

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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HOUSE DRH30529-SBz-31A* (4/28)

Short Title: Phase II Stormwater Management-1. (Public)

Sponsors: Representatives Gibson, McComas, and Hackney (Primary Sponsors).

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR IMPLEMENTATION OF FEDERAL PHASE II
STORMWATER MANAGEMENT REQUIREMENTS, AS RECOMMENDED BY
THE ENVIRONMENTAL REVIEW COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Phase II Stormwater Permit Application and Standards. – An application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management submitted by an owner or operator of a small municipal separate storm sewer system (MS4) located in whole or in part within an urbanized area as designated by the 1990 or 2000 census by the Bureau of the Census shall be deemed timely received if the application was submitted to the Department in accordance with the application schedule set out in Section 6 of the temporary rule adopted by the Environmental Management Commission on 10 October 2002. To obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management under this Section, an applicant shall develop, implement, and enforce a stormwater management plan approved by the Department that satisfies the six minimum control measures required by 40 Code of Federal Regulations § 122.34(b) (1 July 2003 Edition). The evaluation of the postconstruction stormwater management measures required by 40 Code of Federal Regulations § 122.34(b)(5) (1 July 2003 Edition) shall be conducted as provided in Section 10 of the temporary rule adopted by the Environmental Management Commission on 10 October 2002. A municipality with a population of less than 1,000, including a municipality designated by the 1990 or 2000 census, is not required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management unless the municipality is shown to be contributing to an impairment of State waters, as determined under the requirements of § 33 U.S.C. 1313(d).

1 **SECTION 2.** New Development. – New development or redevelopment in
2 any area designated as an urbanized area under the 1990 or 2000 census by the Bureau
3 of the Census or designated under procedures established in Section 7 of this act, and
4 located in a local planning jurisdiction that does not administer either a Phase I or Phase
5 II National Pollutant Discharge Elimination System (NPDES) permit for stormwater
6 management or a local stormwater management program approved pursuant to Section
7 5 of this act shall comply with the standards set out in Section 10 of the temporary rule
8 adopted by the Environmental Management Commission on 10 October 2002. The
9 Department shall administer and enforce these standards in these areas. A public entity
10 may request that the Department delegate administration and enforcement of the
11 stormwater management program to the public entity as provided in Section 5 of this
12 act.

13 **SECTION 3.** Coordination of Phase II and other Stormwater Management
14 Programs. – In any circumstance where any stormwater control requirement under a
15 Phase II National Pollutant Discharge Elimination System (NPDES) permit for
16 stormwater management conflicts or overlaps with any stormwater control requirement
17 under any other water quality program, the more stringent requirement shall apply. The
18 Secretary of Environment and Natural Resources or the Secretary's designee shall
19 resolve any dispute as to whether there is a conflict or overlap between or among
20 stormwater management requirements and shall determine which requirement shall be
21 deemed the most stringent.

22 **SECTION 4.** General Permit. – After the Department has issued a Phase II
23 National Pollutant Discharge Elimination System (NPDES) general permit for
24 stormwater management, a public entity that has applied for a permit under Section 1 of
25 this act may submit a notice of intent to be covered under the general permit to the
26 Department. The Department shall treat an application for a permit under Section 1 of
27 this act as an application for an individual permit unless the applicant submits a notice
28 of intent to be covered under a general permit under this Section.

29 **SECTION 5.** Delegation. – A public entity that does not administer a Phase
30 II National Pollutant Discharge Elimination System (NPDES) permit for stormwater
31 management throughout the entirety of its planning jurisdiction and whose planning
32 jurisdiction includes an area designated as an urbanized area under the 1990 or 2000
33 census by the Bureau of the Census or a local government designated pursuant to
34 Section 7 of this act may submit a stormwater management program for its jurisdiction
35 or a portion of its jurisdiction to the Department for approval. To this end public
36 entities are authorized to adopt ordinances and regulations necessary to establish and
37 enforce stormwater management programs. Public entities are authorized to create or
38 designate agencies or subdivisions to administer and enforce the programs. An
39 ordinance or regulation adopted by a public entity shall at least meet and may exceed
40 the minimum requirements of this act and the six minimum control measures required
41 by 40 Code of Federal Regulations § 122.34(b) (1 July 2003 Edition). Two or more
42 public entities are authorized to establish a joint program and to enter into any
43 agreements that are necessary for the proper administration and enforcement of the
44 program. The resolutions establishing any joint program must be duly recorded in the

