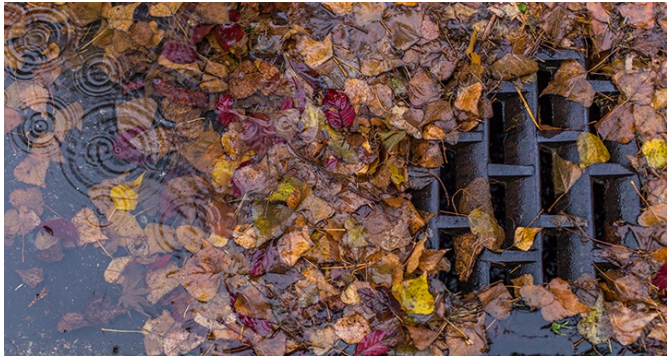


New Stormwater Rules Effective January 1, 2017

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Stormwater management is a concern across the country. The United States Environmental Protection Agency renewed municipal stormwater as one of its National Enforcement Initiatives. North Carolina is no different, and after months of back and forth comment, the North Carolina Rules Review Commission ("RRC") finally approved the Environmental Management Commission's ("EMC") substantial reorganization of, and revisions to, various regulations in the North Carolina Administrative Code governing stormwater management ("Stormwater

Rules"). As discussed in an earlier article setting out the proposed changes, the new Stormwater Rules were originally slated to become effective on September 1, 2016, but they did not become effective until January 1, 2017.

The New Generation of Stormwater Rules

The Stormwater Rules result from the EMC's compliance with the North Carolina General Assembly's review mandate in its 2013 Regulatory Reform Act requiring state agencies to review all regulations within their purview every 10 years.

The Stormwater Rules revisions run the gamut from minimal or no changes to brand new rules. While some changes are innocuous, the overall scope of the changes will affect development activities, communities, and municipalities, particularly in areas subject to post-construction stormwater programs such as the Jordan and Falls Reservoir Water Supply, Coastal Counties, Goose Creek Watershed, and the Universal stormwater management programs.

Definitions of terms were revised heavily and expanded in the Stormwater Rules. Key terms such as "Built Upon Area," "Development," "Project," and "Redevelopment" all now refer to their statutory definitions, and allow the use and installation of gravel to qualify as a permeable pavement/pervious surface. This should minimize or eliminate hotly debated inconsistencies that arose when permeable qualities of gravel were used in the past.

The term "Minimum Design Criteria" ("MDC") encompasses requirements within stormwater permits for siting, site preparation, design, construction, and post-construction monitoring and maintenance for compliance with water quality standards. Primary and secondary "Stormwater Control Measures" ("SCM") are defined as the structural best management practices designed, constructed, and maintained to remove pollutants from stormwater runoff through many methods.

Design requirements in the Stormwater Rules apply to all projects subject to any North Carolina stormwater

program. Technical project density calculations and design requirements for low and high density projects are included, based on thresholds set forth in the particular stormwater program, with high density required to meet MDC by designing SCMs to achieve either newly defined runoff treatment or runoff volume match.

Post-construction stormwater management in urbanizing areas will apply to development that disturbs one acre or more of land and is subject to a municipal National Pollution Discharge Elimination System post-construction stormwater program. Fecal coliform reduction, vegetated setbacks, and deed restrictions, among other requirements, will apply. There are certain limited exclusions and exceptions for projects meeting variance-like requirements.

The revised rule for stormwater management in the 20 coastal counties went through some back and forth. The result was the removal of a redefinition of the required storm depth for high density projects (a proposed 90-95th percentile storm event) back to the one year 24-hour storm for "SA" classified waters and the 1.5 inch storm event for freshwater outstanding resource waters ("ORW") and coastal county waters. High density projects discharging to SA waters are subject to new requirements for runoff treatment for discharging and non-discharging SCMs.

Fast-track permitting, long desired by developers, is now available under a two-step process similar to the construction of septic systems:

- The issuance of an Authorization to Construct what is submitted in site plans accompanying the permit application;
- The issuance of a Final Permit after submittal of an as-built package depicting what was built and a confirmatory site inspection by DEQ.

The definition of a "licensed professional" who must be involved for a project to be eligible for the fast-track permitting process caused a delay in approval of the Stormwater Rules because design plans for SCMs will not be reviewed by the agency prior to being built. The RRC rejected the first three versions of the definition as insufficiently clear to provide notice of who would qualify as the professional competent to design the particular SCM. Now, applications for an Authorization to Construct under the fast-track permitting process must be signed by:

"a person licensed pursuant to either Chapter 89A or Chapter 89C of the NC General Statutes. The signature and seal of such persons on the fast-track application shall signify that they have the expertise, education, and experience required to design SCMs proposed in the application in accordance with the MDC and that they are in compliance with the applicable standards of professional conduct."

Chapter 89A of the North Carolina General Statutes pertains to landscape architects and Chapter 89C pertains to engineering and land surveying.

The proposed New Stormwater Technologies Program did not make it into the approved version of the Stormwater Rules, but the process for receiving approval of SCMs and technologies not otherwise covered by the Stormwater Rules has been incorporated into the rules covering the MDC for all SCMs. The new rules lay out design criteria for infiltration systems, bioretention cells, wet ponds, stormwater wetlands, permeable pavement, sand filters, rainwater harvesting, green roofs, level spreader-filter strips, disconnected impervious surfaces, treatment swales, and dry ponds.

Transferring Stormwater Permits

The EMC now has included Permit Transfer and Renewal regulations in the Stormwater Rules to supplement the transfer process that was modified in 2011 by Session Law. These new regulations formalize the

documents the North Carolina Department of Environmental Quality Division of Energy, Mineral and Land Resources ("DEMLR") will require to initiate a permit transfer. The necessary documentation now includes:

- The Permit Transfer application form;
- Documentation showing that the proposed permittee, if a corporation or LLC, is in good standing with the North Carolina Secretary of State;
- Legal documentation of the conveyance of the real property containing the stormwater management system to a new owner/proposed permittee;
- An operation and maintenance agreement signed and notarized by the proposed permittee;
- A copy of recorded deed restrictions if required by the permit; and,
- Certification from a licensed professional that the stormwater system has been built and maintained under the approved plans.

The Permit Transfer regulations are especially important in the context of community associations where developers often overlook and fail to transfer the community's common area stormwater permits before leaving the project. Prior to the 2011 Session Law, consent by community associations to take over a stormwater permit was a prerequisite to permit transfer. Since 2011, DEMLR must transfer the permit to an association upon the request of the declarant (i.e. the developer) if the proper documents are provided and (i) common areas related to the operation and maintenance of the stormwater management system have been conveyed to the unit owners association or owners association under the declaration; (ii) the declarant has conveyed at least fifty percent (50%) of the units or lots to owners other than a declarant; and (iii) the stormwater management system is determined to substantially comply with the stormwater permit after inspection by DEMLR. The regulations mandate transfer if the conditions are met. Permit transfer continues to be an area of contention between permittees and community associations who may be unprepared and underfunded to take on operation and maintenance of SCMs.

Conclusion

Because water quality is continually threatened by the discharge of pollutants, stormwater management will continue to receive attention from federal, state, and local authorities. Opportunities for new projects exist through the fast-track permitting program, even with detailed technical standards. However, permit transfer may receive heightened scrutiny. Partnering with consultants and counsel with specialized knowledge and experience with stormwater management and regulatory personnel are a must to obtain permits and avoid enforcement actions.

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