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CIVIL DIVISION

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P.O. Box 515 • 315 HIGH ST. • HAMILTON, OH 45012-0515

July 26, 2018

Gregory J. Wilkens
Butler County Engineer
1921 Fairgrove Ave.
Hamilton, OH 45011

Re: ***Permissible Expenditures from Storm Water Maintenance Fund***

Dear Greg:

In your letter dated July 2, 2018,¹ you requested our written opinion regarding the permissible expenditures from the Storm Water Maintenance Fund which was created by the Board of County Commissioners' Resolution No. 04-02-0301, adopted on February 18, 2004. The stated purpose for the fund was "receiving assessment revenues and disbursing funds for appropriate expenditures relative to the costs of compliance with the National Pollution Discharge System District as provided for under O.R.C. 6117."

R.C. § 6117.01 authorizes the Board of County Commissioners to "lay out, establish, consolidate, or otherwise modify the boundaries of, and maintain, one or more sewer districts within the county and outside municipal corporations," and to "acquire, construct, maintain, and operate within any district . . . drainage facilities that it determines to be necessary or appropriate . . . for the collection, control, or abatement of waters originating or accumulating in, or flowing in, into, or through, the district . . ." In furtherance of this authority, R.C. § 6117.02(D) provides in pertinent part:

The board may fix reasonable rates and charges, including connection charges and penalties for late payments, to be paid by any person or public agency owning or having possession or control of any properties that are connected with, capable of being served by, or otherwise served directly or indirectly by, drainage facilities owned or operated by or under the jurisdiction of the county, including, but not limited to, properties requiring, or lying within an area of the district requiring, in the judgment of the board, the collection, control, or abatement of waters originating or accumulating in, or flowing in, into, or through, the district, and may change those rates and charges from time to time as it considers advisable. In addition, the board may fix the rates and charges in order to pay the costs of complying with the requirements of phase II of the storm water program of the national pollutant discharge elimination system established in 40 C.F.R. part 122.

...

All moneys collected as drainage rates, charges, or penalties in or for any sewer district shall be paid to the county treasurer and kept in a separate and distinct drainage fund established by the board to the credit of the district. Except as otherwise provided in any proceedings authorizing or providing for the security for and payment of any public obligations, or in any indenture or trust or other agreement securing public obligations, moneys in the drainage fund shall be applied first to the payment of the cost of the management, maintenance, and operation of the drainage facilities of, or used or operated for, the district, which cost may include the county's share of management, maintenance, and operation costs under cooperative contracts for the acquisition, construction, or use of drainage facilities and, in accordance with a cost allocation plan adopted

¹ We received this letter (together with a packet of supporting materials) at a meeting in our office on July 20, 2018.

under division (E) of this section, payment of all allowable direct and indirect costs of the district, the county sanitary engineer or sanitary engineering department, or a federal or state grant program, incurred for drainage purposes under this chapter, and shall be applied second to the payment of debt charges payable on any outstanding public obligations issued or incurred for the acquisition or construction of drainage facilities for or serving the district, or for the funding of a bond retirement or other fund established for the payment of or security for the obligations. Any surplus remaining may be applied to the acquisition or construction of those facilities or for the payment of contributions to be made, or costs incurred, for the acquisition or construction of those facilities under cooperative contracts. Moneys in the drainage fund shall not be expended other than for the use and benefit of the district. (Emphasis added).

“[I]f the law prescribes a particular purpose for which revenue collected by county officials is to be used, R.C. 5705.10(D) requires the revenue to be paid into a special fund and used for only that purpose. 2011 *Atty.Gen.Ops.* No. 2011-017.” However, R.C. § 5705.12 provides that in addition to a special fund required by R.C. § 5705.09(F)² a county “may establish, with the approval of and in the manner prescribed by the auditor of state, such other funds as are desirable, and may provide by ordinance or resolution that money derived from specified sources other than the general property tax shall be paid directly into such funds.” You have not provided us with any evidence that the Storm Water Maintenance Fund was established with the consent of the Auditor of State pursuant to R.C. § 5705.12.

On February 20, 2003, the Board of County Commissioners adopted its Resolution No. 02-3-267 which established a Butler County Storm Sewer District “for the purpose of administering the NPDES Phase II Permit for Butler County” and approved a General Plan of Drainage. In furtherance of the Board’s authority to “fix the rates and charges in order to pay the costs of complying with the requirements of phase II of the storm water program of the national pollutant discharge elimination system established in 40 C.F.R. part 122,” the Board adopted on September 4, 2003 its Resolution No. 03-9-1467 which approved and certified to the County Auditor a rate of \$13.00 per ERU for placement on real property taxes for the 2003 year.” By its Resolution No. 04-02-0301, the Board established the Storm Water Maintenance Fund to receive the revenue collected from those rates and charges.

In your recent letter and our recent meeting, you indicated that numerous subdivision plats filed prior to 1988 provided for the developer’s construction of certain drainage facilities (primarily subsurface drainage pipes) within drainage easements dedicated to the County but outside of the road rights-of way. By email dated May 11, 2017, our office advised in regards to one of these plats that “the County is responsible for maintaining or replacing any underground structure or facility for the drainage of waters from the surface of the land but that the individual property owners must maintain any drainage channels on the surface.” You further indicated that some of the underground drainage facilities in these subdivisions are reaching a point where they are beginning to fail and are in need of maintenance, repair, or replacement. You are requesting that we provide our opinion as to whether monies in the Storm Water Maintenance Fund may be expended for that purpose.

