

## **POLICY ISSUE: STORM DRAIN REGULATORY FEES**

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### **QUESTION:**

Does the Committee recommend that the Council:

- a. Institute a storm drain regulatory fee to cover the cost of regulatory programs (i.e. enforcement, clean-up activities, and mitigation) within the Storm Drain Fund that are mandated by State or Federal law; and
- b. Retain the existing fee, which may be subject to Proposition 218 requirements, to fund operations and maintenance of the storm drain system and other services that benefit the rate base as a whole?
- c. If so, does the Committee recommend the hiring of a consultant to assist staff in the analysis of storm drain services to determine applicability and development of a rate structure?

### **BACKGROUND:**

#### **- Stormwater Regulation**

In 1991, the City implemented its first stormwater program. The purpose of this program is broadly to protect and enhance the water quality of the City's stormwater. As such, it is regulated at both the Federal (Clean Water Act) and the State level (California Water Code).

In compliance with the Federal Clean Water Act, any public agency operating a municipal storm drain system must obtain a National Pollutant Discharge Elimination System (NPDES) permit from their Regional Water Quality Control Board (RWQCB). The RWQCB in turn drafts the NPDES permits keeping in mind the specific issues of their region. These permits impose strict regulations on the quality of water public agencies can allow to flow into, through, or from their storm drainage systems.

Each NPDES permit lasts for five years and, pursuant to the Clean Water Act, each successive permit must be more stringent than the prior permit. Modesto, in its fifth permit iteration, faces stringent requirements for inspection, monitoring enforcement, cleanup and treatment. NPDES permit violations can result in various sanctions such as fines of up to \$10,000 per violation per day, criminal liability, and authorization of third party lawsuits.

Over time, the cost of compliance has soared as Modesto's NPDES permit has become more and more stringent. As a result, the storm drain fund requires a substantial annual allocation from the General Fund in order to meet its

obligations. In FY 2007-08, the General Fund loan subsidy totaled \$826,000. Even with this subsidy very little non-regulatory work is possible with the current level of funding.

**With over \$6.6 million in total expenditures for FY 2007-08, staff estimates that nearly 90% are directly attributable to regulatory mandates.**

- Storm Drain Fee

Originally, the storm drain fee was established to offset the costs of storm water collections/transmission and NPDES permit compliance. This fee was last updated in 1992 and is currently set at \$3.23 for a typical single-family residence. Like the fees for water and sewer, the stormwater collection and transmission fee is subject to Proposition 218. Unlike water and sewer fees, under current law, these storm water fees require a positive vote (50%+1 of the voting property owners) for an increase to occur in the stormwater fee.

Over the past several years, Council has made a concerted effort to assure adequate rates were in place for all of the City's utilities. After completing rate analysis work on both the Water and Wastewater Funds, staff began an analysis of the Storm Drain Fund.

Concurrent with this effort, in November 2007, Council evaluated various funding options for the City's pruned refuse program which was budgeted as a General Fund expense although aligned with the City's NPDES permit requirements for Stormwater. Recognizing the nexus between the pruned refuse program and NPDES permit requirements, Council took three actions:

1. Moved the City's pruned refuse program from the General Fund to the Storm Drain Fund.
2. Directed staff to reduce expenses for non-regulatory services to provide the \$600,000 in half-year funding for pruned refuse.
3. Directed staff to begin the Proposition 218 process on the matter of a Storm Drain Fund rate increase.

Upon receipt of Council direction, an internal rate review team immediately began work. During this process, the team's legal representative became aware of various court cases clarifying the distinction between **regulatory fees** and **property-related fees charged as an incident of property ownership**. Within the context of these court rulings, these fees are described as:

- *A regulatory fee is imposed, pursuant to a City's police powers, on some property owners or users of property for the purpose of eliminating or reducing adverse effects to the City caused by, or mitigating the cost of*

***regulation of, the use or activity that occurs on the property. Regulatory fees are not subject to Proposition 218 because they are imposed on particular uses or users of property, rather than as an incident of property ownership.***

- Building inspection fees are a good example of a regulatory fee since inspection programs are a key component of building code regulation and they are not imposed on all, or even most, property owners.
- ***As this example indicates, not all fees related to property are incidental to property ownership. However, property-related fees that are charged because of normal ownership or use of property are generally subject to Proposition 218.***
- Water service is now considered a property-related service.

**After numerous discussions with outside legal experts and a thorough analysis by the City's own legal staff, staff believes there is a legal basis for charging one or more regulatory fees, not subject to Proposition 218, to those customers whose uses require the particular regulatory activity for which the fee is charged.**

**FISCAL IMPACT:**

In past years, both the Gas Tax Fund and the General Fund have borne the cost of programs that, had the Storm Drain Fund been healthy, would have been paid out of the Storm Drain Fund. Examples of this include rockwell maintenance, development of the Storm Drain Master Plan, pruned refuse, and leaf collection. Implementation of the regulatory fees would return those dollars to the originating fund where it could be re-programmed or held in reserves as determined by the City Council.

Within the Storm Drain Fund, the removal of pruned refuse from City streets, would be considered a regulatory cost, since without the program, a great deal of litter and debris would enter the storm drainage system in violation of the City's NPDES permit.

Since these regulatory fees are charged only to those rate payers deriving a benefit from a particular regulatory activity, much more analysis is needed before the fiscal impact on individual storm drain utility users is known.

**OTHER FACTORS FOR CONSIDERATION:**

Regulatory fees are, by nature, not charged to all customers. They are attributable to and paid by specific user groups benefiting from the services.

Under this example, activities that support the entire customer base, such as Stormwater collection and transmission infrastructure, would not fall into the regulatory fee category. Rather they would be considered a property-related fee subject to Proposition 218. For this reason, staff would recommend continuing the Proposition 218 process to increase the existing property-related fee which would pay for those services of the Storm Drain Fund that cannot be tied to a specific regulatory action attributable to a specific class of customers.

**ALTERNATIVES:**

The Committee could:

1. Not recommend storm drain regulatory fees and direct staff to continue the Proposition 218 process for a storm drain rate increase which would include all regulatory and non-regulatory, but beneficial, services of the fund.
2. Recommend phasing-in regulatory fees over time to reduce the impact on storm drain customers who receive the services for which the fees are charged and continue with the Proposition 218 process for those non-regulatory services and services that benefit all customers.
3. Not recommend storm drain regulatory fees and direct staff to conduct a Proposition 218 process for the pruned refuse program only. With this option, the existing fee of \$3.23 would remain in place to offset the cost of maintaining the storm drain system, however existing subsidies from the General and the Gas Tax Funds would, at some level, remain in place.