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Opinion No. 12-96

Authority for Storm Water Fees/Unfunded Federal Mandates

QUESTIONS

1. Is the "storm water fee" charged to customers by some water utility districts required under the Clean Water Act of 1977?

2. Does the assessment of these storm water fees constitute an unfunded federal mandate prohibited by federal law?

OPINIONS

1. There is no express provision in the federal Clean Water Act regarding the setting and charging of storm water fees. However, the State of Tennessee is required to comply with the regulations found in the Clean Water Act, including regulations related to municipal storm water discharges. As a result, Tenn. Code Ann. §§ 68-221-1101 to -1113 expressly authorize Tennessee municipalities to regulate storm water discharges, operate storm water and flood control facilities and set a graduated storm water fee in order to at least partially fund compliance with these provisions. Therefore, the setting of storm water fees by some water utility districts is a necessary function in meeting the requirements of the Clean Water Act as required under state and federal law.

2. Unfunded mandates are not universally prohibited by federal law. Congress enacted the Unfunded Mandates Reform Act of 1995 (UMRA) to address state and local governmental concerns over a perceived increase in unfunded federal mandates in the 1980s and 1990s, but nothing in the legislation prohibits the creation or application of such mandates. Additionally, nothing in the UMRA or any other legislation makes unfunded federal mandates *per se* improper. Unfunded mandates are commonly used in regulatory schemes, including environmental protection legislation, and courts have recognized that insufficient funding is not a valid reason for failing to comply with a federal mandate. The ability of municipalities to develop and implement a storm water fee framework as authorized by the General Assembly provides funds to not only comply with the provisions of the Clean Water Act, but also maintain flood controls and generally protect the public. Although the adoption of storm water fees by some municipalities is, in part, a response to the requirements of the Clean Water Act, such fees are not mandated by the provisions of the Act. However, even if storm water fees were considered an unfunded federal mandate, such mandates are not prohibited by federal law.

ANALYSIS

1. The Clean Water Act of 1977 (CWA), 33 U.S.C. §§ 1251-1387, was enacted with the objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA regulates point source discharges of pollutants, including storm water, through the National Pollutant Discharge Elimination System (NPDES) permitting scheme. 33 U.S.C. § 1342. Under section 1342(p) of the CWA, the United States Environmental Protection Agency (EPA) regulates discharges from municipal separate storm sewer systems (MS4s) that meet the criteria for regulation and requires such municipalities to obtain NPDES permits. 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26; 40 C.F.R. § 122.32. *See also Vandergriff v. City of Chattanooga*, 44 F.Supp.2d 927, 929 (E.D. Tenn. 1998) (stating "municipalities are required to obtain NPDES permits for discharges from municipal storm sewer systems"). However, the CWA also provides for state implementation of the NPDES permitting system, provided that the state, at a minimum, meets the requirements of the CWA. 33 U.S.C. § 1342(b)-(c). Tennessee's EPA-approved NPDES permitting program is found in the Tennessee Water Quality Control Act (TWQCA) and is implemented through the Tennessee Department of Environment and Conservation (TDEC). Tenn. Code Ann. §§ 69-3-101 to -133. *See also Vandergriff*, 44 F.Supp.2d at 929 (concluding that "the CWA allows states to develop a program for issuing NPDES permits").

