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ARE STORMWATER UTILITIES IN THE FORECAST FOR NEW HAMPSHIRE?

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Cities and towns in New Hampshire are under pressure to maintain and replace aging stormwater infrastructure, prevent flooding and erosion, improve water quality and comply with new regulatory mandates in the form of new MS4 and General Permit obligations. Stormwater funding in NH is typically funded through either general property tax revenues or through consumption-based water and sewer fees. Annual storm water maintenance budgets must compete with other priorities such as funding public education, basic municipal services, and public works activities. One way to provide a stable and equitable mechanism for funding stormwater maintenance and improvements is implementation of a stormwater utility. As of 2019, stormwater utilities have been implemented nation-wide, with over 1700 stormwater utilities created in 40 states, Washington, D.C. and Canada.[1] Stormwater utilities are also directly tied to environmental benefits as the funded activities clean, maintain, and repair existing stormwater systems and incentivize green infrastructure which treats stormwater.

Stormwater utilities have the benefit of providing separate, stable funding for stormwater management, provide a more fair and equitable means for charging for those services, reduce pressure on property taxes and sewer use charges and also incentivize implementation of green infrastructure and/or low impact development (GI/LID) on public and private property. By law, all users including government and non-profit property owners who are traditionally not subject to property taxes (but benefit and utilize stormwater systems) must pay stormwater utilities. Under the stormwater utility model, all users (public, private and non-profit) pay their fair share. Installations of GI/LID on private property reduces long-term capital expenditures by the cities and/or towns.

Equity is also a key consideration for stormwater utilities. Most stormwater utilities are based upon the impervious area (think roofs, parking lots or other non-porous surfaces) on a property that causes run-off to the stormwater system. As stormwater runs across these impervious surfaces, it picks up pollutants such as debris (suspended solids), oil/grease/fuel, nitrogen and phosphorus, that later discharges to the lakes, rivers and streams. To the extent a property has more impervious area contributing additional pollutants to stormwater, the higher the stormwater utility is paid to offset those increased management and service costs.

The Clean Water Act require cities and towns to implement best practices to treat and reduce pollutants in stormwater before it is discharged to the water. One way to treat stormwater is to hold it in place on the property or disconnect the impervious area so the pollutants settle out or are

[1] NJ DEP case study on stormwater utilities – see https://www.nj.gov/dep/dwq/resources_swu.html#case-studies

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removed prior to discharge. GI/LID systems such as infiltration trenches, bioswales, rain gardens, and porous pavement capture stormwater and treat it. The stormwater utility credits and abatements can be utilized by property owners to install and implement these GI/LID practices to offset their stormwater utility costs.

In response to pressure for pending regulatory mandates and competing funding obligations, the NH Legislature passed Title X, Chapter 149-I:6 in August 2008 to allow for the creation of stormwater utilities and stormwater utilities commissions in NH.[2] A stormwater utility or fee must be directly related to stormwater manage costs for the following purposes: flooding and erosion control, water quality management, ecological preservation and managing annual pollutant loads contained in stormwater.[3] Stormwater utilities do not need to be limited to municipal boundaries, but can be regional and subject to inter-municipal control and management by a stormwater utility commission.[4] Fees are typically based upon an equivalent residential unit (ERU)[5] or the average impervious area for a single family property in a town or city that sets the basis for fee calculations. Stormwater utilities must charge government and non-profit owned properties[6] but must also offer credits and abatements to offset charges[7] that are typically used to incentivize GI/LID and implementation of other best management practices by property owners. Despite this authorization, no stormwater utility has yet been implemented in NH, although many communities are now reconsidering it given the rising costs of stormwater management.

In 2007, the City of Manchester, recognizing that stormwater management activities were underfunded and would require additional investments in both operational and capital improvements conducted a feasibility study.[8] As far back as 2007, Manchester projected its annual stormwater fee budget would increase from $765,000 to $2,600,000 and projected a stormwater fee of $4.00 per month would generate approximately $2,800,000 annually[9].

