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When It Rains, It Pours: New Jersey's Proposed 'Rain Tax'

The so-called Clean Stormwater and Flood Reduction Act (Assembly Bill A2694; Senate Bill 1073), which was passed by the New Jersey Legislature on January 31, currently awaits Gov. Murphy's signature. The act notes that 10 percent of New Jersey's land area is covered with impervious surfaces. The bill received wide support, because, as it states, "New Jersey, in particular, is prone to pollution and flooding problems," which are "particularly acute in the 21 urban New Jersey municipalities that have combined sewer systems, which routinely overflow and discharge untreated wastewater and stormwater into the State's waters, contributing to water pollution and impairing the use and enjoyment of those waters."

The act would permit a county or municipality to establish a public stormwater utility for the purposes of "acquiring, constructing, improving, maintaining, and operating stormwater management systems in the county or municipality." Once a utility is established, a county or municipality could establish and collect "reasonable fees and other charges" to recover the stormwater utility's cost for stormwater management. Such "fees and other charges" may be billed to and collected from the "owner or occupant, or both, of any real property from which originates stormwater runoff which directly or indirectly enters the stormwater management system or the waters of the State" and are to "be based on a fair and equitable approximation of the proportionate contribution of stormwater runoff from the property." Farmland or land in agricultural use and assessed as such pursuant to the Farmland Assessment Act would be exempt from such fees or other charges. Presumably, such a fee would be based on the amount of impervious coverage a property has; however, the act provides for a partial fee reduction for properties that incorporate stormwater management strategies that exceed New Jersey Department of Environmental Protection or local stormwater control requirements.

A portion of the funds collected would be diverted to state and local coffers other than those of the stormwater utility. The lesser of 5 percent of such fees and charges or $50,000 is to be remitted to the state treasurer by each public stormwater utility for deposit into the Clean Stormwater and Flood Reduction Fund. Up to 5 percent of a surplus in annual revenue from a stormwater utility may be transferred to and included in the local municipal budget.

While there is no doubt that the enhancement of stormwater infrastructure encouraged by the act would be a public benefit, particularly in reducing pollution from runoff, it is questionable whether the proposed act will actually make a difference in a state with some of the most aggressive stormwater regulations in the country. One of the arguments against the so-called "rain tax" is the existence of New Jersey's Stormwater Management rules, which regulate runoff through the Residential Site Improvement Standards in connection with residential applications as well as in connection with major developments and site plan applications. The Stormwater Management rules have been in effect since 2004.

It is likely that such fees will add another layer of cost for developers who already have to comply with stormwater management regulations to reduce runoff and sometimes make off-tract improvements to stormwater systems. The stormwater utilities that would be formed pursuant to the act can be compared to existing sewer authorities, which collect connection and usage fees; yet despite these funds, many sewer systems are antiquated. In such cases, despite the payment of sewer connection and usage fees, sewer authorities and municipalities still look to developers to repair or upgrade the off-tract sewer systems in connection with development approvals.

Gov. Murphy has not yet signed the act. If he does, it remains to be seen how many municipalities and counties will establish local stormwater utilities and fund them through local taxation.

UPDATED: *On March 18, Governor Murphy signed New Jersey's Clean Stormwater and Flood Reduction Act into law as P.L. 2019, c. 42. The tax involved may be established on a town-by-town basis so property owners should take notice as to whether their individual municipality creates a stormwater utility and enacts a tax to support it.*

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