submitted with any 5 year MS4 Notice of Intent (“NOI”) should be binding only for the expected accomplishments proposed for that permit term. For the general permit (PAG-13) program to succeed there should be no requirement in this next MS4 permit Notice of Intent (“NOI”) for a municipality to submit a Stormwater TMDL Plan which would serve to “lock in” every MS4 to extremely restrictive, long term requirements and financial commitments without opportunity to assess the progress of TMDL program and to propose and defend reasonably achievable next steps during each permit re-iteration. Moreover, many potential regulatees are concerned about the quality of the technical work underlying in place TMDL and want to be assured that there is ample legal opportunity to seek reconsideration of promulgated TMDLs and to allow DEP and the U.S. EPA to modify existing TMDLs without facing the prohibition of the “anti-backsliding” provisions of the Clean Water Act and its regulations.
2. PaSW Coalition members believe that it is imperative that municipalities have considerable flexibility in their preparation and adoption of any required municipal

therefore, would not contribute via general taxation to the support of the MS4, they could be required to pay user fees for services rendered if the Municipal Codes authorized such a charge.

6. Finally, the Coalition strongly believes that the DEP must publish or otherwise make available to all stakeholders a clear statement of its proposed MS4 program and all issues in dispute or discussion with the EPA. The "new" MS4 program was first proposed nearly 2 years ago and all stakeholders deserve the opportunity to understand the issues that appear to be agreed between the DEP and the EPA and those still outstanding.