The rates and charges fixed by the Board under R.C. § 6117.02(D) may be collected from the owners of properties “that are connected with, capable of being served by, or otherwise served directly or indirectly by, drainage facilities owned or operated by or under the jurisdiction of the county.” R.C. § 6117.02(D) expressly requires the Board of County Commissioners to establish a separate and distinct special fund to receive and hold “moneys collected as drainage rates, charges, or penalties” for any sewer district

² R.C. § 5705.09(F) requires a subdivision to establish “[a] special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose.”

within the county. This statute expressly states that money in that special fund may be expended for “the payment of the cost of the management, maintenance, and operation of the drainage facilities of, or used or operated for, the district.” Our conclusion is that the language referring to costs of complying with an NPDES permit was added to R.C. § 6119.02(D) to make clear that those costs were a permitted expenditure of rates established for a drainage district rather than as a limitation on the use of monies within the special fund established to receive monies collected from those rates. In the absence of documentation that the Storm Water Maintenance Fund was established with the consent of the Auditor of State pursuant to R.C. § 5705.12 rather than pursuant to the mandate contained in R.C. § 6117.02(D), our conclusion is that the Board possesses the discretion to expend money in the Storm Water Maintenance Fund to manage, maintain, and operate the drainage facilities owned or operated by or under the jurisdiction of the county within any sewer district in the County.

However, even if language in Resolutions Nos. 02-3-267, 03-9-1467, and 04-02-0301 referring to the costs of complying with an NPDES permit were viewed as a restriction on the expenditure of monies within the Storm Water Maintenance Fund, our conclusion is that the Board would still possess discretion to use money in that fund for the maintenance, repair, or replacement of drainage facilities owned or operated by the County. The portions of Butler County included within the Storm Water Management District qualify as a “small municipal³ separate storm sewer system” or “Small MS4” as defined in 40 C.F.R. § 122.26(b)(16) and (17). The stated objectives of the storm water regulations for small MS4s set forth in § 122.30 include the following:

(c) Storm water runoff continues to harm the nation's waters. Runoff from lands modified by human activities can harm surface water resources in several ways including by changing natural hydrologic patterns and by elevating pollutant concentrations and loadings. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables.

Section 122.34(a) requires that an NPDES permit issued to a small MS4 “must include permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.” Section 122.34(b) provides:

The permit must include requirements that ensure the permittee implements, or continues to implement, the minimum control measures in paragraphs (b)(1) through (6) of this section during the permit term. The permit must also require a written storm water management program document or documents that, at a minimum, describes in detail how the permittee intends to comply with the permit's requirements for each minimum control measure.

One of these minimum control measures is described in § 122.34(b)(6) which provides:

(6) *Pollution prevention/good housekeeping for municipal operations.*

(i) The permit must identify the minimum elements and require the development and implementation of an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations. Using training materials that are available from EPA, the State, Tribe, or other organizations, the program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance. (Emphasis added)

³ The County is included within the definition of “Municipality” contained in 40 C.F.R. § 122.02.

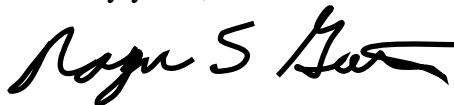
(ii) *Guidance for NPDES permitting authorities and regulated small MS4s*: EPA recommends that the permit address the following: Maintenance activities, maintenance schedules, and long-term inspection procedures for structural and non-structural storm water controls to reduce floatables and other pollutants discharged from the separate storm sewers; controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations and snow disposal areas operated by the permittee, and waste transfer stations; procedures for properly disposing of waste removed from the separate storm sewers and areas listed above (such as dredge spoil, accumulated sediments, floatables, and other debris); and ways to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices. Operation and maintenance should be an integral component of all storm water management programs. This measure is intended to improve the efficiency of these programs and require new programs where necessary. Properly developed and implemented operation and maintenance programs reduce the risk of water quality problems. (Emphasis added)

In short, the NPDES permit would clearly require that the County implement and continue an effective operation and management program for the separate storm water systems owned and operated by the County.

In correspondence following our recent meeting, your staff expressed the belief that the current or imminent failure of the facilities described in your letter is causing or poses the risk of causing sediment, rust, debris and other pollutants as defined by the NPDES Phase II program, to be discharged into surface waters. For this reason, our conclusion is that the maintenance, repair, or replacement of these failing drainage facilities owned by the County would have the ultimate goal of preventing or reducing pollutant runoff from municipal operations and would be within the scope of the minimum control measures required of the County to comply with the terms of the NPDES Phase II Permit.

If you have additional questions on this subject, please feel free to contact our office at your convenience.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Roger S. Gates". The signature is fluid and cursive, with the first name "Roger" being the most prominent.

Roger S. Gates
Assistant Prosecuting Attorney

cc: Charles S. Young, County Administrator