Although there are no express provisions dealing with storm water fees in the CWA, these fees are a necessary outgrowth of compliance with the regulations. As discussed in this Office's prior opinions, the General Assembly enacted Tenn. Code Ann. §§ 68-221-1101 to -1113 to assist municipalities covered under the MS4 regulations with both CWA and TWQCA compliance. *See* Tenn. Att'y Gen. Op. 09-182 (Nov. 30, 2009); Tenn. Att'y Gen. Op. 09-147 (Aug. 4, 2009). This legislation provides mechanisms for covered municipalities "to regulate [storm water] discharges, . . . construct and operate a system of drainage facilities for storm water management and flood control, . . . and fix and require payment of fees for the privilege of discharging storm water."[1] Tenn. Code Ann. § 68-221-1101. Additionally, municipalities are permitted to adopt ordinances setting out "a system of fees for services and permits." Tenn. Code Ann. § 68-221-1105(a)(2). Finally, the statutes also specifically allow covered municipalities to adopt a "graduated storm water user's fee . . . based on actual or estimated use of the storm water and/or flood control facilities of the municipality." Tenn. Code Ann. § 68-221-1107(a). Thus, since Tennessee is required to comply with the mandates of the CWA and the General Assembly has enacted specific legislation addressing the permissibility of setting and collecting storm water fees, municipal storm water fees are a consequential requirement of compliance with the CWA, even if not specifically enumerated in the federal legislation.

[1] "Storm water" is defined as "storm water runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration (other than infiltration contaminated by seepage from sanitary sewers or by other discharges) and drainage." Tenn. Code Ann. § 68-221-1101(8).

2. An unfunded mandate is generally defined as "a requirement set forth by a government agency that does not provide any type of funding to facilitate the requirement."[2] To address the imposition of unfunded federal mandates on states, local governments, tribunal governments, and the private sector, Congress enacted the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. §§ 1501 to 1571. This legislation created a framework for the Congressional Budget Office (CBO) to estimate the direct costs of mandates in legislative proposals to state/local governments and the private sector and for issuing agencies to estimate the direct costs of mandates in proposed regulations to regulated entities. Aside from these informational requirements, the UMRA controls the imposition of mandates only through a procedural mechanism, allowing Congress to decline to consider unfunded intergovernmental mandates in proposed legislation if they are estimated to cost more than specified threshold amounts. However, the UMRA specifically provides that "the inadequacy or failure [of an agency to comply with the obligations of the UMRA] shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting [an] agency rule." *Valentine Properties Assoc., L.P. v. U.S. Dept. of Housing and Urban Dev.*, 785 F.Supp.2d 357, 369-70 (S.D.N.Y. 2011) (citing 2 U.S.C. § 1571(a)(3), which requires agencies to prepare a written statement accompanying regulatory actions likely to result in an expenditure by state or local governments of $100,000,000 or more). Courts have also noted that any issue as to compliance or noncompliance with the UMRA or the applicability of its provisions is not subject to judicial review and that the UMRA does not "create any right or benefit, substantive or procedural, enforceable by any person in an administrative or judicial action." *Id.* at 370 (citing 2 U.S.C. § 1571(b)).

Because the CWA was enacted prior to the UMRA, it would generally be excluded from examination under this legislation. However, even if the UMRA were applicable, it is unclear whether municipal storm water fees would necessarily be considered a "federal mandate" under the definitions in the UMRA. Finally, if the UMRA were applicable and municipal storm water fees were determined to be part of an unfunded federal mandate contained in the CWA, nothing in the UMRA or any other legislation would make such a mandate *per se* improper. Although legislation may contain such a mandate, the Sixth Circuit has recognized that insufficient federal funding is not a defense for failing to comply with federal regulation. *See Sch. Dist. v. Sec'y of the United States Dep't of Educ.*, 584 F.3d 253, 268-78 (6th Cir. 2009) (determining that lack of federal funding was not grounds for failing to comply with the requirements of No Child Left Behind).

As discussed above, the CWA does not specifically provide for the creation, setting or collecting of storm water fees. Although these fees are used to comply with the provisions of the CWA, the funds are also utilized to address other issues, such as flood control through installation, cleaning, and maintenance of the drainage system, and public health issues. As storm water fees are not specifically addressed in the CWA and the collection of these fees

[2] BusinessDictionary.com, located at http://www.businessdictionary.com/definition/unfunded-mandate.htm (last visited Aug. 10, 2012). *See also* 2 U.S.C. § 1555 (2011) (defining "federal mandate" as "any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program").

support many municipal activities, the charging of a storm water fee by some water utility districts does not constitute an unfunded mandate of the CWA.

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