1 minutes of the governing body of each public entity participating in the program, and a
2 certified copy of each resolution must be filed with the Department. The Department
3 shall review each program submitted and within 90 days of receipt thereof shall notify
4 the public entity submitting the program that it has been approved, approved with
5 modifications, or disapproved. The Department shall only approve a program upon
6 determining that its standards equal or exceed those of this act and the six minimum
7 control measures required by 40 Code of Federal Regulations § 122.34(b) (1 July 2003
8 Edition). If the Department determines that any public entity is failing to administer or
9 enforce an approved stormwater management program, it shall notify the public entity
10 in writing and shall specify the deficiencies of administration and enforcement. If the
11 public entity has not taken corrective action within 30 days of receipt of notification
12 from the Department, the Department shall assume administration and enforcement of
13 the program until such time as the public entity indicates its willingness and ability to
14 resume administration and enforcement of the program.

15 **SECTION 6.** Phase II Stormwater Implementation Deadlines. –

- 16 (1) For a Phase II National Pollutant Discharge Elimination System
17 (NPDES) permit for stormwater management application submitted by
18 an owner or operator of a small municipal separate storm sewer system
19 (MS4) located in whole or in part within an urbanized area as
20 designated by the 1990 census by the Bureau of the Census, the
21 Department shall send a draft permit decision to public notice by 1
22 November 2004.
- 23 (2) For a Phase II National Pollutant Discharge Elimination System
24 (NPDES) permit for stormwater management application submitted by
25 an owner or operator of a small municipal separate storm sewer system
26 (MS4) located in whole or in part within an urbanized area as
27 designated by the 2000 census by the Bureau of the Census, the
28 Department shall send a draft permit decision to public notice by 1
29 May 2005.
- 30 (3) A public entity shall adopt postconstruction stormwater management
31 measures that become effective within 24 months after the date on
32 which a Phase II National Pollutant Discharge Elimination System
33 (NPDES) permit for stormwater management is issued.

34 **SECTION 7.** Designation. – A public entity may be designated as a
35 regulated entity through federal designation, through a State designation process, or
36 under a total maximum daily load (TMDL) implementation plan as follows:

- 37 (1) Federal Designation. – A public entity that owns or operates a small
38 municipal separate storm sewer system (MS4) may be designated as a
39 regulated entity pursuant to 40 Code of Federal Regulation § 122.32 (1
40 July Edition).
- 41 (2) State Designation Process. – The Department shall designate a public
42 entity as a regulated entity as provided in this subdivision.
- 43 a. General Criteria. – The Department shall designate a public
44 entity as a regulated entity based on the public entity's potential

1 to adversely impact water quality. An adverse impact on water
2 quality includes any activity that has a significant adverse
3 habitat or biological impact or that violates water quality
4 standards, including, but not limited to, impairment of
5 designated uses.

6 b. Designation Schedule. – The Department shall implement the
7 designation process in accordance with the schedule for review
8 and revision of basinwide water quality management plans as
9 provided in G.S. 143-215.8B(c).

10 c. Identification of Candidate Regulated Entities. – The
11 Department shall identify public entities as candidates for
12 designation as a regulated entity based on the following criteria:

13 1. Municipalities. – A municipality shall be identified as a
14 candidate for designation as a regulated entity if its total
15 population is greater than 10,000 and its population
16 density is at least 1,000 people per square mile.

17 2. Counties. – A county shall be identified as a candidate
18 for designation as a regulated entity if the county
19 municipal and nonmunicipal total population is greater
20 than 45,000 persons.

21 3. Other public entities. – A public entity shall be identified
22 as a candidate for designation as a regulated entity if it is
23 a municipality located within a designated county or is
24 an owner or operator of a municipal separate storm
25 sewer system (MS4).

26 d. Notice and Comment on Candidacy. – The Department shall
27 notify each public entity identified as a candidate for
28 designation as a regulated entity. After notification of the public
29 entities, the Department shall publish a list of public entities
30 within a river basin identified as candidates for designation as
31 regulated entities. The Department shall accept public comment
32 on the proposed designation of a public entity as a regulated
33 entity for a period of not less than 30 days.

