

Muddy Waters: Stormwater Permits Not Meant to Control Flooding or Flood Losses

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Those living in communities subject to North Carolina Stormwater Permits or local stormwater management easement agreements are increasingly alarmed as rainy weather, even without a named storm, causes property to saturate and appear flooded.

Dispelling the Myth: Quality Over Quantity in Stormwater Programs

It is a common misconception that stormwater permits are intended to, or should, prevent flooding during rainfall events. What are the stormwater rules meant to do if not to prevent flooding? The answer is that they are meant to protect water *quality*, not quantity, or stormwater damage. Stormwater runoff from streets, yards, development sites, and agricultural fields drains into lakes, rivers, and streams carrying with it a high pollutant load. It is estimated that stormwater pollution is responsible for over 50 percent of poor water quality in the United States.

In an attempt to maintain and protect water quality, the federal Clean Water Act ("CWA"), requires a permit for discharges of wastewater, including pollutant-laden stormwater, to waters of the United States and state surface waters. Rules enforced by the Environmental Protection Agency ("EPA") require states with delegated CWA permitting programs, such as North Carolina, to regulate stormwater discharges.

In North Carolina, as described in previous articles, stormwater management is a concern across the state. The North Carolina Department of Environmental Quality ("DEQ") has been regulating stormwater under revised rules since January 1, 2017. At the local level, there is ongoing tension between the development community and municipalities over whether local governments may regulate stormwater management in a more restrictive manner. This disagreement has been playing out in the General Assembly.

The primary method to control stormwater discharges is use of best management practices tailored to on-site activities—whether industrial, commercial, or residential—to reduce pollutant sources. DEQ's Division of Energy, Mineral and Land Resources ("DEMLR") implements and enforces various stormwater permitting programs in North Carolina, including those that address construction projects disturbing more than an acre, larger municipalities' discharge permits known as the MS4 Program, and the Coastal Counties Program.

DEMLR's overall Stormwater Permitting Program is a compendium of statewide stormwater control policies, strategies, and rules designed to protect surface waters from the impacts of pollutants from runoff. Nutrient management also is a component of stormwater regulations in North Carolina because of excessive loading of nitrogen and phosphorus in impaired waters such as the Neuse and Tar-Pamlico River Basins and Jordan

Lake.

Stormwater Management—Construction Plans and Completed Development Drainage

Typically, construction plans initiate the process of addressing stormwater management in a project area because the construction process can involve considerable runoff from barren land stripped of foliage. But the ultimate concern is stormwater management after a development project is completed.

Runoff during construction is managed by erosion and sedimentation control plans and construction stormwater permits. In contrast, post-construction runoff is managed by controlling the amount of impervious surface or built-upon area ("BUA") to provide enough infiltration of the stormwater into the ground and engineered control measures to contain and treat sediment and pollutants before runoff reaches waterbodies.

DEMLR issues post-construction stormwater permits and enforces stormwater management for development in a 20 county coastal area in eastern North Carolina unless the local government with jurisdiction over the construction area is required by its MS4 permit to implement its own stormwater management program.

DEMLR issues post-construction permits in two flavors: low density and high density. Low density stormwater permits are perpetual and do not require engineered stormwater control measures; rather, they limit BUA to a certain percentage of the entire development, often with per-lot limits. Low density permits may provide for vegetative swales for conveyance and mitigation of stormwater runoff and are common in residential developments. High density permits are valid only for 10 years and require renewal because they contain requirements for engineered stormwater control measures with specific operation and maintenance requirements.

For both low density and high density situations, state stormwater permits often require certain terms to be included in restrictive covenants to be recorded in the local office of the Register of Deeds to bind later owners and users of the developed property.

Another Layer of Regulation: Municipal Stormwater Programs

Some large municipalities have a population density high enough that their MS4 permits require adoption and implementation of a local stormwater management program to be included in municipalities' land development ordinances. Typically these programs are administered by the local planning departments or the stormwater section of municipalities' engineering offices.

Stormwater management plans must be approved before construction can start. Then an easement agreement or covenant governing stormwater operation and maintenance is entered into between the developer and the governing municipality and recorded in office of Register of Deeds in county(ies) where covered land is located. In these local programs, operation and maintenance obligations run with the land and automatically transfer to new property owners when land is conveyed. Compare this with the state program which, in addition to any terms and conditions the state may require to be recorded in the office of the Register of Deeds (and thus also run with the title to the land), requires a separate permit transfer process each time title to the relevant land is conveyed to a new owner.

Drainage and Flooding

During a good Eastern North Carolina rainstorm, one can watch stormwater sheet flow off of driveways, streets, and parking lots and build up in yards and swales to the extent it looks like a flood is imminent. This is the result of several factors, including natural and constructed drainage patterns, increased BUA from

development that decreases infiltration of stormwater into the ground, and often a high groundwater table.

During a frog-choking soak, the stormwater has nowhere else to go and the waters rise past saturation level. Stormwater programs are not meant to address this volume other than to control the velocity of sheet flow to prevent runoff from carrying pollutants to water bodies. Although some local programs are attempting to address quantity control, existing developments are not permitted or built to do so.

In any development there can be multiple causes of apparent flooding, including violation of BUA limits by property owners and improperly maintained engineered stormwater control measures. More often than not, however, flooding is not a stormwater compliance issue. Rather, common law legal principles of nuisance and trespass are at play, including the natural water flow from higher land and whether the owner of upland property has increased or diverted drainage from its natural flow.

Conclusion

Stormwater management continues to be a hot issue, particularly for those who own property in affected commercial and residential developments. Community associations and property managers are finding themselves increasingly vexed with stormwater related issues. Understanding how a particular stormwater program is intended to affect runoff from the relevant property is the first step in diagnosing the problem and working towards a solution.

A team of experienced environmental attorneys and stormwater engineers and consultants can create and negotiate a solution with DEMLR or the local government with jurisdiction, or assist with a response to landowner complaints.

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