Borough of West Chester v. Pennsylvania State System of Higher Education

New uncertainties for municipal stormwater management

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West Chester v. PASSHE

On April 30, 2026, the Pennsylvania Supreme Court issued its decision in the Borough of West Chester v. Pennsylvania State System of Higher Education case, finding that municipal charges related to stormwater are not fees for service, but are local taxes from which state entities are exempt.

Factual Context

- Pennsylvania's Clean Streams Law and the federal Clean Water Act support clean water for drinking water sources, farm and industrial uses, health benefits, and a booming outdoor recreational economy.
    - The outdoor recreation industry alone contributes over $19 billion to Pennsylvania's economy.
- Stormwater runoff is a leading cause of poor water quality in Pennsylvania.
- Stormwater control programs are designed to clean up and protect water for our health, economy, and environment.

Factual and Legal Context

- Federal and state law requires municipalities to implement measures that prevent discharges of the pollutants contained in stormwater runoff into surface waters (e.g. streams, rivers, and lakes).
- To fund these mandates, many municipalities collect money through a stormwater charge, in order to fund their separate storm sewer systems ("MS4s") and to maintain compliance with NPDES permit requirements.

Case History

- West Chester Borough, a home rule municipality, owns and operates an MS4.
- In 2016, the Borough enacted a Stream Protection Fee Ordinance.
- West Chester University refused to pay the Stormwater Charge on the basis that it constituted a tax, from which it was immune as a state entity. The Borough contended that the Stormwater Charge was not a tax, but a fee for a service.
- On April 30, 2026, the Pennsylvania Supreme Court issued a decision, announcing a new test for determining if a charge from a municipality constitutes a fee or a tax. The Court ultimately found the Borough's Stormwater Charge to be a tax, not a fee.

New Test

- New two-part test distinguishing a fee for service from other charges under municipal taxing authority:
  - Step 1: Determine whether the municipality is performing the service in a quasiprivate or public capacity.
    - Step 1a: If the municipality is performing a duty for the public benefit, and there is no contractual relationship, it is acting in its public capacity: the associated charge is a tax.
    - Step 1b: If providing a discretionary service for private emolument, and within the scope of a contractual relationship, it is acting in its quasiprivate capacity: proceed to step two.

New Test, ctd

- (Test continued)
  - Step 2: Ask whether a charge is measured by the service rendered.
  - If it is “reasonably proportional to the extent of use of the value of the service rendered, then the charge is a fee.”
  - If there is no connection between the amount of the charge and the services rendered, the charge is a tax.

Application to West Chester's Charge

- Borough's stormwater duties were public:
  - Various provisions of the "Stream Protection Fee Ordinance" cited federal and state requirements.
  - The Court concluded that the benefits conveyed by the stormwater system were primarily public in nature.
  - Ordinance language stated stormwater management "is fundamental to the public health, safety, and general welfare of the residents of the Borough" and that inadequate stormwater management "threatens public health and safety."

Outcome: What is Clear

- Municipalities with an MS4 permit cannot continue to bill state entities within their jurisdiction for stormwater charges.
- The Court did not find the tax itself to be impermissible:
  - The decision does not prevent municipalities from collecting monies to fund stormwater management program, but may limit who municipalities may collect from, and may limit the mechanisms that municipalities can use.
- Municipalities remain under an obligation to implement stormwater and water pollution controls.

Outcome: What is Uncertain

- What other entities are exempt from stormwater charges?
- Whether refunds are owed, and to whom?
- Whether West Chester applies to municipal authorities?
- Whether municipalities have the authority to implement a stormwater tax?
- Logistics of implementing a stormwater tax?
- Implications for combined sewer systems?

Who does this apply to?

Considerations:

- Applies to state entities
- Not all nonprofits are exempt from all taxes
    - Pa. Constitutional limits: nonprofit organizations are only exempt from property taxes for the portion of the property used for the operation of the nonprofit.

Refunds

Considerations:

- Issue of refunds was not before the Court.
- Tax refunds are limited to 3 year lookback period.
- Some caselaw suggests that for relief to be retrospective, the Court must explicitly find that backward-looking relief is required.
- Not all entities are tax exempt for all tax purposes.
    - Who would be eligible?

Municipal Authorities

Considerations:

- Threshold question: whether the West Chester test should be applied to stormwater authorities at all?
- Municipal authorities, by their nature, cannot charge general purpose taxes.
  - The Pennsylvania Supreme Court has held that the Municipal Authorities Act does not delegate the taxing power, and that imposition of charges by an authority, related to that authority's purpose, are lawful.
- If the Court did decide to apply the West Chester reasoning to authorities, the outcome is unclear.

MS4 Systems

Considerations:

- Municipalities with MS4 challenges:
  - Logistics of changing to a “tax” paradigm
  - MS4 Compliance
  - Implied authorization to tax
  - Equity and fairness
  - Uniformity Clause

Combined Sewer Systems

Considerations:

- Pennsylvania has 121 active combined sewer overflow (“CSO”) communities.
    - CSOs are difficult and expensive to remediate, but face significant challenges given increased rain intensity in recent years.
- Much case law approves of sewer fees, recognizing that a property benefits from the maintenance of a functioning sewer system.

A note: EO 14428

- September 16, 2026, President Trump signed Executive Order 14428, “Providing Meaningful Water Quality Improvements Through Collaboration and Oversight of Federal Support.”
    - The EO revokes a 2009 federal coordination directive that was issued under former President Barack Obama telling federal agencies how to organize themselves around Chesapeake Bay cleanup.
- The executive order does not change municipal permit obligations under the CWA and our state MS4 permit program, both of which predate either EO and which remain in effect.
- The executive order also does not require municipalities to repeal stormwater fees levied under the Second Class Township Code or the Municipal Authorities Act. An executive order cannot override state law or repeal a local ordinance.

So what now?

- Review your municipality's stormwater ordinance in consultation with your solicitor.
  - Look carefully at elements listed in the opinion: purpose, the nature of the infrastructure, etc.
- Consider carefully what equitable considerations should be taken into account
  - Who is generating the most stormwater? Who is bearing the costs?
  - Uniformity clause considerations under Pa. Constitution.
- Monitor for litigation updates.
- Justice Mundy signaled that there may be an implicit grant of authority for the taxation. This could be an avenue for future litigation, or place for a legislative fix.

Thank you!

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