34 e. Designation of Regulated Entities. – After review of the
35 designation criteria and review of public comments received,
36 the Department shall make a determination on designation for
37 each of the candidates. The Department shall designate a
38 candidate public entity as a regulated public entity if the
39 Department determines that the public entity either:

40 1. Discharges or has the potential to discharge stormwater
41 to sensitive receiving waters in an area with: (i) an actual
42 population growth rate that exceeds 1.3 times the State
43 population growth rate for the previous 10 years; (ii) a
44 projected population growth rate that exceeds 1.3 times

- 1 the projected State population growth rate for the next 10
 2 years; or (iii) an actual population increase that exceeds
 3 fifteen percent (15%) of its previous population for the
 4 previous two years.
- 5 2. Provides a significant contribution of pollutants to
 6 sensitive receiving waters, taking into account the
 7 effectiveness of other applicable water quality protection
 8 programs. To determine the effectiveness of other
 9 applicable water quality protection programs, the
 10 Department shall consider the water quality of the
 11 receiving waters and whether the waters support the uses
 12 set out in subsections (c), (d), and (e) of 15A NCAC 2B
 13 .0101 (Procedures for Assignment of Water Quality
 14 Standards – General Procedures) and the specific
 15 classification of the waters set out in 15A NCAC 2B
 16 .0300, et seq. (Assignment of Stream Classifications).
- 17 f. Notice of Designation. – The Department shall provide written
 18 notice to each public entity of its designation determination. For
 19 a public entity designated as a regulated entity, the notice shall
 20 state the basis for the designation and the date on which the
 21 Phase II National Pollutant Discharge Elimination System
 22 (NPDES) permit for stormwater management must be
 23 submitted to the Department.
- 24 (3) Designation Under a Total Maximum Daily Load (TMDL)
 25 Implementation Plan. – The Department shall designate an owner or
 26 operator of a small municipal separate storm sewer system (MS4) as a
 27 regulated entity if the municipal separate storm sewer system (MS4) is
 28 specifically listed by name as a source of pollutants for urban
 29 stormwater in a total maximum daily load (TMDL) implementation
 30 plan developed in accordance with subsections (d) and (e) of 33 U.S.C.
 31 § 1313.

32 **SECTION 8.** Petition Process. – A petition may be submitted to the Department to
 33 request that an owner or operator of a municipal separate storm sewer system (MS4) or
 34 a person who discharges stormwater be required to obtain a Phase II National Pollutant
 35 Discharge Elimination System (NPDES) permit for stormwater management as follows:

- 36 (1) Connected Discharge Petition. – An owner or operator of a permitted
 37 municipal separate storm sewer system (MS4) may submit a petition to
 38 the Department to request that a person who discharges into the
 39 permitted municipal separate storm sewer system (MS4) be required to
 40 obtain a separate Phase II National Pollutant Discharge Elimination
 41 System (NPDES) permit for stormwater management. The Department
 42 shall grant the petition and require the person to obtain a separate
 43 Phase II National Pollutant Discharge Elimination System (NPDES)
 44 permit for stormwater management if the petitioner shows that the

1 person's discharge flows or will flow into the permitted municipal
2 separate storm sewer system (MS4).

3 (2) Adverse Impact Petition. – Any person may submit a petition to the
4 Department to request that an owner or operator of a municipal
5 separate storm sewer system (MS4) or a person who discharges
6 stormwater be required to obtain a Phase II National Pollutant
7 Discharge Elimination System (NPDES) permit for stormwater
8 management.

9 a. Petition Review. – The Department shall grant the petition and
10 require the owner or operator of the municipal separate storm
11 sewer system (MS4) or the person who discharges stormwater
12 to obtain a Phase II National Pollutant Discharge Elimination
13 System (NPDES) permit for stormwater management if the
14 petitioner shows any of the following:

- 15 1. The municipal separate storm sewer system (MS4) or the
16 discharge discharges or has the potential to discharge
17 stormwater to sensitive receiving waters in an area with:
18 (i) an actual population growth rate that exceeds 1.3
19 times the State population growth rate for the previous
20 10 years; (ii) a projected population growth rate that
21 exceeds 1.3 times the projected State population growth
22 rate for the next 10 years; or (iii) an actual population
23 increase that exceeds fifteen percent (15%) of its
24 previous population for the previous two years.
- 25 2. The municipal separate storm sewer system (MS4) or the
26 discharge provides a significant contribution of
27 pollutants to sensitive receiving waters.
- 28 3. The municipal separate storm sewer system (MS4) or the
29 discharge is specifically listed by name as a source of
30 pollutants for urban stormwater in a total maximum daily
31 load (TMDL) implementation plan developed in
32 accordance with subsections (d) and (e) of 33 U.S.C. §
33 1313.