In 2009, Portsmouth, Nashua and Dover, utilizing funds from NHDES Watershed Assistance Grants and EPA Clean Water Act §319 grants, conducted stormwater utility feasibility studies. All three faced funding pressures from maintaining aging infrastructure, flooding concerns, and pending regulatory mandates from a draft NH MS4 NPDES permit issued by EPA. Portsmouth anticipated funding increases from $512,000 annually to over $2,500,000 (estimated fees in the range of $3.00 - $7.00 per month for average single-family property)[10], while Nashua anticipated increases from $747,000 to over $3,000,000 annually (estimated fees in the range of $1.60 - $6.10 per month for the average single-family property)[11]. While these studies were completed in 2007

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[2] See RSA 149-I:6(a-d)
[3] See RSA 149-I:6(c)
[4] See RSA 149-I:6(b)
[5] See RSA 149-I:6(c)(V)
[6] See RSA 149-I:6(c)(V)
[7] See RSA 149-I:6(c)(III)
[8] "City of Manchester, NH Final Report – Stormwater Feasibility Study, June 2008" by Hoyle, Tanner & Associates and AMEC, p 1.
[9] "City of Manchester, NH Final Report – Stormwater Feasibility Study, June 2008" at pp. 1, 10, 13.
[10] "Portsmouth, NH Stormwater Utility Feasibility – Final Report 2011," by AMEC Earth & Environmental, pp 1,2.
[11] "City of Nashua, New Hampshire Stormwater Funding Feasibility Study – Final Report, December 30, 2011," by Comprehensive Environmental Inc., at pp. 6,9, 26.

and 2011, none of the four communities implemented the stormwater utilities. One key factor noted was public opposition in the Dover report because of a lack of a final MS4 permit to justify the utility[12]. Added to this was a fear of being "first," with concerns about being placed in a competitive disadvantage for attracting future growth.

Stormwater utilities, as demonstrated by the four studies cited above, can be difficult to implement. They require thoughtful planning and extensive public outreach not only to educate and create buy-in from residents, but also from public officials, non-profit and commercial property owners. Notwithstanding these challenges, there may be hope for the creation of stormwater utilities in NH. The City of Concord, NH recently published a stormwater utility feasibility study in February 2020.[13] Concord recognizes the obligations to maintain and improve its separate stormwater system with anticipated annual funding increasing from $925,00 in 2019 to $1,562,000 projected in 2020-2024[14]. The report recommends a fee in the range of $3.55 per month or approximately $40 per year for the typical single-family property.

In addition to the Concord study, EPA recently finalized two NPDES permits impacting cities and towns across the state. As of January 6, 2021, the modified small MS4 Permit regulating stormwater discharges for cities and towns with populations less than 100,000 will become effective which require additional post-development and construction controls on stormwater discharges, implementation of illicit discharge detection and removal, and implementation of GI/LID to reduce discharges of pollutants from stormwater. In addition, on November 24, 2020, EPA issued the Great Bay Total Nitrogen General Permit regulating nitrogen discharges from thirteen (13) wastewater treatment facilities in twelve (12) communities. Those communities, by the terms of the permit, will be asked to evaluate reductions in nitrogen discharges from their facilities as well as non-point sources including stormwater runoff. Given these two recent permit actions, there should be renewed consideration by public officials for implementation of stormwater utilities to provide stable, funding mechanisms to ensure compliance with these new and expensive obligations.

For additional information or advice on how to implement a stormwater utility for your city or town, please contact Sherry Young at sby@rathlaw.com or Jim Steinkrauss at jjs@rathlaw.com.

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[12] Dover New Hampshire, "Stormwater Utility Feasibility Study – Final Report November, 2011," GHD, Dover, NHDES, at p.7.
[13] "Stormwater Utility Feasibility Study – City of Concord, New Hampshire February 2020," by Tighe & Bond.
[14] Concord Report at Sections 2-3, 2-4, 5-5.