STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

August 4, 2009

Opinion No. 09-147

Applicability of City of Smyrna's Storm Water User Fees to Agricultural Land

QUESTION

May the City of Smyrna assess storm water user fees against agricultural land?

OPINION

Yes, if storm water runoff from the agricultural land is discharged into or through the City of Smyrna's storm water and/or flood control facilities. Under Tenn. Code Ann. §§ 68-221-1101 to -1113, municipalities are given authority to regulate storm water discharges, operate storm water and flood control facilities, and set storm water user fees. Owners and operators of agricultural land are subject to a city's storm water user fees unless storm water runoff from that land "is not discharged into or through the storm water or flood control facilities, or both, of the municipality." Tenn. Code Ann. § 68-221-1107(a).

ANALYSIS

In accordance with section 402(p) of the federal Clean Water Act (CWA), 33 U.S.C. § 1342(p), the U.S. Environmental Protection Agency (EPA) regulates discharges from municipal separate storm sewer systems (MS4s). In 1990, EPA issued its Phase I rules, which regulate MS4s that serve populations of 100,000 or more. See 40 C.F.R. § 122.26 (2009). EPA's Phase II rules were adopted in 1999 and regulate smaller MS4s located in urbanized areas. See 40 C.F.R. § 122.26 and .32 (2009). Municipalities subject to the MS4 regulations must obtain National Pollutant Discharge Elimination System (NPDES) permits. Id. See, e.g., Vandergriff v. City of Chattanooga, 44 F.Supp.2d 927, 929 (E.D. Tenn. 1998), *aff'd*, review denied, 182 F.3d 918 (6th Cir. 1999) ("municipalities are required to obtain NPDES permits for discharges from municipal storm sewer systems").

Because Tennessee has an EPA-approved NPDES permit program, MS4 requirements are implemented by the Tennessee Department of Environment and Conservation (TDEC) through the Tennessee Water Quality Control Act (TWQCA), Tenn. Code Ann. §§ 69-3-101 to -133. See 33 U.S.C. § 1342(c); 40 C.F.R. Part 123 (2009). See also Vandergriff, 44 F.Supp.2d at 929 ("The CWA allows states to develop a program for issuing NPDES permits"). The City of Smyrna is one of 85 cities and counties in Tennessee subject to the Phase II MS4 regulations. See TDEC, Storm Water Permitting Phase II MS4s (July 29, 2009), available at http://www.state.tn.us/environment/wpc/stormh2o/MS4II.shtml.

In response to the MS4 requirements, the General Assembly enacted Tenn. Code Ann. §§ 68-221-1101 to -1113. The enactment is designed to facilitate CWA and TWQCA compliance by municipalities affected by EPA's "storm water regulations, particularly those . . . regulating storm water discharges." Tenn. Code Ann. § 68-221-1101. The legislature intended for municipalities "to regulate such discharges," "to construct and operate a system of drainage facilities for storm water management and flood control," and "to fix and require payment of fees for the privilege of discharging storm water."[1] *Id.*

As regards fees, municipalities are expressly empowered to create "a system of fees for services and permits." Tenn. Code Ann. § 68-221-1105(a)(2). The General Assembly also specifically authorized municipalities to establish 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."[2] Tenn. Code Ann. § 68-221-1107(a). The only exemption to the storm water user fee is for "[p]ersons, including, but not limited to, owners and operators of agricultural land, whose storm water runoff is not discharged into or through the storm water or flood control facilities, or both, of the municipality." *Id.* Thus, it is the opinion of this Office that the City of Smyrna is authorized to assess storm water user fees against agricultural land unless that land falls within this exemption.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

BARRY TURNER
Deputy Attorney General

Requested by:

[1] A "municipality" is defined in this law as "any incorporated city or town, county, metropolitan or consolidated government, or special district empowered to provide storm water facilities." Tenn. Code Ann. § 68-221-1102(3).

[2] The City of Smyrna's storm water user fees arise under the authority of these statutes, and not in the exercise of the city's zoning power. Thus, these fees do not implicate section 22 of the 1998 Tenn. Pub. Acts, ch. 1101, which provides that "[f]or any land that is presently used for agricultural purposes, a municipality may not use its zoning power to interfere in any way with the use of such land for agricultural purposes as long as the land is used for agricultural purposes."

Joe Jack Dement
Chairman
Rutherford County Soil Conservation District
315 John R. Rice Blvd., Suite 150
Murfreesboro 37129