34 b. Types of Evidence for Required Showing. – Petitioners may
35 make the required showing by providing to the Department the
36 following information:

- 37 1. Monitoring data that includes, at a minimum,
38 representative sampling of the municipal separate storm
39 sewer system (MS4) or discharge and information
40 describing how the sampling is representative. The
41 petitioner must notify the owner or operator of the
42 municipal separate storm sewer system (MS4) or the
43 person who discharges stormwater of its intent to

- 1 b. A separate petition must be filed for each municipal separate
2 storm sewer system (MS4) or discharge.
- 3 c. The Department shall evaluate only complete petitions. The
4 Department shall make a determination on the completeness of
5 a petition within 90 days of receipt of the petition or it shall be
6 deemed complete. If the Department requests additional
7 information, the petitioner may submit additional information
8 and the Department will determine, within 90 days of receipt of
9 the additional information, whether the information completes
10 the petition.
- 11 d. The petitioner shall provide a copy of the petition and a copy of
12 any subsequent additional information submitted to the
13 Department to the chief administrative officer of the municipal
14 separate storm sewer system (MS4) or the person in control of
15 the discharge within 48 hours of each submittal.
- 16 e. The Department shall post all petitions on the Division Web site
17 and maintain copies available for inspection at the Division's
18 office. The Department shall accept and consider public
19 comment for at least 30 days from the date of posting.
- 20 f. The Department may hold a public hearing on a petition and
21 shall hold a public hearing on a petition if it receives a written
22 request for a public hearing within the public comment period
23 and the Department determines that there is a significant public
24 interest in holding a public hearing. The Department's
25 determination to hold a public hearing shall be made no less
26 than 15 days after the close of the public comment period. The
27 Department shall schedule the hearing to be held within 45 days
28 of the close of the initial public comment period and shall
29 accept and consider additional public comment through the date
30 of the hearing.
- 31 g. An additional petition for the same municipal separate storm
32 sewer system (MS4) or discharge received during the public
33 comment period shall be considered as comment on the original
34 petition. An additional petition for the same municipal separate
35 storm sewer system (MS4) or discharge received after the
36 public comment period ends and before the final determination
37 is made shall be considered incomplete and held pending a final
38 determination on the original petition.
- 39 1. If the Department determines that the owner or operator
40 of the municipal separate storm sewer system (MS4) or
41 the person who discharges stormwater is required to
42 obtain a Phase II National Pollutant Discharge
43 Elimination System (NPDES) permit for stormwater
44 management, any petitions for that municipal separate

1 storm sewer system (MS4) or discharge that were held
2 shall be considered in the development of the Phase II
3 National Pollutant Discharge Elimination System
4 (NPDES) permit for stormwater management.

5 2. If the Department determines that the owner or operator
6 of the municipal separate storm sewer system (MS4) or
7 the person who discharges stormwater is not required to
8 obtain a Phase II National Pollutant Discharge
9 Elimination System (NPDES) permit for stormwater
10 management, an additional petition for the municipal
11 separate storm sewer system (MS4) or discharge must
12 present new information or demonstrate that conditions
13 have changed in order to be considered. If new
14 information is not provided, the petition shall be returned
15 as substantially incomplete.

16 h. The Department shall evaluate a petition within 180 days of the
17 date on which it is determined to be complete. If the
18 Department determines that the owner or operator of the
19 municipal separate storm sewer system (MS4) or the person
20 who discharges stormwater is required to obtain a Phase II
21 National Pollutant Discharge Elimination System (NPDES)
22 permit for stormwater management, the Department shall notify
23 the owner or operator of the municipal separate storm sewer
24 system (MS4) or the person who discharges stormwater within
25 30 days of the requirement to obtain the permit. The owner or
26 operator of the municipal separate storm sewer system (MS4) or
27 the person who discharges stormwater must submit its
28 application for a Phase II National Pollutant Discharge
29 Elimination System (NPDES) permit for stormwater
30 management within 18 months of the date of notification.

31 **SECTION 9.** Model Ordinance. – Pursuant to G.S. 143-214.7(c), the
32 Environmental Management Commission shall develop a model ordinance in
33 cooperation with local governments and other interested parties that shall allow the use
34 of both structural and nonstructural best management practices adequate to meet the
35 standards. The design manual and model ordinance shall be completed by 1 October
36 2005.

37 **SECTION 10.** Design Manual. – Consistent with G.S. 150B-2(8a)h., the
38 Division, in consultation with the Division of Land Resources, Division of Soil and
39 Water Conservation, and North Carolina State University, shall develop a design
40 manual to provide assistance in determining which controls are best suited to the unique
41 characteristics of the permittee.

42 **SECTION 11.** Definitions. – The following definitions apply to this act:

- 1 (1) The definitions set out in 40 Code of Federal Regulations § 122.2
2 (Definitions) and § 122.26(b) (Storm Water Discharges) (1 July 2003
3 Edition).
- 4 (2) The definitions set out in G.S. 143-212 and G.S. 143-213.
- 5 (3) The definitions set out in 15A NCAC 2H .0103 (Definitions of
6 Terms).
- 7 (4) "Built-upon area" means that portion of a development project that is
8 covered by impervious or partially impervious surface including, but
9 not limited to, buildings; pavement and gravel areas such as roads,
10 parking lots, and paths; and recreation facilities such as tennis courts.
11 "Built-upon area" does not include a wooden slatted deck or the water
12 area of a swimming pool.
- 13 (5) "Department" means the Department of Environment and Natural
14 Resources.
- 15 (6) "Division" means the Division of Water Quality in the Department.
- 16 (7) "Population density" means the population of an area divided by the
17 area's geographical measure in square miles, equal to persons per
18 square mile. For the purposes of this definition, the population shall
19 equal the sum of the permanent and seasonal populations as
20 determined by the Department or calculated by the Department from a
21 measure of housing unit density.
- 22 (8) "Public entity" means the United States; the State; or a city, village,
23 township, county, school district, public college or university, single
24 purpose governmental agency; or any other governing body that is
25 created by federal or State law.
- 26 (9) "Redevelopment" means any rebuilding activity other than a
27 rebuilding activity that results in no net increase in built-upon area and
28 provides equal or greater stormwater control than the previous
29 development.
- 30 (10) "Regulated entity" means any public entity that must obtain a Phase II
31 National Pollutant Discharge Elimination System (NPDES) permit for
32 stormwater management.
- 33 (11) "Sensitive receiving waters" means any of the following:
34 a. Waters that are classified as high quality, outstanding resource,
35 shellfish, trout, or nutrient sensitive waters in accordance with
36 subsections (d) and (e) of 15A NCAC 2B .0101 (Procedures for
37 Assignment of Water Quality Standards – General Procedures).
38 b. Waters that are occupied by or designated as critical habitat for
39 aquatic animal species that are listed as threatened or
40 endangered by the United States Fish and Wildlife Service or
41 the National Marine Fisheries Service under the provisions of
42 the Endangered Species Act of 1973 (Pub. L. No. 93-205; 87
43 Stat. 884; 16 U.S.C. §§, 1531 et seq.), as amended.

1 c. Waters for which the designated use, as described by the
2 classification system set out in subsections (c), (d), and (e) of
3 15A NCAC 2B .0101 (Procedures for Assignment of Water
4 Quality Standards – General Procedures), have been determined
5 to be impaired in accordance with the requirements of
6 subsection (d) of 33 U.S.C. § 1313.

7 (12) "Significant contributor of pollutants" means a municipal separate
8 storm sewer system (MS4) or a discharge that contributes to the
9 pollutant loading of a water body or that destabilizes the physical
10 structure of a water body such that the contribution to pollutant loading
11 or the destabilization may reasonably be expected to adversely affect
12 the quality and uses of the water body. Uses of a water body shall be
13 determined pursuant to 15A NCAC 2B .0211 through 15A NCAC 2B
14 .0222 (Classifications and Water Quality Standards Applicable to
15 Surface Waters and Wetlands of North Carolina) and 15A NCAC 2B
16 .0300, et seq. (Assignment of Stream Classifications).

17 (13) "Total maximum daily load (TMDL) implementation plan" means a
18 written, quantitative plan and analysis for attaining and maintaining
19 water quality standards in all seasons for a specific water body and
20 pollutant.

21 (14) "Total population" means the combined permanent and seasonal
22 population of an area as determined from the most recent data
23 available from local, State, or federal sources.

24 **SECTION 12.** Construction of Act. –

25 (1) Nothing in this act shall be construed to limit the authority of the
26 Environmental Management Commission or any unit of local
27 government to adopt stormwater management requirements that
28 exceed the requirements of this act.

29 (2) This act shall not be construed to affect pending litigation.

30 **SECTION 13.** Section 2 of this act becomes effective 1 July 2006. All other
31 sections of this act become effective when the act becomes law.